

SOUTH AFRICA / JUDGMENT

## eThekwini Municipality v Mounthaven (Pty) Ltd (1068/2016) [2017] ZASCA 129; 2018 (1) SA 384 (SCA) (29 September 2017) [2017] ZASCA 129

COURT

Supreme Court of Appeal

BEFORE

Tshiqi, Seriti, Saldulker, Gorven, Ploos van Amstel

CASE / FILE NUMBER

1068/2016

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### THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

#### JUDGMENT

Reportable

Case No: 1068/2016

In the matter between:

eTHEKWINI MUNICIPALITY

APPELLANT

and

MOUNTHAVEN (PTY) LTD

RESPONDENT

Neutral citation: eThekwini Municipality v Mounthaven (Pty) Ltd (1068/2016) [2017] ZASCA 129  
(29 September 2017)

Coram: Tshiqi, Seriti and Saldulker JJA and Gorven and Ploos van Amstel AJJA

Heard:

21 August 2017

Delivered: 29 September 2017

Summary: Claim for re-transfer of property – a debt as contemplated in Chapter III of the Prescription Act – whether reversionary clause creates a limited real right or a personal right – right not absolute but a relative one and only enforceable against a class of individuals – prescription affects the contractual right to claim re-transfer – claim prescribed.

## ORDER

On appeal from: KwaZulu-Natal Local Division, Durban (Mbatha J sitting as a court of first instance):

The appeal is dismissed with costs.

Tshiqi JA (Seriti and Saldulker JJA and Govern and Ploos van Amstel AJJA concurring):

[1] The issue in this appeal is whether a claim for the re-transfer of property from the respondent, Mounthaven (Pty) Ltd (Mounthaven) to the appellant, eThekweni Municipality<sup>[1]</sup> (the Municipality) constitutes a debt as contemplated in Chapter III of the Prescription Act 68 of 1969 (the Prescription Act).

‘Subject to the following special conditions in favour of the Town Council of the Borough of Verulam as Local Authority:

- (1) The Purchaser shall erect, or cause to be erected on the property, buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100 000, 00) and failing the erection of buildings to that value within two (2) years from date of sale, then, for the purpose of levying the general rate and sewer rate payable to the Verulam Town Council by the Purchaser or his successors in title, there shall be deemed to be buildings to such required value on the property and all valuation and rating provisions of Section 157 of Ordinance 25 of 1974 or any amendment thereof shall apply to the property and be binding upon the Purchaser or his successors in title.
- (2) If at the expiry of a period of three (3) years from the date of sale the Purchaser has failed to complete buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100 000, 00) on the property, ownership of the property shall revert to the Seller which shall be entitled to demand re-transfer thereof to it from the Purchaser who shall be obliged to effect transfer thereof to the Seller against payment by the Seller to the Purchaser of all payments made on account of the purchase price less any costs incurred by the Seller in obtaining re-transfer of the property into its name, including costs as between attorney and client, all costs of transfer, transfer duty, stamp duty and the like.
- (3) The Seller shall have a pre-emptive right to re-purchase the property at the price paid by the Purchaser, if the Purchaser desires to sell the property within five (5) years from the date of sale, provided that this condition shall not apply where buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100 000, 00) shall have been erected on the Lot within three (3) years from the date of sale.’

[3] Mounthaven failed to develop the land within the stipulated period of three years and it still remains undeveloped. It cites the unresolved dispute with the Municipality concerning a 750mm diameter storm water pipe that runs under the property as the reason preventing the effective development of the property. On 23 May 2012, the Municipality wrote a letter to Mounthaven in which it invoked the terms of the conditions in Clause C.2 of the Deed of Transfer (the reversion clause) and demanded re-transfer of the property. Mounthaven failed to comply with the demand and on 19 February 2014 the Municipality launched an application invoking the conditions and claiming re-transfer of the property. Mounthaven took the point that that the claim to re-transfer constituted a “debt” as contemplated in Chapter III of the Prescription Act and that it had prescribed. The Municipality submitted that the Prescription Act was not applicable as the claim did not constitute a debt. The court decided to consider a further ground of defense raised by the

Municipality for the first time in its heads of argument: that the claim was founded on the rei vindicatio, was simply a mechanism to perfect the Municipality’s ownership of the property and that it did not prescribe.

[4] The high court found that the claim constitutes a debt and concluded that it had prescribed after a period of three years. Regarding whether the claim was a vindication of a real right the high court held that ‘property can only be transferred by registration thereof and does not occur automatically’. It then concluded that the Municipality did not have an absolute real right to the property and that it lost its right of action when it prescribed after three years.

[5] In this appeal the Municipality relies on four grounds for its contention that the claim has not prescribed:

- a) That its claim for re-transfer of the property is not a claim for payment of money, goods or services, or an obligation to render something and thus does not constitute a ‘debt’, as contemplated in Chapter III of the Prescription Act;
- c) Alternatively, if the claim is a debt, it is secured by a mortgage bond and is not extinguished by prescription for a period of thirty years;
- d) Further alternatively, if the claim is a debt, then the respondent’s failure to develop the property constitutes a continuing wrong.

[6] The Prescription Act does not define what a debt is. In *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344G-H this court said:

‘[A] debt is –

*“that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another.”*

In a subsequent decision in *Desai NO v Desai & others* 1996

- [1] SA)141 (A) at 146G-H the court was called upon to decide whether an obligation to effect transfer of individual shares in two immovable properties had prescribed. The application was for an order directing the appellant, an executor in a deceased estate, to take all steps to sign all the necessary documents. The court said:

‘For the reasons which follow I am of the opinion that the appellant's “debt”, ie the obligation to procure registration of transfer in terms of clause 13(d), was indeed extinguished by prescription.’

The court went further and said at 146H- 147A:

‘The term "debt" is not defined in the Act, but in the context of s 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something . . . . It follows that the undertaking in clause 13(d) to procure registration of transfer was a "debt" as envisaged in s 10(1).’

- [7] Recently in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) and *Makate v Vodacom (Pty) Ltd* [2014] ZAGPJHC 135 Mr Makate, the plaintiff, a former employee of Vodacom, instituted a high court action to enforce an agreement with Vodacom which, according to his undisputed evidence, was that the parties would enter into bona fide negotiations for determining reasonable compensation for the profitable use of his idea in developing the ‘Please Call Me’ service. Vodacom raised two special pleas, including a plea of prescription. The high court, whilst accepting that Mr Makate had proved the compensation agreement between himself and Vodacom, upheld the special pleas. Regarding prescription, the high court held that the word ‘debt’ had to be widely interpreted to include a claim that Vodacom comply with its obligations under a contract and it dismissed his claim.

- [8] The Constitutional Court said in paras 83-85:

‘For the conclusion that a debt contemplated in section 10(1) of the Prescription Act includes a claim to negotiate terms of an agreement, the trial Court relied on *Desai*, a judgment of the Appellate Division (now the Supreme Court of Appeal) and *LTA Construction*, a decision of the Cape of Good Hope Division (now the Western Cape Division of the High Court) . . .

On this construction of *Desai*, every obligation, irrespective of whether it is positive or negative, constitutes a debt as envisaged in section 10(1). This in turn meant that any claim that required a party to do something or refrain from doing something, irrespective of the nature of that something, amounted to a debt that prescribed in terms of section 10(1). Under this interpretation, a claim for an interdict would amount to a debt. However, the Appellate Division in *Desai* did not spell out anything in section 10(1) that demonstrated that “debt” was used in that sense...

The absence of any explanation for so broad a construction of the word “debt” is significant because it is inconsistent with earlier decisions of the same court that gave the word a more circumscribed meaning . . .’

The Constitutional Court then referred to the meaning ascribed to the word ‘debt’ in *Escom* and *Desai* and said the following in para 86:

‘It is unclear whether the court in *Desai* intended to extend the meaning of the word “debt” beyond the meaning given to it in *Escom*. If it did, it does not appear that this followed either from any submissions made to the court by the parties or any issue arising in the case. Nor, if that was the intention, did the court give consideration to the constitutional imperatives in regard to the

interpretation of statutes in section 39(2) of the Constitution.’

It then concluded:

‘However, in present circumstances it is not necessary to determine the exact meaning of “debt” as envisaged in section

10. This is because the claim we are concerned with falls beyond the scope of the word as determined in cases like *Escom* which held that a debt is an obligation to pay money, deliver goods, or render services. Here the applicant did not ask to enforce any of these obligations. Instead, he requested an order forcing Vodacom to commence negotiations with him for determining compensation for the profitable use of his idea.

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. It follows that the trial court attached an incorrect meaning to the word “debt”. A debt contemplated in section 10 of the Prescription Act does not cover the present claim. Therefore, the section does not apply to the present claim, which did not prescribe.’ (Paras 92 and 93).

- [9] In a subsequent decision in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus & others* 2017 (4) BCLR 473 (CC) the Constitutional Court said:

‘*Desai*, on which the Labour Appeal Court relied for holding that “debt” means an obligation to do something or refrain from doing something, was overruled by this court in *Makate*.’

- [10] In this appeal the Municipality contends that the Constitutional Court in *Makate* and in *Myathaza* effectively rejected what it submits was a wider meaning this court ascribed to the word ‘debt’ in *Desai*. That the Constitutional Court endorsed the narrower one in *Escom*, in terms of which debt is confined to an obligation ‘to pay money or deliver goods or render services’. The Municipality

submits therefore that the right to demand re-transfer is not an obligation ‘to pay money, deliver goods, or render services and [is] thus not a debt’.

[11] In reading the Constitutional Court decision in *Makate* one should not overlook what the court did not say. It did not say that Desai was incorrect in its finding that a claim for transfer is a debt. It simply said that Desai was decided in error '[t]o the extent that [it] went beyond what was said in *Escom*'. Had the court wished to overrule Desai in the manner contended for by the Municipality, it would have said so explicitly. As the Constitutional Court said, it is inconceivable

that every obligation to do or refrain from doing something can be described as a debt. The example of an interdict postulated by that court illustrates this absurdity.

[12] Earlier, the Constitutional Court in *Road Accident Fund & another v Mdeyide* 2011 (2) SA 26 para 11 expressed doubt on whether an obligation is indeed a debt in terms of the Act. In *Njongi v MEC, Department of Welfare, Eastern Cape*

[2008] ZACC 4; 2008 (4) SA 237 (CC) it raised, but left open, the question whether a constitutional obligation could be considered a debt. An interpretation that restricts the meaning of 'debt' to 'delivery of goods' confines it to the delivery of movables to the exclusion of all immovable property. This would create a baseless distinction between movable property and immovable property for the purposes of prescription. In cases where the legislature has sought to make this distinction, ie in cases of prescription of debts by mortgage bond, it has done so expressly. The dictum in *Myathaza* must thus be understood in this context.

[13] This then leads me to whether the reversionary clause constitutes a limited real right or a personal right. In *Absa Bank Ltd v Keet* 2015 (4) SA 474 SCA the court explained the distinction between a real right and a personal right as follows in para 20:

'[R]eal rights are primarily concerned with the relationship between a person and a thing and personal rights are concerned with a relationship between two persons. The person who is entitled to a real right over a thing can, by way of vindicatory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership. If, however, the right is not an absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right.'

[14] It then continued in paras 23-25:

'The obligation which the law imposes on a debtor does not create a real right (*jus in rem*), but gives rise to a personal right (*jus in personam*). In other words, an obligation does not consist in causing something to become the creditor's property, but in the fact that the debtor may be compelled to give the creditor something or to do something for the creditor or to make good something in favor of the creditor.

[I]n the case of extinctive prescription one is more specifically concerned with the relationship between creditor and debtor and

prescription serves in the first instance to protect the debtor against claims that perhaps never came into existence or had already

been extinguished. The obligation is by its nature and substance a temporary relationship that is destined to terminate through

performance and moreover a relationship between creditor and debtor in which third parties are only indirectly involved. A real right, by contrast, is a relationship of a durable nature, that can be maintained against anyone and everyone, and which can impede commerce if outsiders cannot with confidence rely on the appearance thereof.

[I]n the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the

creditor, which is a corollary of a “debt”, becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing . . .’

(See also National Stadium South Africa (Pty) Ltd & others v Firststrand Bank Ltd 2011 (2) SA 157 SCA para 31).

[15] In this matter the right to claim re-transfer required Mounthaven to do something in favour of the Municipality. The right is not absolute but a relative one because it can only be enforced against a determined individual or a class of individuals, ie Mounthaven or its successors in title, and not against the whole world. One is concerned with the relationship between the two parties and their successors in title and this is akin to a relationship between a creditor and a debtor. In the event of prescription what is extinguished through the effluxion of time is the contractual right to claim re-transfer against Mounthaven. It follows that the Municipality’s right of action against Mounthaven is a personal right and not a limited real right.

[16] The two alternative grounds of appeal raised by the appellant have no merit. The reversionary clause is not a security clause and is thus not a mortgage bond. The other alternative contention that the failure to develop the property is a continuing wrong and that it cannot prescribe suggests that every debt, as long as it remains unpaid, would constitute a continuing wrong and would not be extinguished by prescription. This cannot be so. For all these reasons it follows that the claim for re-transfer constitutes a debt, and it prescribed after the effluxion of the three year period. The appeal must thus fail.

[17] I make the following order:

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

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[1] It is the successor-in-law to the town council of the Borough of Verulam.

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