

SOUTH AFRICA / JUDGMENT

Majola and Another v Country Cloud Trading 221

CC and Others (AR161/2018) [2019] ZAKZPHC
21;

2019 (5) SA 195 (KZP) (15 April 2019)

[2019] ZAKZPHC 21

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mbatha, Madondo, Hadebe

CASE / FILE NUMBER

AR161/2018

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: AR161/2018

In the matter between:

SIBUSISO BONIFACE MAJOLA

First Appellant

RUTH NOKWETHEMBA MAJOLA

Second Appellant

and

COUNTRY CLOUD TRADING 221 CC

First Respondent

CRAIG SCOTT WALKER

Second Respondent

CATHRYN WALKER

Third Respondent

ORDER

On appeal from: Pietermaritzburg High Court (sitting as court of first instance):

The appeal is upheld;

- (a) The decision of the court a quo is set aside and the appeal succeeds with costs; and
- (b) The counter-appeal is dismissed with costs and the judgment of the court a quo is confirmed.

APPEAL JUDGMENT

Delivered: 15 April 2019

Mbatha J (Madondo DJP et Hadebe J concurring)

Introduction

- [1] The appellants' appeal against the judgment of Mnguni J, delivered on 31 May 2017, granted in favour of the respondents. The respondents were also granted leave to cross-appeal on one issue which was not granted in their favour. The appeals are before us with leave of the court a quo.

Relief sought in the court order

- [2] The respondents in the court a quo sought the following orders:

2.1 An order compelling the appellants to sign forthwith all the documents required by the Registrar of Deeds, KwaZulu-Natal in terms of s 4(1)(b) of the Deeds of Registries Act[1] (the Act) to correct Title Deed T23005/2013 in the following respects:

- (a) By substitution of the word "Seller" in Clause G with the name of the first respondent (Country Cloud Trading 221 CC);
- (b) By inserting in line 1 of Clause G of the phrase "or its Successors-in-title, or" between the phrase "221 cc" and the word "assigns";
- (c) By substituting the figure of "8 495 (EIGHT FOUR NINE FOUR FIVE) square meters" in Clause H with the figure "8 945 (EIGHT NINE FOUR FIVE) square meters";
- (d) By insertion of the phrase "as created in T54593/2006" at the end of Clauses G and H.

2.2 An order directing the appellants to forthwith, but by no later than seven (7) days from having been required to do so, sign all documents required to effect the subdivision of Erf 73, the consolidation of the component portions to form the new erven and the registration of the title deeds evidencing the above;

2.3 An order, in the event of the respondents failing to comply with the orders set out in paragraphs 2.1 and 2.2 above, that the Sheriff of this Honourable Court, be and is hereby authorised to sign all such documents set out in paragraphs 2.1 and 2.2 above on behalf of the appellants.

2.4 Directing the appellants to pay the costs of the application on the scale as between attorney and own client.

- [3] The court a quo granted the respondents the relief sought in the notice of motion save for an order for the substitution or the change in the number of square meters that needed to be transferred to the respondents. The applicants appeal against all the orders made against them and the cross-appeal lies against the refusal of the court for the substitution of the figure of 8 495 square meters to 8 945 square meters.

The respondents' case (applicant in the main application)

- [4] According to Terry Stark (Stark), the sole member of the first respondent Country Cloud Trading 221 CC (Country Cloud), and the deponent to the founding affidavit, the first respondent purchased property known as Block H Sakabula Golf Estate (Sakabula). It was a term of the agreement, with the owner of Block H that Country Cloud, had to also purchase Erf 73 and Erf 74, within a year from the purchase of the property known as Block H. The purchase of Erven 73 and 74 was concluded and registered in the name of Country Cloud as per Title Deed T13815/2006. It is stated in the founding affidavit

that the intention was to redesign Block H, and Erven 73 and 74 into four properties with new boundaries and sizes. To achieve this purpose this required the reconfiguration of the layout of Block H, so that the view of Block H, over the golf estate, would not be disturbed by the erection of another house on Erf 74, which erf lies between Block H and the golf estate. The result which was envisaged by Stark, was that the reconfiguration would make it possible for him, his life partner and their children to have views of the golf estate and a direct access to the bottom internal road.

- [5] Stark stated that Block H and Erf 74 are just in excess of 3 hectares in size and Erf 73 is the smaller one in size, with about 2, 8945 hectares in extent. He stated that in order to be in a position to attend to his dream of subdividing and consolidating the properties to form a new erven, he decided to sell Erven 73 and 74 owned by Country Cloud.
- [6] Special reversionary title conditions were made when Erven 73 and 74, were sold, to provide him with the right to claim re-transfer of the portions of the properties so defined upon approval of the subdivision of the properties. A further condition was added stating that no consideration would be paid to the purchaser for such a transfer back to Country Cloud. The two conditions were endorsed on the deeds of transfer of the two erven.

- [7] Erf 74 was subsequently sold to JC & L Construction CC, who sold it to one Karamchand Modilal Gayadin. This is evidenced by Title Deed T16232/2008. Erf 74 was repossessed by Nedbank from Mr Gayadin and purchased by the second and third respondents (Craig Scott Walker and Cathryn Aimee Walker, respectively) from Nedbank as evidenced by Title Deed T25795/2013. The second respondent is married to the third respondent. The third respondent is the brother to the life partner

of Stark, namely, Shayleen Jane Spiers and thus there are no issues with Erf 74. Erf 73 was repossessed by FirstRand Bank and sold in execution by the Sheriff and transferred to the purchaser Rumila Gayadin as evidenced by Title Deed T34374/2008. Later on, Erf 73 was sold by Rumila Gayadin to the first and second respondents as evidenced by Title Deed T23005/2013.

- [8] When the properties were transferred pursuant to such sale the following conditions of title were entered into the deeds of transfer; Title Deed T54594/2006 in respect of Erf 74 and Title Deed T54593/2006 in respect of Erf 73. The exact wording of the conditions appears in both deeds of transfer as follows (there is a difference in size between the numbers expressed in words and numbers, this will be dealt with later):

‘G. Subject to a right in favour of the SELLER, or its Successors-in-title or assigns, that upon approval of sub-division of the property then the SELLER or its Successors-in-title or assigns shall be entitled to obtain re-transfer of that portion so sub-divided.

H. There will be no consideration paid to the purchaser for such transfer, provided however that the portion that the SELLER may reclaim shall be restricted to no more than 8 495 (EIGHT FOUR NINE FOUR FIVE) square meters and shall exclude the portion on which the dwelling and other improvements have been erected.’

The only difference lies in the number of the extent of the square meters that were to be re-transferred in respect of Erf 74.

- [9] Stark stated that an error occurred when transfers were made to the two Gayadin purchasers in that the reversionary right referred to the “Seller” instead of “Country Cloud”. He stated that the error was partially corrected, particularly in respect of the sale of Erf 73 to the appellants. The clauses of conditions appear as follows on the Erf 73 Deed of Transfer (there is once again a difference in size between the numbers expressed in words and numbers, this will be dealt with later):

‘G. Subject to a right in favour of Country Cloud Trading 221cc assigns, that upon approval of sub-division of the property then the SELLER or its Successors in title or assigns shall be entitled to obtain re-transfer of that portion so sub-divided.

H. There will be no consideration paid to the purchaser of such transfer however provided that the portion that the Country Cloud Trading 221cc may reclaim shall be restricted to no more than 8 495 (EIGHT FOUR NINE FOUR FIVE) square meters and shall exclude the portion on which the dwelling and other improvements have been erected.’

He further stated that though there was a partial correction, the conveyancers failed to specify that such conditions were corrected in Title Deed T54593/2006 and that the phrase “the Seller” still erroneously remained in the third line of Clause G. This according to Stark could be rectified in terms of s 4(1)(b) of the Act, as a correction of an error.

[10] Stark stated that in order for the reconfiguration to be according to their proposed plans of subdivision, attached to the founding affidavit, it would be necessary to take off an area of 1, 0046 hectares from Erf 74 and an area of 0, 8 945 hectares from Erf

73. The effect would be that Erven 73 and 74 would be slightly over 2 hectares and Block H would be slightly over 3 hectares. The persons to benefit from this would be the first respondent and the Stark’s family members as their properties would increase to approximately 5, 0011 hectares.

[11] Stark further stated that an error occurred with regard to Erf 73, in that the maximum area of the portion to be deducted therefrom was to be 8 945 square meters instead of 8 495 square meters as reflected in Clause H of the conditions. The size differs as expressed in words and numerals. In that regard he believed that s 4(1)(b) of the Act should be used to rectify the errors. The application to correct such errors could only occur with the co-operation of the appellants as they became aware of such errors when the issues arose and they engaged with the appellants, who refused to co-operate.

[12] In strengthening his case Stark relied also on the deed of sale concluded between Ms Gayadin and the appellants, in particular Clause 7 therefore, which reads as follows (respondents’ emphasis):

‘VOETSTOOTS: The property is sold voetstoots and absolutely as it stands and Difference as to quantity, quality, description or otherwise notwithstanding and the PURCHASER acknowledges that he has thoroughly inspected the Property and acquainted himself with its nature, extend (sic), locality, conditions of title, servitudes, leases, any conditions to be lawfully imposed at the instance of a government and/or provincial and/or local authority and other encumbrances including the applicable statutory and other rules relating thereto and still have no claim whatsoever against the SELLER or the AGENT for any defects in the Property whether latent or patent.’

The abovementioned clause appears from the deed of sale between Rumila Gayadin and the appellants dated 24 April 2013. He asserted that the applicants failed to acquaint themselves with the conditions of title and other encumbrances as required in terms of Clause 7 above. At the same time he stated that he also became aware of the error when the current issues arose with the respondents.

[13] Stark has since November 2014 obtained approval from the Provincial authorities to create a township on Block H, Erf 73 and Erf 74. He states that the process took him over six years to finalise. The Department of Co-operative Governance and Traditional Affairs (COGTA), approved of all ‘new erven’ in excess of 2 hectares in size. It will require the correction of

Clause H of Title Deed T23005/2013, failing which it will not comply with the approved plans. He approached the respondents, who have refused to co-operate. He asserted that they were bound to co-operate with the subdivision because of the conditions of title in Clauses G and H registered against their title deed and that their refusal was unlawful, malicious and prejudicial to the respondents.

- [14] Stark stated that they were entitled to the re-transfer of the portion of the land registered in the names of the appellants, on the basis of the registered conditions of Clause G and H, which are registered reversionary rights. He asserted that the appellants could address their displeasure and concerns to Rumila Gayadin, as the person who sold the property to them.
- [15] Stark stated that the second and third respondents have been unable to build on Erf 74, though the property was registered in their names since 2 August 2013, as their house plan encroaches on the part of the land falling under Erf 73, owned by the appellants. That portion of land needs to be transferred to form a part of Erf 74. The position has been exacerbated by the conditions imposed by COGTA, particularly Clause 4 thereof, which reads as follows:

‘4. Building and selling prior to approval

The owner’s attention is drawn to the provisions of section 36 of the Ordinance, which prohibits:

- (a) the erection of any building, tent or structure upon any land forming part of the private township; and
- (b) the sale, purchase, lease, advertising for sale or lease, or disposing of in any way of more than one lot in a private township.

until such private township has been established as an approved private township, the MEC for Co-operative Governance and Traditional Affairs has issued the certificate contemplated by section 28(1) and the reserved lots have been transferred or, alternatively, the prior written approval of the MEC for Co-operative Governance and Traditional Affairs has been obtained.’

According to Stark the prejudice being that the second and third respondents, cannot build the house of their dreams, having obtained diagrams for the subdivision from the Surveyor-General, which needs the appellants’ signature thereto.

The appellants case (respondents in the court a quo)

- [16] First, the appellants challenged the relief sought by the respondents on the basis that the powers envisaged in s 4(1)(b), require the written consent of the interested parties, in effecting a rectification on the deed of transfer, and that where consent is withheld, the court can be approached in terms of s 4(1)(b), and such a party should bear the costs thereof as the error was made by their conveyancers. Secondly, they asserted that what was sought to be rectified by the respondents were not a correction of errors in terms of s 4(1)(b) but they sought to substitute ‘Seller’ for Country Cloud, ‘or successors-in-title’ and amend the extent of the property. The registrar was only empowered to rectify such errors if the

requirements in s 4(1)(b)(ii) to (iv) were met. Thirdly, it appeared that the conditions first appeared in the Deed of Transfer No T54593/2006, when the Moetanalos (the first purchasers) took transfer of the property from the first respondent. The said conditions referred to a seller and purchaser and not to the first respondent, which meant that the right was enforceable against the purchaser and not against

successors-in-title. Fourthly, they acquired the property from Rumila Gayadin, in the ordinary course of Gayadin's business, a well-known speculator in property, and that such transaction was protected in terms of the Consumer Protection Act.[2] They took transfer of the property on 26 July 2013; the respondents never informed them about their reversionary right to claim part of the property. Fifthly, the respondents sought to enforce a personal right, which should never have been registered against Erf 73's title deed. Lastly, on appeal, they have challenged the constitutionality of the provisions of s 4(1)(b) of the Act.

[17] The replying affidavit by the respondents, also highlighted that Stark had been unable to locate a copy of the said sale between Country Cloud and the first purchaser, the Moetanalos, but had a full recollection of the terms thereof. It is clear to this court that the appellants were only engaged by the respondents after the approval of the plans as per letter dated 27 November 2014 from COGTA.

Finding by the court a quo

[18] The court a quo held that it appeared to it that the title conditions, which appeared in all subsequent deeds of transfer, were real rights, enforceable against all future owners until exercised by Country Cloud. It also held that there was no evidence presented before it as to the errors in the hectare figures and declined to substitute 8 495 square meters for 8 945 square meters. The appellants were also directed to pay the costs of the application.

Evaluation of the evidence

[19] In the appeal before us, the appellant contended that rectification cannot be inconsistent to the contract, as the application was based on an assumption that a title deed could be 'rectified' in terms of s 4(1)(b) of the Act, regardless of the underlying contract. It was submitted further that the respondents failed to show that there was a common intention between the contracting parties, as the party seeking rectification of the contract has to show that it will give effect to the common intention between the contracting parties. Lastly, the rectification should not be permitted in circumstances whereupon it will adversely affect the rights of the innocent parties, as it was the case with the appellants who were not parties to the initial contract with Country Cloud.

[20] The respondents' challenged this as a new ground raised for the first time on appeal. I find this not to be a new ground as challenged by the respondents. The appellants relied on *Bester NO & others v Schmidt Bou Ontwikkelings CC*, [3] where it was held that the rectification of a title deed is permitted to allow 'the true contract under which the land is held to be reflected on the register.' The common intention of the parties is required where a

rectification is required. I am of the view that it is not a new ground on the basis that the respondents sought to correct 'errors' on the title deed, whereas, the nature of the corrections amount to a rectification of the title deed.

- [21] In support of the aforementioned contention the courts are enjoined by s 39(2) of the Constitution that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' Rectification refers to the competence of rectifying an incorrect party description in a contract which is required to be done in writing and signed.[4] In *Osborne & another v West Dunes Properties 176 (Pty) Ltd & others*,[5] where the court was requested to determine if a written sale of land, which named the wrong party as the buyer, was capable of rectification. The judge in *Osborne* referred to the principle in *Magwaza v Heenan*[6] that rectification of a contract, which a statute requires to be in writing and signed, is possible only, if the document on the face of it, complies with the statutory requirements. The identity of the parties, as in this matter, is an essential part of correction or rectification and needs to be identified in a deed of sale. A deed of sale has not been produced by Stark to confirm that indeed the conditions referred to the first respondent, and not to the seller in general, and that it contained the references to successors-in-title

and assigns. Stark has not taken this court into his confidence as he never mentioned the sale to the Moetanalos in his founding affidavit. Stark refers only to the sale to Ms Gayadin. He never made any attempt to trace the Moetanalos and there is a likelihood that they still have a copy of the deed of sale.

- [22] The provisions of s 39(3) also provide that '[the] Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill.' Therefore the interpretation given to the said conditions of title should also accord with the provisions of s 25(1) 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.' The relevant part of s 25(2) provides that

'Property may be expropriated only in terms of law of general of application:

- (a) ...; and
- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.'

The conditions appearing in Clause H appear not to be in line with the provisions of s 25 of the Constitution as it requires that the appellants should simply transfer their property to the respondents without any form of compensation. The significance of this lies in that the appellants' were not the original purchasers of the property from the respondents. They are the third purchasers of the property. Clause H is ultra vires the law, unconstitutional and invalid as it is not in line with s 25 of the Constitution.

[23] The appellants never entered into any contract with the respondents and their rights need to be protected, particularly as the property is mortgaged for the entire value of the property. The court has the power to decide on legal issues not pertinently raised in the affidavits, where it is satisfied that all the relevant facts have been canvassed in the affidavits so that none of the parties is prejudiced.[7] The issue relating to the common intention of the parties, which has been raised by the appellants, though not pertinently raised in the appellants' papers, however, arises out of the established facts. This issue may be considered by the court and may form the basis of its judgment.[8] I do not see how the consideration of common intention would prejudice the respondents, as it is related to the interpretation of the provisions of s 4(1) of the Act. Section 39(2) of the Constitution is also applicable to the interpretation of legislation, like s 4(1) of the Act, which should not be used to achieve an unconstitutional end.

[24] Even if it can be regarded as new evidence introduced at the appeal stage, it is trite that the court can in exceptional circumstances, deal with new evidence.[9] The exceptional circumstances in this instance being the deprivation of the appellants of their rights to property without compensation, this is a Constitutional issue. This is not evidence on new facts. The rectification issue arises from the question whether the relief sought by the respondents was a correction of an error or not.

[25] The second issue for consideration is whether a correct interpretation was given to the provisions of s 4(1)(b): Section 4(1)(b) deals with the Powers of the Registrar in respect of the rectification of errors, of an incorrect property description in the

title deed or in the conditions affecting any such property. The Supreme Court of Appeal (the SCA) in *Bester NO & others v Schmidt Bou Ontwikkelings CC*, [10] endorsed the application of s 4(1)(b) as a remedy to rectify the mistakes in the transfer of property. Section 4 provides as follows:

‘4. Powers of registrar. —

(1) Each registrar shall have power—

- (a) to require the production of proof upon affidavit or otherwise of any fact necessary to be established in connection with any matter or thing sought to be performed or effected in his registry;
- (b) whenever it is in his opinion necessary or desirable to rectify in any deed or other document, registered or filed in his registry, an error in the name or the description of any person or property mentioned therein, or in the conditions affecting any such property to rectify the error: Provided that —
 - (i) every person appearing from the deed or other document to be interested in the rectification has consented thereto in writing;

- (ii) if any such person refuse to consent thereto the rectification may be made on the authority of an order of Court;
 - (iii) if the error is common to two or more deeds or other documents, including any register in his or her registry, the error shall be rectified in all those deeds or other documents, unless the registrar, on good cause shown, directs otherwise;
 - (iv) no such rectification shall be made if it would have the effect of transferring any right;
 - (v)
 - (c) to issue, under conditions prescribed by regulation, certified copies of deeds or other documents registered or filed in his registry;
 - (d) if in his opinion any deed or other document submitted to him has become illegible or unserviceable, to require that a certified copy thereof be obtained to take its place.
- (2)

[26] Section 4(1)(b) requires the consent of ‘interested persons’ when such an application is made to the Deeds Office to amend certain errors. Section 4(1)(b)(iv) categorically states that no such rectification shall be made if it would have the effect of transferring any right.

Therefore, the rectification which has not been substantiated by any consent or proof of the existence of a real right, should not be effected in this fashion as it would amount to a transfer of rights. Section 4(1)(c) and (d) call for certified documents or other documents to prove the existence or ascertain the intention of the parties, which the respondents have failed to provide.

[27] The respondents sought a substitution of the word ‘Seller’ with ‘Country Cloud’ in Clause G; insertion of the phrase ‘or its successors-in-title’ or between the phrase ‘221cc’ and the word ‘assigns’; substitution of ‘8 945 square meters’ instead of ‘8 495 square meters’; and in Clauses G and H the insertion of the phrase ‘as created in T45493/2006’ at the end of these clauses. If the insertions are made Clauses G and H would read as follows:

G. SUBJECT to a right in favour of the SELLER, or its Successors-in-title or assigns, that upon approval of sub-division of the property then the SELLER or its Successors-in-title or assigns shall be entitled to obtain re-transfer of that portion so sub-divided, as created in T45493/2006.

H. There will be no consideration paid to the purchaser for such transfer, provided however that the portion that the SELLER may reclaim shall be restricted to no more than 8 495 (EIGHT FOUR NINE FOUR FIVE) square meters and shall exclude the portion on which the dwelling and other improvements have been erected, as created in T45493/2006.

[28] The changes have the effect of transferring rights to the respondents. The common intention of the parties to the contract, should have evidenced that effect. Stark has not produced the source document showing the alleged missing errors. He has not even attempted to trace the first purchaser to whom he sold the property to when these

conditions were created in favour of the first respondent. He came to court with an expectation that his word would be accepted. Stark sold the property for his own reasons and entered into a contract with the first purchaser, and created reversionary rights for an indefinite period. On 11 June 2015 in a letter addressed to Stark's attorneys of record, the appellants' attorneys were the first persons who pointed out that they noted that Erf 73 was first sold to Mr and Mrs Moetanalos in 2006, who in turn sold it to Ms Rumila Gayadin in 2008, and in 2013 the property was sold to the appellants. The appellants' attorneys requested proof that the first purchasers were informed of the existence of the condition, in a form of a sale agreement in which the condition was inserted, when exactly the condition was created and endorsed on the title deed and who the owner of the property was at that time. The respondents' attorneys' response, dated 23 June 2015, referred the appellants to the deeds of transfer, but a sale

agreement was not attached. They were referred to their earlier response of 24 April 2015, which the respondents unfortunately did not attach to the founding affidavit,

- [29] I therefore conclude that s 4(1)(b) is not applicable to the rectifications and corrections sought by the respondents, as it does not correct errors but creates rights without any conclusive proof of the existence of such rights. Stark as the person who had an interest in Erf 73 should have ensured that the endorsements on the title deeds were correct from the time he sold the property to the Moetanalos.
- [30] Another question which arose was also whether the conditions created in the title deed were personal rights or real rights. The respondents contended that they were entitled to invoke the reversionary rights clause, in the conditions of title and demanded re-transfer of the extensive portion of the property, without making any payments to the appellants. Ownership is a real right, and avails the holder of the right to a *rei vindicatio*, that is a right to recover the property from anyone who is in possession thereof. Can it be said that the first respondent had a real right enforceable in terms of the law against the current holders in title?
- [31] The court *a quo* found that the conditions in Clauses G and H created a real right. The test for real rights as set out in *Willow Waters Homeowners Association (Pty) Ltd v Koka N.O.*[11] was stated as follows (references omitted):

‘To determine whether a right or condition in respect of land is real, two requirements must be met: (a) the intention of the person who creates the right must be to bind not only the present owner of the land, but also successors in title; and (b) the nature of the right or condition must be such that its registration results in a 'subtraction from dominium' of the land against which it is registered. Whether the title condition embodies a personal right or a real right which restricts the exercise of ownership is a matter of interpretation. The intention of the parties to the title deed must be gleaned from the terms of the

instrument, ie the words in their ordinary sense, construed in the light of the relevant and admissible context, including the

circumstances in which the instrument came into being. The interest the condition is meant to protect or, in other words,

the object of the restriction, would be of particular relevance.'

- [32] According to Stark the conditions of title were created during negotiations when a sale between the first respondent and the Moetanalos was concluded. Stark stated that the conditions referred to on Erven 73 and 74 created 'special reversionary title conditions', giving the first respondent a right to reclaim and re-transfer that portion of the properties so defined, upon approval of the subdivision of the properties and for no consideration to be paid to the purchaser for such a transfer. Notably, the original conditions refer to a seller and purchaser and not to any assigns or successors-in-title. This can be construed to have been agreed between the seller and the purchaser then.
- [33] I have noted that Stark stated that the purpose of the sale of Erf 73 was to raise funds for the subdivision and consolidation of all the erven. I have noted that there is no time frame within which he should have claimed re-transfer of the property. In the absence of the sale agreement the court can only speculate that the Moetanalos may have offered to the first respondent the exercise the reversionary right, before they sold the property to Ms Gayadin. A personal right cannot exist in perpetuity.
- [34] It is my view that this was a personal right enforceable only against the first purchaser of Erf 73. In *Absa Bank Ltd v Keet*,^[12] the distinction was made between a limited real right and a personal right. The court held that real rights are primarily concerned with a relationship between a person and a thing and personal rights are concerned with a relationship between persons; a person, entitled to a real right over a thing, can by way of a *rei vindictio*, claim the thing from any person who interferes with his right; such a right is a right to ownership. If a right is not 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. 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.
- [35] Section 63 of the Act, provides that no condition in a deed of transfer, purporting to create or embody any personal right, nor one which does not restrict the exercise of any right of any ownership, in respect of immovable property, is capable of registration. However, it carries a proviso which states that 'a deed containing such a condition may be registered if, in the opinion of the registrar such a condition is complimentary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.' The question which arises is whether the registration of the reversionary rights in favour of the seller created a real right. In *eThekweni Municipality v Mounthaven (Pty) Limited*,^[13] the Constitutional Court settled this issue, on the basis that it 'rests on the proper interpretation and effect of a reversionary clause in the original deed of sale and subsequent deed of transfer' whether a

reversionary right creates a personal or a real right. It confirmed the distinction of real and personal rights, as stated in *Absa Bank Limited v Keet*.^[14] In para 11 of the judgment it re-affirmed what the SCA stated, ie that two requirements must be met: (1) the person who created the right must have intended the present owner as well as successors-in-title to be bound; (2) the right must result in the subtraction from the dominium of the land against which it is registered.^[15]

[36] The court in *Mounthaven* held that a reversionary right may be registered properly or registered by mistake, but it does not translate a personal right

into a real right. It went on to state that a reversionary right restricts the exercise or full enjoyment of the right to ownership

and it remains a personal right. A fideicommissum, pre-emption right or any other personal rights are registered for practical purposes. It held further that if a reversionary right is registered, it does not get elevated to a real right. It is my view that in this case it is clear that this was a personal right, which cannot translate to a real right. I have taken into account the intention of the parties as stated by Stark, that the property was sold to the first purchaser for purposes of raising funds to create the consolidation of title and subdivision of the properties. Secondly, the unique proviso, that a certain portion thereof would be re-transferred to the first respondent without any payment of consideration to the purchaser and that a specified number of hectares is stated in the conditions. In interpreting the relevant clauses of the conditions, the factors to be considered include the language used, in the light of the ordinary context in which the word or phrase is found; the purpose to which the provision is directed; the knowledge of the parties, where more than one meaning is possible, it must be considered against the

background

of the above facts and whether the process of interpretation is an objective one. Furthermore, a sensible meaning is to be preferred to one that would lead to absurdity.^[16] The only conclusion I can come to is that a personal right was created in the conditions of title.

[37] It is noted that the property had exchanged hands a number of times before the respondents asserted their rights to it. The appellants' purchased the property from Ms Gayadin and not the first respondent. The respondents rely on Clause 7, a voetstoots clause, appearing in a contract between the appellants and Ms Gayadin, particularly where the clause states that they acknowledge to have satisfied themselves as to the conditions of title and other encumbrances. This is a standard clause in an agreement of sale between the seller and the purchaser. Ms Gayadin had enjoyed the use of the property without any

claim from the first respondent, and sold it as it is to the appellants. Binding agreements are a cornerstone of such contracts or conditions. The rights to be exercised by the respondents appear to be open-ended. The court a quo's interpretation, with due respect, is not without difficulty as there appears to be no meaningful parameters to exercise the pre-emptive right.

- [38] In *Bondev Midrand (Pty) Limited v Ramokgopa*,^[17] a Gauteng judgment, states that developers often include a clause in their agreements requiring the purchaser to erect buildings within a specified period or to establish a township, insert a clause that the developer has a right to claim re-transfer of the property, if the property is not developed within a certain period, as a result that such a right to claim re-transfer prescribes in terms of the Prescription Act.^[18] This was also the case in *Mounthaven* where the municipality lost the right to exercise a reversionary right within a certain period. It is very unusual in this case that the exercise of the reversionary right is infinite. I am not raising the issue of prescription, but it is one of the disturbing features of these conditions.
- [39] In the *Bondev* judgment, one of the issues before the court was whether registration of the condition in the title deed meant that it was a real right and incapable of prescription, alternatively whether it was a personal servitude that expires after 30 years. This is a factual question. In the case before this, I find that it was a personal right.
- [40] The court held that on a proper reading of the Deeds Registries Act, that registration of conditions which create personal obligations in a title deed do not elevate them to real rights, that 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 may be created by agreement; the mere fact that a personal right has been registered in the deed of transfer does not change it to a real right. The seller in this matter was no longer the first respondent. I find that the reversionary right was only enforceable upon the first transferee of the property, particularly as that would have been without any payment. The reduction of the area in the property of the appellants impacts in the decrease in the value of the title, without the reduction of the mortgage bond to the bank. It also amounts to a deprivation of property without compensation, in conflict with the provisions of s 25 of the
- Constitution.
- [41] The respondents' argument was that the rectification of the conditions of title, was a mere correction of errors made by their conveyancer, it did not affect any transfer of rights, the appellants never had a full title to the land and the procedure provided by s 4(1)(b)(iv) of the Act was not arbitrary, and should not be rejected by this court. I am of the view that where one seeks to excise a portion of the land, without any compensation, it does not fall within the ambit of s 4(1), instead it amounts to a contravention of s 25 of the Constitution.
- [42] For the same reasons, which I have alluded to above the counter-appeal by the respondents is not competent. Accordingly I make the following order:

The appeal is upheld;

- (b) The counter-appeal is dismissed with costs and the judgment of the court a quo is confirmed.

Mbatha J

Date of hearing

: 1 February 2019

Date delivered

: 15 April 2019

Appearances:

For the Appellants

: Adv DP Crampton

Instructed by

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: Adv CG van der Walt

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[1] Deeds Registries Act 47 of 1937.

[2] Consumer Protection Act 68 of 2008.

[3] Bester NO & others v Schmidt Bou Ontwikkelings CC 2013

(1) SA 125 (SCA) para 8, quoting Weinerlein v Goch Buildings Ltd 1925 AD 282 at 293 with approval.

[4] Osborne & another v West Dunes Properties 176 (Pty) Ltd & others 2013 (6) SA 105 (WCC).

[5] Osborne & another v West Dunes Properties 176 (Pty) Ltd & others 2013 (6) SA 105 (WCC).

[6] Magwaza v Heenan 1979 (2) SA 1019 (A).

[7] Minister van Wet en Orde v Matshoba [1990] 1 All SA 425 (A) 428-429; 1990 (1) SA 281 (A) 285E-H.

[8] Van Rensburg v van Rensburg & andere 1963 (1) SA 505 (A) 509H-510B; Minister of Justice v Nationwide Truck Hire (Pty) Ltd 1981 (4) SA 826 (A) at 833G; Cabinet for the Territory of South West Africa v Chikane & andere 1989

- (1) SA 349 (A) at 260F-G.
- [9] The court has power under s 19(b) of the Superior Courts' Act 10 of 2013 to receive further evidence.
- [10] Bester NO & others v Schmidt Bou Ontwikkelings CC 2013
- (1) SA 125 (SCA) para 8.
- [11] Willow Waters Homeowners Association (Pty) Ltd v Koka NO 2015 (5) SA 304 (SCA) para 16.
- [12] Absa Bank Ltd v Keet 2015 (4) SA 474 (SCA).
- [13] eThekwini Municipality v Mounthaven (Pty) Ltd
- [2018] ZACC 43; 2019 (2) BCLR 236 (CC) para 1.
- [14] Absa Bank Ltd v Keet 2015 (4) SA 474 (SCA).
- [15] William Waters Homeowners Association (Pty) Limited v Kok N.O.
- [2014] ZASCA 220; 2015 (5) SA 304 (SCA) para 16; eThekwini Municipality v Mounthaven (Pty) Ltd
- [2018] ZACC 43; 2019 (2) BCLR 236 (CC).
- [16] See the principles succinctly stated in Natal Joint Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18.
- [17] Bondev Midrand (Pty) Limited v Ramokgopa & others: In re Bondev Midrand (Pty) Ltd v Pulling Pulling [2017] ZAGPPHC 600, confirmed in Bondev Midrand (Pty) Ltd v Puling & another & a Similar Case
- [2017] ZASCA 141; 2017 (6) SA 373 (SCA).
- [18] Prescription Act 68 of 1969.

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