

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 17136/2007

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED:

In the matter between:

BALDUZZI, ORESTE

PLAINTIFF

and

RAJAH, DEVI

FIRST DEFENDANT

BRASG, STANLEY N.O.

SECOND DEFENDANT

Coram: WEPENER J

Heard: 27 MARCH 2014

Delivered: 4 APRIL 2014

Summary: Prescription – Abolition of Racially Based Land Measures Act 109 Of 1991 – Right to claim transfer of immovable property is a personal right and it prescribes after three years of the vesting of such right

JUDGMENT

WEPENER J:

[1] The plaintiff is the registered owner of immovable property. The first defendant is the wife of a deceased person and the second defendant the executor of the deceased's estate. I refer to the first and second defendants collectively as the defendant. The defendant is in possession of the immovable property. The plaintiff seeks the vindication of the property from the defendant.

[2] The defendant pleaded that the plaintiff is not entitled to vindicate the property as the defendant is the true owner of the property. The proposition may, at a first glance, be untenable by virtue of the laws of the country that ownership of immovable property can, generally, only pass by registration of transfer into the name of the owner. Such registration, in the main, follows upon the parties' concluding a written deed of sale. There are, however, exceptions to this general proposition. Such an exception is contained in the Abolition of Racially Based Land Measures Act 108 of 1991 (the Abolition Act). It provides in s 48 as follows:

'(2) Any transaction whereby a person (hereinafter referred to as a nominee owner) acquired property contrary to section 40 of the Group Areas Act, 1966, on behalf of another person (hereinafter referred to as the principal) shall, from the commencement of this section, be deemed not to be an illegal transaction or a transaction which constitutes an offence.

(3) The parties to a transaction referred to in subsection (2) may within thirty months after the commencement of this section in writing request the registrar of deeds concerned to transfer property which by virtue of the

transaction is registered in the name of the nominee owner to the principal in accordance with this section.

(4) A request referred to in subsection (3) shall be accompanied by affidavits or solemn affirmations by the nominee owner and the principal, respectively, in which the following submissions are contained, namely-

(a) in the case of the nominee owner-

- (i) that he is a party to a transaction referred to in subsection (2) as nominee owner;
- (ii) that the person who made the affidavit or affirmation referred to in paragraph (b) is the principal in the transaction;
- (iii) that a property registered in his name and specified in the affidavit or affirmation was registered in his name by virtue of the transaction;
- (iv) that he acquired the property on behalf of the principal with the exclusive object of circumventing the Group Areas Act, 1966; and
- (v) that he has no objection to the transfer of the property to the principal;

(b) in the case of the principal-

- (i) that he is a party to the transaction concerned as principal;
- (ii) that the person who made the affidavit or affirmation referred to in paragraph (a) is the nominee owner in the transaction;
- (iii) that the property concerned was registered in the name of the nominee owner by virtue of the transaction; and
- (iv) that the nominee owner acquired the property on his behalf with the exclusive object of circumventing the Group Areas Act, 1966.

(5) On receipt of a request in accordance with subsection (3) and the supporting affidavits or solemn affirmations in which the submissions referred to in subsection (4) are contained, the registrar of deeds shall, subject to section 56 of the Deeds Registries Act, 1937 (Act 47 of 1937), transfer the property concerned to the person who according to the affidavits or solemn

affirmations is or is purported to be the principal, by making the necessary entries and endorsements in respect of his registers and other documents, as well as in respect of any relevant documents produced to him.

(6) No transfer duty, stamp duty or other fees shall be payable in respect of a transfer referred to in subsection (5).

(7) Any person who makes an affidavit or a solemn affirmation referred to in this section which to his knowledge is false or in any material respect misleading, shall be guilty of an offence and liable on conviction to a fine not exceeding R8 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(8) If a nominee owner-

(a) refuses or omits to make an affidavit or a solemn affirmation referred to in subsection (4);

(b) cannot be found to make such an affidavit or solemn affirmation; or

(c) dies after the conclusion of a transaction referred to in subsection 2, the principal may within 30 months after the commencement of this section apply to a court for an order authorizing the transfer of the property concerned to him: Provided that if paragraph (c) is applicable, such period shall only commence after compliance with any testamentary disposition or the law regarding intestate succession, as the case may be.

(9) The registrar of deeds shall carry out an order of the court under subsection (8) by making the necessary entries and endorsements in respect of his registers and other documents, as well as in respect of any relevant documents produced to him.

(10) The provisions of subsection (5) shall apply *mutatis mutandis* in respect of a transfer referred to in subsection (8).'

[3] The defendant pleaded it's entitlement to the ownership of the immovable property, based on the provisions of s 48(2) of the Abolition Act. The defendant,

however, failed to implement the provisions of the remainder of s 48 by not utilising the provisions to effect transfer of the immovable property into its name.

- [4] Counsel for the defendant submitted that the provisions of secs 48(3) to (10) are peremptory and a failure to effect transfer in terms thereof does not affect the rights created in terms of s 48(2). On the assumption that the right was obtained pursuant to the provisions of s 48(2) and that the transfer of the property need not have been effected as provided for in secs 48(3) – (10), that is within a period of 30 months, I am to determine whether the right to claim transfer has become prescribed by virtue of the provisions of the Prescription Act 68 of 1969 (the Prescription Act).
- [5] The defendant's denial of the plaintiff's right to vindicate the immovable property is based on its entitlement to the property by virtue of the provisions of s 48(2) of the Abolition Act. The defendant claimed, in addition, transfer of the property which it acquired pursuant to an agreement of sale with the plaintiff. It is common cause that such an agreement, if proved, was an oral agreement which, in the normal course, but for the provisions of s 48(2) of the Abolition Act, would have been illegal and unenforceable.
- [6] The provisions of s 48(2) of the Abolition Act have legalised any oral or other agreement in terms of which immovable property was acquired in a manner that avoided the racially based legislation of the past. If the allegations of the defendant are established, the defendant indeed acquired the property legally as the affect of the repugnant provisions, disentitling immovable property from being registered in the name of the defendant, was undone by the Abolition Act.
- [7] Pursuant to the provisions of s 48(2) of the Abolition Act, the party acquiring the property (here the defendant) obtained rights upon the passing of the Abolition Act. Although there are procedures prescribed in terms of which an easy transfer into the name of the true owner, or as referred to in the Act the principal, could be

effected, the wording of the Act does not make it obligatory to utilise the measures therein set out in order to effect transfer of the property.

- [8] By providing that a principal, such as the defendant, 'may' take steps to transfer the property by utilising the procedures referred to in section 48, the legislator did not, in my view, close the doors against obtaining a transfer in the ordinary way as prescribed in the Deeds Registries Act 47 of 1937. The benefits of obtaining a quick and inexpensive transfer would, in the latter circumstances, not be available to a principal.

- [9] After the defendant pleaded its right of ownership to the immovable property pursuant to the provisions of s 48(2) of the Abolition Act and counterclaimed for transfer of the immovable property, the plaintiff responded with a special plea that the defendant's right to claim transfer had become prescribed.

- [10] The defendant's right to claim transfer is not based on the procedures contained in secs 48(3) to 48(10) of the Abolition Act but on the right established in s 48(2). It was submitted on behalf of defendant that the nature of the right is of significance in order to determine whether it has become prescribed. Defendant's counsel submitted that the provisions of s 48(2) caused the defendant to be vested with a real right, and thus it was argued, a right which is not susceptible to prescription. Counsel for plaintiff, however, argued that the right to claim transfer had become prescribed as more 23 years have passed since the right, if it is proven, vested in the defendant. The defendant cannot and does not rely on the provisions of secs 48(3)-(10) as the period of 30 months provided for to effect transfer of immovable property has lapsed and even on the assumption that that period could be extended by a court on application, no such application is before the court.

[11] Counsel for the plaintiff submitted that the defendant cannot claim transfer of the property by virtue of the provisions of the Prescription Act 68 of 1969 which provides that;

‘10 Extinction of debts by prescription

- (1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.
- (2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.
- (3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.

11 Periods of prescription of debts

...

- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.’

The only relevant period, should the plea of prescription prevail, is that contained in s 11(d), being a period of three years. The relevance of prescription has been said to be:

‘The Prescription Act deals with prescription in general. In terms of s 10(a) debt is extinguished by prescription after the lapse of the period which applies in respect of the prescription of the debt. A claim is thus after a certain period of time no longer actionable and justiciable. It is a deadline which, if not met, could deny a plaintiff access to a court in respect of a specific claim.’ See *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at paragraph 10.

[12] Counsel for the defendant submitted that the enforceability of a real right does not prescribe within a period of three years or at all. For this proposition counsel relied on *Staegemann v Langenhoven and Others* 2011 (5) SA 648 (WCC) and *Bester NO and Others v Schmidt Bouontwikkelings CC* 2013 (1) SA 125 (SCA).

In *Staegemann*, Blignaut J held that a vindicatory action was not a debt within the meaning of secs 10 and 11 of the Prescription Act and that it is not subject to the prescriptive periods therein contained. Having regard thereto, it was argued that the claim by the defendants for registration of transfer of the property into the name of the defendant has not become prescribed. It is immediately apparent that *Staegemann* dealt with a vindicatory action and not with a claim such as that which the defendant instituted for the registration of transfer of the property into the defendant's name, which property is in the possession of the defendant. The matter of *Bester* dealt with rectification of a title deed. The law of rectification requires an error to have been made in order to seek rectification. There is no question of any error in this matter as the property was registered in the name of the plaintiff by design and agreement. Both the matters of *Staegemann* and *Bester* are therefore distinguishable from the facts in this matter.

[13] In *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N), Booysen J said at 804A-C:

'Assuming the applicant had the right to have the expropriation and transfer set aside or to demand redelivery of the land to him by registration thereof in his name, that right arose as soon as he was deprived of his possession and ownership. The effect of the expropriation, whether valid or not, is that the applicant has been deprived of ownership of the land. He was thus left with no more than a personal right (if he has any right at all) to claim redelivery of the land by registration of title in his name. Such a claim constitutes a debt within the meaning of s 10 and 11 of the Prescription Act 68 of 1969. While "debt" is not defined in the Act, it has to be given a wide and general meaning. (*HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909A-B.) There is no reason why a claim for vindication of property movable or immovable should not be included. (Joubert (ed) *The Law of South Africa* vol 21 para 96.)' (own underlining).

See also *Perumal v Messenger of the Court and Others* 1953 (2) SA 734 (N) at 736D-E and 737H – 738A; *Smith v Weston* 1961 (1) SA 275 (W) at 277F and *Strydom en 'n Ander v De Lange en 'n Ander* 1970 (2) SA 6 at 12H.

- [14] In *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA), Streicher JA said 580 B-D:

‘An agreement to grant a servitude gives rise to a real right only when it has been registered (see *Van Vuren v Registrar of Deeds* 1907TS 289 at 295; *Van der Merwe Sakereg op cit* 526-527, and *The Law of Property op cit* 380-381). Dealing, at 23H-24E, with the distinction between real rights and contractual rights, in that case unregistered servitudes, Ogilvie Thomson JA referred to *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 where Innes CJ said at 16:

“Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than a contract of sale of land passes the *dominium* to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram lege loci* by an entry made in the register and endorsed upon the title deeds of the servient property.” ’

- [15] In *Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd* 1930 AD 169 the Appellate Division said at 180:

‘But that does not apply to the class of personal rights which are known as *jura in personam ad rem aquirendam*. As contracts, with few exceptions, give rise only to personal rights, the class of right, although relating to immovable property, is a personal right until registration, when it is converted into a real right by such registration. The same applies to burdens upon land, encumbrances of immovable property, (*onera realia*). They are personal until registration, when they become real.’

- [16] In *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 265A-C it is said:

‘By their common consent alone, however, they only create personal rights and obligations, notwithstanding the fact that in part their consent aims at the

constitution of a real right in immovable property which is to inhere in the lender. A consensual right to claim hypothecation of immovable property is prior to registration a personal right available only against the debtor. When the debtor gives effect to the reciprocal obligation in this respect by causing the mortgage bond to be registered in the Deeds Registry then, and only then, is the real right properly constituted in favour of the mortgagee. (*Registrar of Deeds (Tvl.) v. Ferreira Deep Ltd.*, 1930 AD 169 at p. 180).’

[17] In *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* [2003] 4 All SA 471 (W), a full bench of this Division said at paragraph 39:

‘In the case of sale of immovable property a real right is only obtained upon registration. Thus, in *Wahloo Sand Bk en andere v Trustees, Hambly, Parker Trust, en andere* 2002 (2) SA 776 (SCA) the rule *qui prior est tempore potior est jure* was applied in favour of the holder of an unregistered servitude of right of way against the purchaser of the servient tenement which, it was accepted, had no knowledge of the agreement creating the servitude at the time of purchase of the servient tenement, but had not yet obtained transfer. However, all three concurring judgments of Brand AJA (at 784F–G), Cloete AJA (at 789I–J), and Olivier JA (at 794 E) pointed out that the rule *qui prior est tempore potior est jure* is not an inflexible one, and that special circumstances may on equitable grounds justify a departure therefrom. In the case of lease, also of immovable property, it has in general terms been said that the lessee obtains a real right upon taking possession of the leased premises. (See: CG van der Merwe, *Sakereg*, 2ed at 596–597 and cases there cited; and Silberberg and Schoeman’s *The Law of Property*, 4ed at 406 and cases there cited). This statement has usually been made in the context of the rule “huur gaat voor koop” where a lease was concluded prior to a sale of the property. However, if the taking of possession by a lessee converts the lessee’s personal right to a real right, like registration of immovable property converts the personal right of a purchaser into a real right, then the position of a lessee in possession vis-à-vis a claimant of an earlier personal right to have a servitude registered, may be different to that of the purchaser who had not yet obtained registration in *Wahloo* (*supra*).’

[18] The *causa*, which establishes the right whether being an agreement or legislation, does not itself confer a real right. It is an *ius in persona ad rem acquirendam* or 'vorderingsreg' or legal claim to acquire a real right.

[19] In *Evins v Shield Insurance Co Limited* 1979 (3) SA (W) 1136, the court in this Division held at 1141F as follows:

'The word "debt" in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property. While this is so "debt" cannot embrace all rights between two persons. In my view, "debt" in ss 10 and 15 (1) of the Prescription Act means an obligation or obligations flowing from a particular right.'

[20] The matter of *Desai NO v Desai and Others* 1996 (1) SA 141 (A) dealt with an obligation of a party to procure registration of transfer of interests in immovable properties. Grosskopf JA said at 146G to 147B as follows:

'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. 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.

Section 10(1) of the Prescription Act 68 of 1969 ('the Act') lays down that a "debt" shall be extinguished after the lapse of the relevant prescriptive period, which in the instant case was three years (see s 11(d)). 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. (See *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F-G; *Oertel en Andere NNO v Direkteur van Plaaslike Bestuur en Andere* 1983 (1) SA 354 (A) at 370B.) It follows that the undertaking in clause 13(d) to procure registration of transfer was a "debt" as envisaged in s 10(1).'

- [21] In *Barnett v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) at paragraph 19, Brand JA said:

‘[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 vindicatory 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 and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344F - G and *Desai NO v Desai and Others* 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) at 1141F - G).’

- [22] The defendant’s claim herein is nothing other than a claim for the enforcement of an owner’s rights to property as referred to by Brand JA, based on legislation. As such it is a personal right.

- [23] In *Leketi v Tladi* NO 2010 [3] All SA 519 (SCA), Mthiyani JA (as he then was) said at paragraph 8 as follows:

‘[8] In this context and for the purposes of considering the provisions of the Prescription Act, the appellant is the “creditor” and any obligation on the part of the estate of Albert to restore to its rightful owner, property which he fraudulently appropriated is a “debt” as described in section 11(d) of that Act. In terms of the section, the ordinary period of prescription for the “debt” is three years from the date upon which a debt becomes due.’

Leketi referred, with approval, to the *Barnett* and *Evins* cases. In *Mdeyide*, *supra*, the Constitutional Court referred, with approval, to both the *Barnett* and *Desai* matters when it said at paragraph 11:

‘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 goods or to abstain from doing something.'

[24] The distinction drawn by Blignaut J in *Staegemann* is contrary to the authority of the Supreme Court of Appeal and the Constitutional Court. In so far as *Staegemann* dealt with a vindicatory action, it is distinguishable from the matter now under consideration. The defendant claims a transfer of the immovable property into its name. It is not a vindicatory claim but the enforcement of a personal right to claim delivery of land by registration of title into its name.

[25] Finally, in *Ongopolo Mining Limited v !Uris Safari Lodge (Pty) Ltd and Others* (I3544/2010) [2014] NAHCMD 55 (19 February 2014), Damaseb JP disagreed with the finding in *Staegemann* and said as follows at paragraph 42:

'*Staegemann* supports the plaintiff's exception, except that I am not bound by it and need not follow it, unless I find it to be persuasive. With the greatest respect, I do not consider *Staegemann* sufficiently persuasive for the following reasons:

- a) the learned judge did not cite any judgment, reported or unreported, for that proposition;
- b) Under the guise of being *obiter*, Blignaut J ignored *ex cathedra* pronouncements of the Supreme Court of Appeal making clear that a debt under the Prescription Act includes not only the doing of something or failing to do something, but also a claim for *rei vindicatio*;
- c) The learned judge in *Staegemann* did not refer to *Leketi* and did not for that reason distinguish it if it was possible to do so, and for that reason, the *dictum* in *Staegemann* was reached *per incuriam*.'

[26] The *stare decisis*-rule binds me to apply the law as set out by the Supreme Court of Appeal and Constitutional Court as set out in the cases referred to herein

before. Insofar as the decision in *Staegemann* may be in conflict with these decisions, I decline to follow it.

[27] I consequently conclude and issue an order that the defendant's claim for registration of transfer of the property into the defendant's name has become prescribed and the special plea is upheld with costs.

Wepener J

Counsel for Plaintiff: C. McKelvey

Attorneys for Plaintiff: Ellis Coll Attorneys

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