

**(NORTHERN CAPE DIVISION, KIMBERLEY)
IN THE HIGH COURT OF SOUTH AFRICA**

Case No: 48/2017

Heard on: 08/12/2017

Delivered on: 16/01/2018

In the matter between

CECILIA KENEWANG OLIPHANT N.O.

Plaintiff/Applicant

(In her capacity as an intestate heir of the
Deceased's estate of the late Rosy Oliphant
With Estate No. 1647/2008

And

LUCAS OLIPHANT

1st Defendant/Respondent

DAVID OLIPHANT

2nd Defendant/Respondent

THE MASTER OF THE NORTHERN CAPE
HIGH COURT, KIMBERLEY

3rd Defendant/Respondent

THE REGISTRAR OF DEEDS, KIMBERLEY

4th Defendant/Respondent

JUDGMENT

PAKATI J

[1] The applicant/plaintiff , Ms Cecilia Kenewang Oliphant, in her capacity as an intestate heir of the deceased's estate of the late Rosy Oliphant (Estate No. 1647/2008), instituted an action against the first to fourth respondent s/defendants, Lucas Oliphant ("Lucas"), David

Oliphant ("David"), The Master of the High Court, Kimberley ("the Master") and the Registrar of Deeds in their official capacity, respectively seeking an order summarised as follows:

- 1.1 That the registration and transfer of the property known as Erf [...], Galeshewe, Kimberley ("the property ") to the name of the first respondent be set aside;
- 1.2 That the Registrar of Deeds be authorised and ordered to cancel the registration and transfer of the said property;
- 1.3 That the Registrar of Deeds be ordered to transfer the property back to the estate of the late Rosy Oliphant, Estate No. 1647/2008; and
- 1.4 That Lucas or anyone wishing to oppose the action is ordered to pay costs. Ms Oliphant's claim is based on *rei vindicatio*.

[2] On 24 November 2001 the deceased died intestate and her estate should be administered in terms of the Intestate Succession Act¹. The property forms part of her estate.

[3] Only Lucas opposes the application. The Master is cited only in so far as he may have an interest in the matter. No relief is sought against him. It is common cause that Ms Oliphant, Lucas and David are the deceased's biological children and therefore intestate heirs of the deceased.

[4] On 28 February 2017 Ms Oliphant issued summons served on 15 March 2017 upon Ms Charmain Mauza on behalf of Lucas and upon David personally on 16 March 2017. Initially she instituted action in her capacity as the representative of the Master of the Northern Cape High Court, Kimberley. For this assertion she relied on the letter of authority issued by the Master on 18 July 2008 (Annexure "A").

[5] Lucas disputes the appointment of Ms Oliphant by the Master as representative of the estate of their deceased mother. He claims that on 27 March 2002 he was appointed as the representative of the estate in terms of Regulation 4 (2) of R200 on 06 February 1987 and that Ms Oliphant was aware of this. He denied unlawfully and fraudulently transferring the property in his name but did not explain the circumstances surrounding the transfer of the property into his name.

[6] Ms Oliphant alleges that on 08 March 2013 Lucas unlawfully and fraudulently obtained transfer of the property into his name without her authority and/or consent. She alleges further that he failed and/or refused to transfer the property back to the estate of the deceased. Ms Oliphant contends that the two affidavits which were purportedly signed and attested to in

¹ 81 of 1987

favour of the first defendant attached to the plea (Annexure "A" and "B") were fraudulently obtained. She stated that she learned of this when she received a letter dated 06 January 20 14 from the Master's Office.

[7] On 10 April 2017 Lucas filed a notice of intention to defend the action and a plea on 26 April 2017. On 07 August 2017 Lucas raised a special plea of prescription stating that a period of three years had elapsed since the date upon which the debt became due calculated from 06 January 2014 when Ms Oliphant received the letter from the Master's Office. He asserts that a right to claim and enforce transfer of immovable property is a debt in terms of the Prescription Act.² He states that she became aware of the alleged fraudulent transfer of the property during January 2014 and did nothing about it. She therefore failed to demand transfer. He therefore prays for the dismissal of the claim with costs.

[8] A notice of set down was filed on 07 August 2017 for the hearing of the special plea on 15 September 2017 on the opposed roll. In the meantime Ms Oliphant filed a notice to amend her Particulars of Claim also on 07 August 2017. In her amended Particulars of Claim her status changed and acted in her capacity as the intestate heir of the deceased estate and not the representative of the Master of the High Court. The matter could not be heard on 15 September 2015. Consequently, on 17 October 2017 Mr Coetzee, for the first respondent, relied on paras 11 to 14 of **ARMIEN & OTHERS v ARMIEN & OTHERS**³ while Mr Olivier relied on para 13 where Cloete AJ held:

"[11] Before turning to evaluate the evidence, it is necessary to consider whether the plaintiffs' claim is 'a debt' for purposes of extinctive prescription within the meaning of the Prescription Act, whether the plaintiffs' claim is vindicatory in nature (i.e. the rei vindicatio), and the incidence of the burden of proof in the determination of this matter.

[12] In Staegemann v Langenhoven 2011 (5) SA 648 (WCC) the court was faced with a similar issue, albeit relating to the return of a motor vehicle and thus movable property. In that case the applicant sought to recover his motor vehicle which had been misappropriated and ultimately sold to the first respondent, who was an innocent purchaser. The first respondent resisted the claim, contending that the applicant's rei vindicatio was a debt within the meaning of s 10 of the Prescription Act and, because three years had since elapsed, the debt had prescribed in terms of s 11 (d) thereof At 650J-655B Blignault J analysed the relevant authorities. I propose

² Act 68 of 1969

to summarise the findings made by him as follows:

1. *The answer lies in the fundamental distinction between a real right and a personal right (at 651E);*
2. *The object of a real right is a thing. Ownership, being a real right, avails the owner of the rei vindicatio, i.e. the right to recover the thing in question from anyone in possession thereof (at 652A-F; see also the authorities cited therein);*
3. *On the other hand, the object of a personal right is some sort of performance by another, often coupled with a duty to counter-perform (at 652A- and F-H). Put differently, an obligation is equivalent to a personal right and not a real right;*
4. *The Prescription Act recognises this distinction. Real right. are subject to acquisitive prescription (see Chapters 1 and 2 thereof) and personal rights to extinctive prescription (in Chapters 3 thereof which incorporates ss 10 and 11 referred to above) (at 652I-J and 653F);*
5. *Since the rei vindicatio is a claim to ownership in a thing, it is a real right which is subject to acquisitive prescription; it cannot be considered a debt subject to extinctive prescription.*

[13] In my view, and by parity of reasoning, the same principles must apply in respect of a claim based on ownership of immovable property or, as is the case in the present matter, undivided shares in an immovable property. The plaintiff's claim is clearly founded on the rei vindicatio - they became owners of undivided shares in the property under the laws of intestate succession upon the death of the deceased. Accordingly, the plaintiffs' claim against the 1st defendant is subject only to the provisions of Chapter I of the Prescription Act. Section I (contained in Chapter 1 provides as follows:

'1 Acquisition of Ownership by Prescription, - Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which is possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years. "

³ (6943/2008) [2012] ZAWCHC 98 delivered on 25 January 2012

[9] Mr Olivier persisted that Ms Oliphant's position does not change despite her change of citation and capacity with which she claims. He insisted that the claim has not prescribed. He urged me to dismiss both special pleas raised by the first respondent.

[10] Mr Coetzee on the other hand argued that because of Ms Oliphant's amended Particulars of Claim the special plea of prescription raised initially in the plea has become moot. He then raised lack of *locus standi* by the plaintiff.

LOCUS STANDI

[11] Mr Olivier, on behalf of Ms Oliphant, submitted that Ms Oliphant's claim is based on *rei vindicatio*. He submitted further that the plaintiff has a direct interest in the relief sought as the intestate heir and therefore she has *locus standi* in the matter. He submitted further that the plaintiff's claim is vindicatory in nature and therefore not extinguished by prescription after the expiry of a period of three years. For this assertion he relied on **CABINET OF THE TRANSITIONAL GOVERNMENT FOR THE TERRITORY OF SOUTH WEST AFRICA v EINS**⁴ where Rabie ACJ had this to say:

"A person who claims relief from a Court in respect of any matter must, as a general rule, establish that he has a direct interest in that matter in order to acquire the necessary locus standi to seek relief

...In Dabymple and Others v Colonial Treasurer 1910 TS 372 at 390 Wessels J stated that:

"The person who sues must have an interest in the subject-matter of the suit, and that interest must be a direct interest."

And that-

"Courts of law ...are not constituted for the discussion of academic questions, and they require the litigant to have not only an interest, but also an interest that is not too remote."

"...the action popularis has disappeared,

⁴ [1988] 2 All SA 379 (A) at 384-385; see also Kolbatschenko v King NO and Another [2001] 4 All SA 107 (C) at 114 where Thring and Van Heerden JJ said:

"What is required, then is that-

(a) The applicant for relief must have an adequate interest ("voldoende belang") in the subject-matter of the litigation, which is not a technical concept; it is usually described as a direct interest in the relief sought;

(b) It must not be too far removed;

(c) It must be actual, not abstract or academic;

(d) It must be a current interest, and not a hypothetical one.

Whether these requirements are met in any particular case will depend on the facts, and no hard- and-fast or generally binding rules can be laid down. "

"Courts of law have required the applicant to show some direct interest in the subject-matter of the litigation or some grievance special to himself.

1933 AD 87 at 101 Wessels CJ referred to the requirement that a plaintiff has to show a direct interest in the matter in issue in the following terms:

"...by our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have. "

[12] S 13 of the Administration of Estates Act ("the Act")⁵ provides:

"13 Deceased estates not to be Liquidated or distributed without letters of executorship or direction by Master

(1) No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act, or under an endorsement made under section fifteen, or in pursuance of a direction by a Master."

Emphasis added

[13] For a claim of *rei vindicatio* to succeed a plaintiff must allege and prove ownership of the thing whether movable or immovable and that the defendant was in possession of the property when the action was instituted.⁶

[14] In *KARA v THE PROPERTIES FORMERLY KNOWN AS THE FARM CATO MANOR NO 812*⁷ Meer AJ stated:

"[8] It is trite law that it is the executor of a deceased estate, and not any heir thereto, that has locus standi to liquidate and distribute the estate. It follows that where a deceased estate has been dispossessed of a right in land, it is the executor who is entitled to prosecute the restitution claim and not the heirs. That principle has been acknowledged in several decisions of this Court. Ebrahim Kara in his capacity as heir, acting for him and the other heirs, accordingly has no locus standi to prosecute a claim for the restitution of rights in land in respect of the subject property. "

Emphasis added

[15] In *CLARKSON NO v GELB AND OTHERS*⁸ Coetzee J described a deceased estate as follows:

"A deceased estate is an aggregate of assets and liabilities. It has no legal personality

⁵ Act 66 of 1965

⁶ *Concur Construction (Cape) Pty Ltd v Santambank Ltd* [1993] 2 All SA 496 (A), 1993 (3) SA 930 (A)

⁷ [2002] JOL 9306 (LCC) at para 8

and, when referring to it as an entity, one must be careful not to imply or understand thereby that one is dealing with anything like a persona. The executor is vested with its administration and he alone has the power to deal with this totality of rights and obligations. He is not merely a procurator or agent. His primary duty is to obtain possession of the assets of the deceased to realise them as far as may be necessary, to make payment of debts and expenses to frame a liquidation and distribution account and thereafter, to effect a distribution to the heirs and legatees. Heirs and legatees can claim whatever is due to them only after confirmation of the liquidation and distribution account (in terms of section 35 (12) of the [Administration of Estates] Act) according to its tenor." Emphasis added

[16] Zondi JA (Maya, Bosielo, Wallis JJA and Meyer AJA concurring)⁹ held :

*"[20] In my view, there is merit in the argument that a vindicatory claim, because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act. The High Court in Staegmann (paragraph 16) was correct to say that the solution to the problem of the prescription is to be found in the basic distinction in our law between a real right *jus in re*) and a personal right *jus in personam*). Real rights are primarily 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, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right. "*

[17] The authorities *supra* clearly state that only the executor of a deceased estate and not an heir has *locus standi* to liquidate and distribute the estate. This is the case when the deceased estate has been dispossessed of a right in land. The executor is entitled to prosecute restitution. Nowhere in the papers does she allege or claim to be the owner of the property which means that her claim is not vindicatory.

[18] It is unclear why Ms Oliphant amended her status and approached the Court in her capacity as an heir. If it were proved that Lucas unlawfully and fraudulently transferred the property in his name, it then belongs to the estate of the deceased. She is therefore not in a position to liquidate and distribute the estate as an heir in terms of s 13 of the Act and as required by a claim of *rei vindicatio*. The implication is that the estate is unrepresented. In

⁸ 1981 (1) SA 288 (W) at ...

my view, the amendment to her particulars of claim was to her peril. Moreover a close reading of section 13 clearly shows that she lacks *locus standi*.

PRESCRIPTION

[19] Sections 10 and 11 of the Prescription Act, 68 of 1969 provide:

"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

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. "

⁹ Absa Bank Limited v Keet (2015] 4 All SA I (SCA) at para [20]

[20] I do not agree with Cloete AJ in Armien's case that the plaintiff's claim was founded on the *rei vindicatio* and that the heir became owners of undivided shares in the property under the laws of intestate succession upon the death of the deceased. I say so for the reasons advanced earlier in this judgment. In my view, in the instant case, the plaintiff's claim would have been different if she had not amended her Particulars of Claim. Mr Coetzee submitted that her claim is for the enforcement of a personal right, I agree. There is no indication that at the time of the alleged dispossession of the property by the first defendant the estate had already been wound up or that the liquidation and distribution account had been confirmed in order to conclude that what was left was for the heirs to claim their shares. Ownership of property only passes by registration of transfer into the name of the owner.

I accordingly make the following order:

The special pleas (prescription and *locus standi*) are upheld with costs.

BM PAKATI

JUDGE

On Behalf of the Plaintiff: AD V COEZEE SC

Instructed by: Van De Wall Inc

On Behalf of the Defendant: ADV OLIVIER

Instructed by: Thomas Kouter Attorneys