

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 47616/2014

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
7/6/15 DATE SIGNATURE

15/6/2015

In the matter between:

BONDEV MIDRAND (PTY) LIMITED

Applicant

and

MTSHAVHENI GIDEON RASALANAVHO

First Respondent

THABELO RASALANAVHO

Second Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Third Respondent

STANDARD BANK OF SOUTH AFRICA

Fourth Respondent

JUDGMENT

DODSON AJ:

Introduction

[1] This is an application to compel the first and second respondents to re-transfer to the applicant, as developer, an erf in a township development ("the property"). Re-transfer is sought at the price originally paid by the first and second respondents. The grounds on which re-transfer is sought is that they have failed to build a residence on the erf within the time period stipulated by way of a restrictive condition of title registered in their deed of transfer.

[2] The application is opposed on the basis that –

[2.1] the founding affidavit lacked essential averments pertaining to the deponent's authority and the facts being within his own personal knowledge;

[2.2] the applicants claim for re-transfer has prescribed;

[2.3] the period for completion was tacitly extended; and

[2.4] the balance of convenience favours allowing the first and second respondents to complete their dwelling and retain ownership.

[3] I am also called on to decide an application for condonation of the late filing of the applicant's replying affidavit.

Factual background

[4] The applicant initially sold the property to a close corporation. The close corporation sold the property to the first and second respondents ("the

respondents") on 18 March 2012. Transfer was registered on 29 May 2012.

- [5] The relevant title deed condition was reflected in the identical wording to that which appeared in the deed of transfer in respect of the initial sale to the close corporation. It provides as follows:

"B. ONDERHEWIG AAN die volgende voorwaarde opgelê en afgedwing deur BONDEV MIDRAND PROPRIETARY LIMITED. (Nr. 2000/027600/07) (die transportgewer) naamlik:

Die transportnemer, sy opvolger in title of regsverkrygendes, is verplig om 'n woonhuis op die eiendom op te rig binne 18 (agtien) maande vanaf 7 Desember 2007, by gebreke waarvan die transportgewer geregtig sal wees, maar nie verplig, nie, om te eis dat die eiendom aan die transportgewer op kostes van die transportnemer getransporspoorteer word teen betaling van die oorspronklike koopprys, rente vry. Die transportnemer sal nie die eiendom binne gemelde tydperk mag verkoop of oordra sonder skriftelike toestemming van die ontwikkelaar nie. Hierdie tydperk kan in die diskresie van die ontwikkelaar verleng word.¹

- [6] The applicant consented to the transfer of the property. The written consent was attached to the deed of transfer and recorded that the title deed condition had not yet been complied with and was to stand as a condition of title. It also recorded that the developer had granted an extension of the time period for the construction of the residence. The period of the extension was not recorded in the written consent. The written consent was signed on 8 May 2012.

¹ Translated, this means –

"B. SUBJECT TO the following condition imposed and enforced by BONDEV MIDRAND PROPRIETARY LIMITED (No 2000/027600/07) (the transferor) namely:

The transferee, his successor in title or assigns, is obliged to erect a residence on the property within 18 (eighteen) months from 7 December 2007, failing which the transferor shall be entitled, but not obliged, to demand that the property be transferred to the transferor at the expense of the transferee against payment of the original purchase price, interest free. The transferee may not, during the said time period, sell or transfer the property without written permission of the developer. This time period may in the discretion of the developer be extended."

- [7] In order to determine the time period of the extension, one must look to a written agreement signed by the applicant and the respondents on 9 April 2012. Although the agreement is framed in the first person singular, both the first and second respondents signed it. The material parts of the agreement, entitled "Extension of building period : Midlands Estate", read as follows:

"I, ... hereby acknowledge that I am aware that:

- 1. The original building period, namely 18 (eighteen) months after proclamation expired on 30 June 2009.*
- 2. Bondev is entitled to purchase the stand back at the original selling price which Bondev sold the stand for;*
- 3. There are Aesthetical Rules for Midlands Estate;*
- 4. The construction period is 9 months;*
- 5. Extra levies will be imposed by the Midlands HOA should the original building period be exceeded.*

I undertake to:

- 1. Immediately proceed with the preparation of building plans and lodge building plans within 45 calendar days hereof at the Aesthetical Committee.*
- 2. Appoint a building contractor within 80 days hereof.*
- 3. Supply Bondev with a monthly building programme within 80 days hereof.*
- 4. Start construction within 90 days after acceptance hereof.*
- 5. Complete construction within 12 months hereof.*

I understand that this agreement does not negate or affect:

- 1. Bondev's rights in terms of the original offer to purchase and the title deed.*
- 2. The decision of the Home Owners Association to charge an extra levy.*

Bondev hereby extends the building period by a maximum of 12 months on condition that this undertaking is strictly complied with."

- [8] The effect of the extension agreement was that the first and second respondents had to complete construction of a residential dwelling on the

property within 12 months from 9 April 2012. This would have given the first and second respondents until 9 April 2013 to complete the construction of the dwelling.

[9] It is common cause that that 9 April 2013 came and went without completion of the residential dwelling.

[10] On 23 October 2013, the applicant addressed a letter to the first respondent which read as follows:

"Despite several requests to resolve this matter we have no cooperation from you.

In terms of inter alia the Title Deed of the property and the Home Owner's Association Rules this stand should have been developed long ago.

Unless you submit building plans and/or start with the building process immediately, Bondev will exercise their right to re-transfer this property back into their name. Messrs Tim Du Toit Attorneys will then liaise with you in the preparation of the transfer documents."

[11] The first respondent replied, saying that *"the architect was busy finalising the final council / municipal and working drawings (sic)."* Despite this, the residential dwelling has not been developed.

[12] In their answering affidavit, the first and second respondents say that the period for construction was extended *"by conduct"* because the letter of demand was only sent on 23 October 2013, six months after expiry of the time limit for construction.

[13] They attributed the delays to their awaiting the finalisation of the drawings by the architect and the approval of those drawings by the municipality.

[14] They also point out that the application was only brought eight months after the letter of demand and, when it was brought, it was not properly served as it was sent by email.

[15] They also referred to correspondence with the applicant. This included-

[15.1] an email addressed by the first respondent to the applicant on 4 December 2013 which refers to their attached response. However, this attachment does not appear to have been included in the annexures to the answering affidavit;

[15.2] an email dated 22 May 2014 referring to their efforts to have the plans approved by the municipality;

[15.3] a letter dated 25 July 2014 from the respondents' attorneys recording that the application had not been properly served, that they had been instructed to oppose the application and recording that the respondents were now in possession of all the necessary documents authorising them to start building. Attached to the letter was a copy of a certificate of compliance following a site inspection by the Home Owners Association Estate Controller. The letter recorded that construction would start early the following week. The applicant was in the circumstances called upon to withdraw its application to court.

[16] Further, according to the first and second respondents, construction has already started on the property but they were advised to stop the construction after being formally served with this application.

[17] The letter of 25 July 2014 also attached a copy of a certificate to commence construction dated 21 July 2014 issued by the Home Owners Association and approving the first site building plan.

[18] Although construction had already started, the first and second respondents say that after they were formally served with the court documents, construction was halted.

Condonation

[19] The applicant's explanation for the late filing of its replying affidavit is that its attorney was tied up with litigation in the lead-up to the Christmas period. As a result it was only filed in the new year. Although the explanation is not a compelling one, the respondents were unable to point to any substantial prejudice that might arise from condoning the late filing of the replying affidavit. The filing of the replying affidavit constitutes a component of the right to be heard in terms of section 34 of the Constitution. In my view, the extent of the applicant's delay and the weakness of its explanation does not justify denying this right. I accordingly condone the late filing of the replying affidavit.

Lack of authority and essential averments in the founding affidavit

[20] Due to what is manifestly a typing or word processing error, most of paragraph 1 of the founding affidavit never made it into the affidavit. The paragraph begins "*except where stated to the contrary and are true and correct*". In its replying affidavit the applicant explains that this was a typographic error, provides the missing averments as to the requisite

authority and provides the missing part of the sentence in which the deponent avers that the facts are within his own personal knowledge.

[21] I should add that notwithstanding the absence of the averment pertaining to authority, a resolution in terms of which the applicant decided to bring the application and authorised its director, the deponent, Johannes Adrian Bothma, to do what was required in the application is attached to the founding affidavit.

[22] A party who wishes to challenge the authority to bring proceedings must make use of rule 7 of the Uniform Rules of the High Court.² The respondents made no attempt to engage the provisions of rule 7. On this basis alone, this point stands to be dismissed. In any event, I am satisfied that the applicants were entitled to rectify a typographical error in the replying affidavit. There was no prejudice to the respondents.

Prescription

[23] The relevant provisions of the Prescription Act No. 68 of 1969 are as follows:

² *Eskom v Soweto City Council* 1992 (2) SA 703 (W); *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA); *Games & Ano v Telkom Namibia Ltd* 2004 (3) SA 615 (SCA).

7 Extinction of servitudes by prescription

(1) A servitude shall be extinguished by prescription if it has not been exercised for an uninterrupted period of thirty years."

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."

[24] The applicant contends that because the obligation on the respondents to complete the construction within a fixed time period arises from a registered restrictive condition of title,³ the relevant prescription period is 30 years. They argue in this regard that a restrictive condition of title constitutes a servitude as contemplated in section 7 of the Prescription Act. Accordingly, the 30 year period provided for in section 7(1) applies.

[25] It is not necessary for me to decide this issue. It is complicated by the fact that the operative time period in respect of the respondents was contained

³ On the nature of restrictive conditions of title, see J Van Wyk *Planning Law* 2nd Ed Juta para 7.7.3.5 p 310-317.

in an agreement that does not form part of the title deed. I will assume in favour of the respondents that the shortest period of three years as provided for in section 11(d) of the Prescription Act applies.

[26] In terms of section 12(1) of the Prescription Act prescription commences to run “as soon as the debt is due”. In *Truter & Ano v Deyse*⁴ Van Heerden JA held as follows:

“For the purposes of the Act, the term ‘debt due’ means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.”

[27] The point at which the “entire set of facts” constituting the applicant's cause of action arose was on 9 April 2013 when the period for construction of the residential dwelling expired. Clearly if the applicant had commenced legal proceedings before that date, they could have been defended on the basis that the proceedings had been commenced prematurely.

[28] The prescription period having commenced to run on 9 April 2013, it has yet to expire. Accordingly, the applicant's claim has not prescribed.

Tacit extension

[29] The respondents argue that because the applicant waited until 23 October 2013 to send a letter of demand, allowed a further delay during which

⁴ 2006 (4) SA 168 (SCA) at [16].

various letters were addressed to the applicant by the respondents and also delayed in properly serving the application (having originally only emailed it to the respondents), they had tacitly consented to an extension.

[30] In terms of the restrictive condition of title itself, the time period can only be extended in writing. On this ground alone, there is no substance in this defence.

[31] In any event, even if it could do so, I am not persuaded that the applicant has by its conduct waived its right to enforce the restrictive condition of title.

In *Vermeulen's Executrix v Moolman*⁵ Innes J held that –

“the well-known principle applies that an intention to waive rights of any kind is never presumed. There must therefore be clear evidence not only of the owner's knowledge, but of his inaction for a sufficient time and under effective circumstances.”

[32] The applicant's conduct in affording the respondents a period of grace in which to remedy their breach of the restrictive condition of title and the extension agreement, is not automatically to be equated with a tacit waiver of its rights.

Balance of convenience

[33] The respondents argued that the “balance of convenience” favoured them.

The present application and consequential process of retransfer would only delay construction even further, than if the applicant allowed the respondents to continue with their construction. The balance of convenience also favoured them, they argued, because the applicant would

⁵ 1911 AD 384 at 409.

be stuck with a “half erected building” if relief was granted in the applicant's favour.

[34] Counsel for the respondents was unable to refer me to any authority for the balance of convenience being a defence to an application to enforce a restrictive condition of title or a term of a binding agreement, nor is there any.

Conclusion

[35] In the circumstances, I am satisfied that the applicant has made out a case for enforcement of the restrictive condition of title. I accordingly make the following order:

- 1) The first and second respondents are ordered to take the necessary steps to re-transfer the property described as Erf 2662, Midstream Estate, Extension 31 Township, Registration Division JR, Gauteng, held by deed of transfer T37212/2012, to the applicant.
- 2) The first and second defendants are to bear the costs of such retransfer.
- 3) The applicant is to pay to the first and second respondents the amount of R520 000,00 (five hundred and twenty thousand rand) against transfer of the property in terms of paragraph 1, less any amounts as contemplated in paragraphs 5.1 and 5.2 below.
- 4) The first and second respondents are directed to sign all documents and take all steps reasonably required to give effect to the order in paragraph 1) above,

within 7 (seven) days from date of such request by or on behalf of the applicant.

- 5) Should the first and second respondents refuse or fail to sign the relevant documentation to give effect to the order in paragraphs 1 and 4 above, then the deputy sheriff having jurisdiction is authorised and directed to sign all necessary documents on their behalf to –

5.1.) effect re-transfer of the aforementioned property from the first and second respondents to the applicant, against payment of the amount of R520 000,00 (five hundred and twenty thousand rand), less the costs payable to the sheriff, transfer fees, clearance fees at the local authority and homeowners association in respect of the transfer; and

5.2.) discharge any indebtedness in respect of the bond secured over the property;

- 6) The applicant is entitled to register this order at the Registrar of Deeds.
- 7) The relief in paragraphs 1 to 6 of this order is without prejudice to the rights of the fourth respondent as bondholder over the property.
- 8) The first and second respondents are ordered to pay the costs of this application.



ALAN DODSON
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Counsel for the applicant: ADV J WASSERMAN SC

Instructed by: TIM DU TOIT & CO INC,
433 Rodericks Road,
cnr Sussex Road,
Lynnwood,
Pretoria

**Counsel for the first and
second respondents:**

ADV T W BABEDI

Instructed by: NDEKWE ATTORNEYS,
49B Die Uitsig Road,
Eldoraigne Ext. 3,
Centurion

Date of hearing : 6 May 2015

Date of judgment: 10 June 2015