REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 4622/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED: YES/NO

SIGNATURE: Naude-Odendaal J

DATE: 23/10/2024

In the matter between:

BETTY MAHLANGU	**1st APPLICANT**
BETTY MAHLANGU N.O. (As Executrix of Estate Late Mbablekwa Lucas Mahlangu)	**2nd APPLICANT**
and	
GIJA PLAZA (PTY) LTD	**1st RESPONDENT**
MALULEKE KHAZAMOLA FRANS	**2nd RESPONDENT**
MOGALAKWENA LOCAL MUNICIPALITY	**3rd RESPONDENT**
THE REGISTRAR OF DEEDS, PRETORIA	**4th RESPONDENT**

JUDGMENT

NAUDE-ODENDAAL J:

[1] The Applicant applied for a declaratory order, declaring the registration and transfer of the immovable property described as Erf A[…], Mahwelereng Township, Mokopane ("the property"), in the name of the First Respondent and Second Respondent to be null and void, *ab initio*, and/or cancelled and that all subsequent transfers of the above property are also to be declared null and void and cancelled.

[2] The background facts are briefly the following. Mbalekwa Lucas Mahlangu ("the deceased") became the owner of the property on or about 25 April 1994. The deceased entered into a written sale agreement with the 1st Respondent on 22 August 1995 in terms whereof the property was sold to the 1st Respondent for a purchase price of R500 000.00. The property was transferred and registered in the 1st Respondent's name on 2 August 1996.

[3] The deceased passed away on 14 December 2005. The 2nd Applicant was appointed as the executrix of the estate of the deceased on 11 November 2011. In an e-mail dated 27 July 2013, the Applicants' Attorneys of record indicated that the 1st Respondent was co-owned by the 1st Applicant, the deceased and Mr. McCormick.

[4] The 3rd Respondent obtained judgment against the 1st Respondent due to unpaid municipal rates owned on the property. The 2nd Respondent purchased the property at a sale in execution on the 18th of July 2014. The property was transferred from the 1st Respondent to the 2nd Respondent on 14 May 2015.

[5] The Applicants' instituted these proceedings only on the 23rd of July 2020. Some 9 years after being appointed as Executrix and 15 years after the deceased passed away. Furthermore, about 26 years after the 1st Respondent became the registered owner of the property. The Applicants on their own version state that they became aware of the transfer of the property to the 1st Respondent during the year 2015.

[6] The 1st Respondent raised prescription as a point *in limine.* It was submitted that the Application was served on the 1st Respondent on a date that is more than 3 years after the date on which the Applicants, at the latest, became aware of their alleged claim/s. In the premises the Applicants' claim/s have prescribed in terms of Section 11 of Act 68 of 1969.

[7] The Applicants' in reply to the point *in limine* of prescription submitted that the claim is not of a debt but a claim for restitution of an immovable property. It was further submitted that a claim for the return of immovable property was also a constitutional claim, and therefore does not prescribe. It was submitted that the Prescription Act, 68 of 1969 applies to debt and not to a claim in respect of immovable property.

[8] During argument, the Applicant referred this court to **Absa Bank v Keet (817/13) [2015] ZASCA 81 (28 May 2015)** where in it was held that a claim under *rei vindicatio* is not a debt in terms of Chapter Ill of the Prescription Act, 68 of 1969 and does not prescribe after three years.

[9] It was held as follows in Absa Bank v Keet supra:

> *"[9] I turn now to consider the merits of the appeal, namely whether the appellant's claim for the repossession of its vehicle is a 'debt', which for the purposes of the Prescription Act prescribes after three years. The court a quo dismissed the appellant's claim for repossession of the vehicle on the basis that it was a 'debt' as contemplated in s 11 of the Prescription Act and thus prescribed after three years. As I have already stated above, it reached its conclusion on the basis that Staegemann was wrongly decided.*
>
> *[10] Counsel for the appellant submitted that a vindicatory claim is clearly a claim based on ownership of a thing and that it cannot be described as a claim for satisfaction of a debt. He argued that this Court should follow the reasoning in Staegemann, which he submitted, was correct. The amicus curiae submitted that if the legislature in its wisdom, had wanted to stipulate the period of prescription in respect of a vindicatory claim, for which neither*

the 1943 Prescription Act nor the present Prescription Act provided, it could have done so. But it chose not to do so, because, he submitted, it intended the prescription period in respect of a vindicatory claim to be decided on a case by case basis. But when asked by the Court whether that proposition reflected a correct approach to construing a statute such as the Prescription Act, he was constrained to concede that the construction he contended for was incorrect. His alternative argument was that for the sake of consistency this Court should in construing the Prescription Act interpret the concept 'debt' in the same manner as it was interpreted in cases such as Barnett; Desai N.O. v Desai; and Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd.

[11] Staegemann was a case on all fours with the present one. The applicant claimed the return of his vehicle from the first respondent, who had bought it from a third party, to whom it was fraudulently sold by the third respondent. The first respondent resisted the applicant's claim contending that the claim had prescribed. This plea was rejected after a thorough review of the authorities.

[12] It was pointed out by Holmes AJA in Electricity Supply Commission at 344F-H with reference to the Shorter Oxford English Dictionary and also to Leviton & Son v De Klerk's Trustee that a debt is 'that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another and 'whatever is due - debitum - from any obligation'. That definition was thereafter adopted and extended by this Court in Desai N.0. at 146I-J where a 'debt' was said to have 'a wide and general meaning, and includes an obligation to do something or refrain from doing something'. The notion that a vindicatory claim constituted a debt subject to extinctive prescription has its origins in the following statement in Evins (at 1141F-G):

'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.'

[13] It is by no means clear what King J intended by this dictum. Evins dealt with a motor vehicle accident claim and the issue was whether a claim for personal injuries and a claim for damages for loss of support arising from the death of the plaintiff's husband were separate claims or a single debt for the purposes of prescription. No issue of a vindicatory claim arose for consideration. As the judge was contrasting a claim sounding in money with a claim for delivery of property, he may have meant nothing more than that both types of claims could give rise to a debt. His statement was not approved when the case came before this Court in Evins and there is a passage in the judgment of Corbett JA (at 842E-F) that seems inconsistent with it. There, in dealing with what constitutes a debt for purposes of prescription, Corbett JA said:

'... it is clear that the "debt" is necessarily the correlative of a right of action vested in the creditor, which likewise becomes extinguished simultaneously with the debt. (Cf Erasmus v Grunow en 'n Ander 1978 (4) SA 233 (0) at 245E.)'

[14] In Erasmus v Grunow, Van Heerden J had said that 'a right of action' and 'a debt' were two poles of an obligation' ("n Vorderingsreg en 'n skuld is egter twee pole van 'n verbintenis'.) In other words, they are the opposite poles of a single obligation. An obligation for these purposes could arise from contract, delict or ex lege as Van Heerden AJA made clear in Oertel, where he said that a debt is an obligation to do something, either by payment or the delivery of goods or services. It is one pole of an obligation, which in this context encompasses a right to receive and a corresponding duty to give. Significantly absent from this exposition is any suggestion that a claim arising other than from an obligation of this character, such as a claim to enforce a real right, is a debt.

[15] In Barnett this Court was confronted with a special plea of prescription raised by certain persons who had occupied and built structures on State land. The occupiers' argument in support of the plea relied on s 12(3) of the

Prescription Act. They contended that the prescription period of three years commenced to run, at the latest, when the government acquired knowledge of the 'identity of the debtor and of the facts upon which the debt arose'; the 'debt' being the vindicatory relief which the government sought to enforce.

[16] Brand JA writing for this Court stated at para 19 of the judgment with reference to Evins that he was prepared to accept that the vindicatory relief which the government sought to enforce constituted a 'debt' as contemplated by the Prescription Act. He said that he could see no reason why it would not include a claim for the enforcement of an owner's right to property. But then the prescription point was dismissed on the basis of application of the concept of a continuous wrong.

[17] Grobler concerned the question whether a claim to recover the proceeds of certain insurance policies ceded to the appellant's late husband, had prescribed. The high court held on the basis of the application of the pledge theory that what the applicant there sought to enforce was a vindicatory claim that became prescribed after 30 years. This Court rejected that finding. At para 19 this Court stated:

'... the prescription period of 30 years in s 1 of the Prescription Act relates to acquisitive prescription. For extinctive prescription, the period can, in the present context, only be three years provided for in s 11(d) of the Act'.

It referred to Evins and Barnett in support of that proposition. In the end nothing turned on the prescription point and the case was decided on other grounds.

[18] In Leketi the appellant alleged that his grandfather had fraudulently caused certain property to be registered in his own name instead of in the name of the appellant's late father. His claim was directed at setting aside the registration in the name of his grandfather and then procuring transfer of the property from his late father's estate. The claim was not a vindicatory claim and accordingly the reference to Barnett was obiter and irrelevant to the

decision, which turned on the appellant's knowledge of the allegedly fraudulent transfer.

[19] In Schmidt Bou Ontwikkelings the question whether a vindicatory claim gives rise to a 'debt' which prescribed after three years, was raised, but not decided by this Court. But the reasoning in Staegemann in which the correctness of Barnett was doubted, was found attractive and quite convincing and an inclination was expressed to revisit the correctness of the decisions in Barnett; Grobler; and Leketi to the effect that such a claim is extinguished by prescription after three years.

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

[21] That distinction between real rights and personal rights has consistently been recognised in our case law and was recently explained by this Court in National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd para 31:

'The first concerns the distinction between real and personal rights. Real rights have as their object a thing (Latin: res; Afrikaans: saak). Personal rights have as their object performance by another, and the duty to perform may (for present purposes) arise from a contract. Personal rights may give rise to real rights; for instance, a personal obligation to grant someone a servitude

matures into a real right on registration. Real rights give rise to competencies: ownership of land entitles the owner to use the land or to give others rights in respect thereof. Others may say that ownership consists of a bundle of rights, including the right to use the land, but it does not really matter who is right on this point.'

[22] Wessels points out at 3-4 that:

'In a real right we have the owner in direct relation to the thing he claims, but in a personal right the claimant must claim his right to a thing or act indirectly through an intermediate person called a debtor. The person who claims from his debtor money lent has no absolute right to particular coins, but he has the right of compelling his debtor to pay him what is due to him by virtue of the loan. The debtor is under a legal obligation to pay his creditor what is due to the latter.'

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

[24] The manner in which the Prescription Act is structured, reflects this distinction - acquisitive prescription of real rights is dealt with in Chapters 1 and 2 and the extinctive prescription of obligations is dealt with in Chapter 3. The reason for arranging the Prescription Act in this manner was explained by Professor J C de Wet, the author and draftsman of the present Prescription Act, in a full memorandum he submitted to the Legislature. The memorandum was published in February 1979 in a work called Opuscula Miscellanea. Professor de Wet had this to say at p 77 para 5:

'Whether prescription is concerned with a single legal concept with two branches, viz. acquisitive and extinctive prescription, or whether there are in

fact two distinct legal concepts is an old controversy. It appears to me that one is actually concerned with two distinct legal concepts and even the expressions, "acquisitive" and "extinctive" prescription are somewhat unfortunate and misleading. It is true that the passage of time plays a role in both legal concepts and that certain circumstances, connected to the person against whom "prescription runs", apply to both legal concepts, but nonetheless the two legal concepts rest on different foundations. In the case of acquisitive prescription one is concerned with real rights, which do not concern simply the acquisition of a right by the one and the loss of a right by the other, but also outward appearances that may affect third parties in their relationships with the one or the other. The rationale for the acquisition of real rights by prescription is the perpetuation of a factual situation that has existed for a long time, and upon which third parties may rely in their relationships with the ostensible rightful owner. In the case of extinctive prescription one is more specifically concerned with the relationship between creditor and debtor and prescription serves in the first instance to protect the debtor against claims that perhaps never came into existence or had already been extinguished. The obligation is by its nature and substance a temporary relationship that is destined to terminate through performance and moreover a relationship between creditor and debtor in which third parties are only indirectly involved. A real right, by contrast, is a relationship of a durable nature, that can be maintained against anyone and everyone, and which can impede commerce if outsiders cannot with confidence rely on the appearance thereof' (My own translation)

[25] In the circumstances, the view that the vindicatory action is a 'debt' as contemplated by the Prescription Act which prescribes after three years is, in my opinion, contrary to the scheme of the Act. It would, if upheld, undermine the significance of the distinction which the Prescription Act draws between extinctive prescription, on the one hand and acquisitive prescription on the other. In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a 'debt', becomes

> *extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing. To equate the vindicatory action with a 'debt' has an unintended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor's properly after three years instead of 30 years that is provided for in s 1 of the Prescription Act. This is an absurdity and not a sensible interpretation of the Prescription Act.*
>
> *[26] I am aware that we are differing from a view that has been expressed in three judgments of this court, albeit in my view none of those decisions was dependent upon the correctness of that view for the ultimate result. However, to the extent that this view could be seen as the ratio decidendi of those decisions, I would hold that it was incorrect. I am aware of the restricted basis upon which this Court departs from its earlier decisions, but am of the view that this is one of those rare cases in which it is appropriate to do so. First, the decision (Barnett) is of reasonably recent origin so it cannot be said that people have organised their affairs on the basis that it was correct. Second, the author of the decision has indicated that it should be reviewed by this Court. Third, the perpetuation of that view gives rise to absurdity in the construction of an important statute and would cause uncertainty in a multitude of relationships.*
>
> *[27] In the circumstances, the court a quo erred in upholding the special plea on the basis of its finding that a claim for delivery of a tractor was a 'debt' that becomes prescribed after three years by virtue of the provisions of s 10 of the Prescription Act."*

[10] In the present matter, the Applicants submitted that no lawful passing of ownership of Erf 2[…] Mahwelereng A, took place from the 1st and 2nd Applicant's joint estate to the 1st Respondent on 2 August 1996 through Deed of Grant No TG823/96. It was submitted that the registration of the property in the name of the 1st Respondent was unlawful and null and void, *ab initio*, and must be cancelled.

[11] It was submitted, that it therefore follows that the transfer and registration of the property to the 2nd Respondent was also null and void as the Sheriff was acting on an unlawful Judgment and Writ of Execution.

[12] The Applicants' however lose sight of the fact that the 2nd Applicant was already appointed as Executor of the deceased estate on 28 November 2011. They only instructed their attorneys to investigate the status of the property on 10 November 2015 and only instituted proceedings on 23 July 2020. The Applicants knew as early as 23 January 2014 that the 1st Respondent owned the property.

[13] The Applicants claim is directed at setting aside the registration of the property in the name of the 1st Respondent and the 2nd Respondent and then procuring transfer of the property back in the estate of the deceased, and is therefore not a vindicatory claim.

[14] In addition, in order for the Applicants to succeed with a vindicatory claim, they had to allege and prove ownership of the property and that the Respondents were in possession of the property when they instituted action. (See **Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd [1993] 1 All SA 259 (A), 1993 (1) SA 77 (A) p82 and Concor Construction (Cape) (Pty) Ltd v Santambank Ltd [1993] 2 All SA 496 (A)**)

[15] It is common cause that the Applicants are not the owners of the property, but the 1st Respondent was, and now the 2nd Respondent. The Applicants can therefore, in my view, also on this ground, not rely on a vindicatory claim.

[16] The Applicants also lose sight of the fact that when the property was sold to the 1st Respondent by the deceased, the deceased declared in the sale agreement at clause 7.3 thereof as follows:-

> "7.3 The Seller warrants in favour of PURCHASER COMPANY in respect of the SALE PROPERTY that (save as expressly agreed to in writing by PURCHASER COMPANY):

7.3.1 the SELLER is the registered owner of the SALE PROPERTY;

7.3.2 no person has or, on REGISTRATION, will have any rights of acquisition (including options, rights of pre-emption or rights of first refusal) in respect of the SALE PROPERTY nor any right to encumber the SALE PROPERTY;"

[17] I find it highly improbable that the Applicants, and especially the 2nd Applicant in her capacity as executrix of the estate of the deceased, did not know of the fact that the deceased was not the owner of the property from at least around end of the year 2011, beginning of the year 2012.

[18] Accordingly, this court therefore makes the following order:-

1. The point *in limine* of prescription is upheld.

2. The Application is dismissed with costs.

M. NAUDÈ-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION,
POLOKWANE

APPEARANCES:

HEARD ON: 24 JULY 2024

JUDGMENT DELIVERED ON: 23 OCTOBER 2024

For the Applicants: Adv. R. Baloyi

Instructed by:	Kgariya Inc. C/O Everton Dankuru Attorneys, Polokwane admin@edalaw.co.za info@bhlattorneys.co.za
For the 1st Respondent:	Adv. Minnaar
Instructed by:	Slade Shezi Attorneys C/O Pratt Luyt & De Lange, Polokwane dolla@prattluyt.co.za
For the 2nd Respondent:	Adv. A. Basson
Instructed by:	Borman Snyman & Barnard Inc. C/O Niland Pretorius Inc. Polokwane martie@nilandpretorius.co.za