THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 076/2017

In the matter between:

DEVANAYAGY RAJAH	**FIRST APPELLANT**
STANLEY BRASG N.O	**SECOND APPELLANT**

and

ORESTE BALDUZZI	**RESPONDENT**

Neutral citation: *Rajah v Balduzzi* (076/2017) [2018] ZASCA 57 (16 May 2018)

Coram: Navsa, Leach and Wallis JJA and Mothle and Hughes AJJA

Heard: 16 March 2018

Delivered: 16 May 2018

Summary: Immovable property purchased by disqualified person in contravention of the Group Areas Act 36 of 1966 – registered owner seeking eviction of testamentary heir of purchaser – defence that registered owner holding property as nominee on behalf of purchaser – such a claim in terms of s 3 of Restitution of Land Rights Act 22 of 1994 – exclusive jurisdiction of Land Claims Court – eviction action stayed in terms of s 19*(d)* of Superior Courts Act 10 of 2013 pending action before Land Claims Court

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ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Wepener J and Matojane J, each sitting as courts of first instance):

The following order is made:

1 The application for condonation for the late filing of the application for leave to appeal against both judgments is granted and the first and second appellants are ordered to pay the costs of the application for condonation, the one paying the other to be absolved.

2 Leave to appeal against both judgments is granted.

3 The appeals are upheld with costs, including the costs of two counsel and including the costs of both applications for leave to appeal in the High Court and the application for leave to appeal in this Court.

4 The orders of Wepener J and Matojane J in the high court are set aside.

5 The following order is made:

(a) The action under case number 17136/2007 in the Gauteng Local Division is stayed pending finalization and determination of an action to be instituted in the Land Claims Court by the appellants.

(b) The first and second appellants are directed to institute that action within six months from the date of this order, failing which the second appellants' counter-claim in case number 17136/2007 will lapse and the respondent will be entitled to enrol the said action for trial.

JUDGMENT

Hughes AJA (Navsa, Leach and Wallis JJA and Mothle AJA concurring):

[1] Under the Group Areas Act 36 of 1966 (the Act) and its predecessor, the Group Areas Act 41 of 1950, black people wishing to live or trade in white group areas were compelled due to racial segregation to resort to the mechanism of a white person fronting as the registered owner or occupier of immovable property. Simply put, the white owner or occupier was a nominee for the black beneficial owner or occupier. This was done to circumvent the effects of those racially based laws that precluded black people from owning or occupying immovable property in areas designated for ownership and occupation by white people. Since 1991 remedial legislation has been passed to address these situations of nominee ownership. Whether the respondent, Mr Balduzzi, entered into such an arrangement with Mrs Rajah, the first appellant's, late husband, Mr Manogaram Rajah, and whether the second appellant, Mr Brasg, an attorney and the executor of Mr Rajah's estate (the executor), could take advantage of that remedial legislation, gives rise to the principal issues in this appeal.

[2] There was before us an application for leave to appeal, referred for oral argument in terms of section 17(2)*(f)* of the Superior Courts Act 10 of 2013. The parties were directed to be prepared, if called upon to do so, to address us on the merits. We heard argument on the application and the merits. The application concerns two orders of the Gauteng Local Division, Johannesburg, arising in eviction proceedings brought by Mr Balduzzi against Mrs Rajah, in which the executor counter-claimed for transfer of the property in question to the estate. The first order (Wepener J), issued on 4 April 2014, upheld a special plea of prescription to the executor's counter-claim. The second (Matojane J), issued on 10 July 2015, and varied on 7 December 2015, 'confirmed' that the special plea of prescription had been upheld and that the issue of prescription was *res judicata*. The background, as it emerges from an affidavit deposed to by Mrs Rajah in opposition to an application for summary judgment and the executor's affidavit in support of the application for leave to appeal, is reflected in the pleadings and is set out hereafter. For the purposes of adjudicating the issues in the high court and this court these facts are to be treated as correct without reaching any conclusion on their correctness.

[3] Mr Oreste Balduzzi and Mr Manogaram Rajah were members of Ital Machinery CC, a close corporation. During the course of 1986, and by way of a loan advanced by

the close corporation, the respondent purchased residential property described as Portion 1 of Erf 1979 Orange Grove Township, also known as 127 17th Street, Orange Grove, Johannesburg (the property). In 1990 he purchased another property in Houghton. At the same time, according to Mr Balduzzi, Mr Rajah and his family moved to Johannesburg for the purposes of the business.

[4] According to Mrs Rajah, in 1990 Mr Balduzzi offered to sell the property to her husband, who accepted and took occupation of the property. Mrs Rajah said that the deceased and Mr Balduzzi reached an agreement facilitating the adjustment of their respective loan accounts with the close corporation, thereby enabling Mr Rajah to pay for the property. In 1999, the close corporation, made a substantial profit in a business transaction, and the deceased paid the outstanding balance on the mortgage bond registered over the property. As a result, the bond was cancelled on 4 October 1999.

[5] Thereafter Mr Balduzzi provided Mr Rajah with the original title deed which is currently in the possession of the executor. The property was in a white residential area and Mrs Rajah said that '[o]wing to the existence at that time of relevant apartheid legislation which prevented my husband from taking transfer of the property into his own name, Mr Balduzzi agreed to keep the property registered in his name, as my husband's nominee. He was the 'white front' for my husband.' On 22 October 1990 Mr Rajah obtained a permit in terms of section 21 of the Act, allowing him to occupy the property.

[6] Mrs Rajah stated that from the time she and her husband took occupation of the property they never paid any rental to the respondent nor were they ever called upon to do so. She said that they paid all the expenses in respect of the property i.e. municipal charges, rates and taxes, water and electricity and maintenance costs. She insisted that he had been the beneficial owner of the property, whilst the respondent stood in as the 'white front', enabling them to secure the property as their own in the white residential area.

[7] Mr Rajah died testate in November 2000 leaving the property and its entire contents to Mrs Rajah. Thereafter, court proceedings were instituted, to validate the will, which was being disputed by Mr Rajah's sister. The first appellant stated that she

had sought the assistance of the respondent who was subpoenaed to give evidence. In September 2005 she succeeded in having the will declared valid. According to Mr Brasg during those proceedings the respondent gave him an undertaking that he would sign the necessary documents for the property to be transferred to the estate of the deceased. This is disputed by Mr Balduzzi.

[8] Mr Balduzzi issued summons on 31 July 2007, seeking Mrs Rajah's eviction from the property. Mr Balduzzi pleaded that he was the owner of the property and that Mrs Rajah 'is in occupation of the property and, despite demand, has failed and/or refused to vacate same'. He sought summary judgment, which was resisted on the basis set out above. The claim that Mr Balduzzi was only a nominee for Mr Rajah was advanced at that stage as it has been at all times during the litigation.

[9] Mrs Rajah also raised the non-joinder of Mr Brasg the executor of the deceased's estate, he was subsequently joined as a party on 11 June 2013. Mr Brasg pleaded that the deceased estate was the beneficial owner of the property and that Mr Balduzzi was a nominee. In a counter-claim he sought transfer of the property into the name of the deceased estate. This brought about the special plea of prescription raised by Mr Balduzzi, which was decided in his favour by Wepener J.

[10] Mr Brasg, in his counter-claim, pleaded that Mr Balduzzi was 'a nominee or "front" for' Mr Rajah. He alleged that Mr Rajah had paid off the purchase price in 1999; that the mortgage bond over the property was paid off; and that Mr Balduzzi handed the title deed to Mr Rajah. He also pleaded – and this was the source of much of the confusion in this case – that Mr Rajah became entitled to transfer of the property into his name in terms of section 48(3) of the Abolition of Racially Based Land Measures Act 108 of 1991(the Abolition Act). Section 48(3) of the Abolition Act required the principal seeking to have property registered in their own name to seek such registration within thirty months from its commencement, which was 30 June 1991. The special plea raised by Mr Balduzzi contended that Mr Brasg's claim was subject to a prescriptive period, and because a period of twenty-two years had elapsed since the promulgation of the Abolition Act, the claim had prescribed, in terms of both that Act and the Prescription Act 68 of 1969 (the Prescription Act).

[11] It is necessary, to have regard to the provisions of section 48(2) of the Abolition Act which reads:

'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.'

It will be recalled that Mr Balduzzi had initially acquired the property for himself and according to Mrs Rajah later agreed to sell it to her late husband. The property continued to be registered in Mr Balduzzi's name. Whether that fell within the terms of this section is doubtful because Mr Balduzzi had sold his own property to Mr Rajah, not bought it on behalf of Mr Rajah, but what is relevant is that Mr Brasg relied on this section in raising the defence set out above.'

[12] In determining the special plea and distracted by the approach adopted by the parties in dealing with Mr Brasg's claim, namely, that the claim was one that properly resorted under section 48(2) of the Abolition Act, Wepener J reasoned that the failure to follow the procedural steps prescribed by section 48(3) did not preclude a claim for registration of the property into the name of the principal. He went on to consider whether the Prescription Act applied. In his view, section 11(3) of that Act applied and the claim would have prescribed after a period of three years. He reasoned that a claim for the enforcement of the right of ownership to the property was purely a personal right. In this regard, he relied on the dicta of Brand JA in *Barnett v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) *(Barnett)* at para 19. In *Barnett* the vindicatory relief sought was considered to be a debt as contemplated by the Prescription Act. Brand JA gave a wide and general meaning to the word debt to include 'an obligation to do something or refrain from doing something'. He further concluded that this would include 'a claim for the enforcement of an owner's rights to property'.

[13] Wepener J accordingly upheld the plea of prescription and refused leave to appeal against that order. Undeterred by this Mr Brasg amended his claim in reconvention by altering the reference to section 48(2) of the Abolition Act to a reference to section 48(3) of the Abolition Act. This brought forth two further special pleas, the one of *res judicata* and the other a repeated plea of prescription. The matter

then came before Matojane J for the adjudication of these special pleas and two others raised separately by Mrs Rajah, which are not relevant at this stage. Matojane J upheld the special plea that the issue of prescription was *res judicata* as a result of the order of Wepener J and ruled that the claim had prescribed. He dismissed an application for leave to appeal.

[14] According to Mr Brasg, he thought that the judgments on prescription did not preclude him from continuing to defend the eviction claim on the basis that Mr Balduzzi was not the owner of the property, but a nominee for Mr Rajah. He continued on his own and Mrs Rajah's behalf to defend the action on that basis. In preparing to defend the action two relevant judgments on prescription, *ABSA Bank Ltd v Keet* 2015 (4) SA 475 (SCA) *(Keet)* and *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) *(Makate),* were reported and it was thought that these could be invoked in favour of the defence. In *Keet*, at para 16, this court pointed out that although Brand JA was prepared to accept in *Barnett* that the vindicatory relief the government had sought to enforce was a 'debt' as contemplated by the Prescription Act, the prescription point was dismissed on the basis of a continuing wrong. In *Keet* this court went on, at para 25, to hold that the view that a vindicatory action is a 'debt' as contemplated by the Prescription Act which prescribes after three years is 'contrary to the scheme of the Act'. It said the following:

'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 property 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.'

In *Makate* the Constitutional Court in paras 85 and 86 warned against too broad an interpretation of the word 'debt' in the Prescription Act.

[15] At the pre-trial conference, Mr Brasg received a rude awakening when Mr Balduzzi's lawyers indicated that in light of the two judgments ownership of the property was no longer in issue and that it would be for Mrs Rajah to commence giving evidence in support of her claim to remain in occupation of the property. Hence, the present application for leave to appeal to this Court against the two orders referred to above. Mrs Rajah and Mr Brasg seeks condonation for the late filing of the application for leave to appeal. The application was filed on 6 February 2017, some twenty-three

months after Wepener J refused leave to appeal and one year and a month after Matojane J refused leave to appeal.

[16] When the special plea was adjudicated by Wepener J, the Restitution of Land Rights Act 22 of 1994 (the Restitution Act) was in place. Section 3 of the Restitution Act provides as follows:

'**Claims against nominees**:

'Subject to the provisions of this Act a person shall be entitled to claim title in land if such claimant or his, her or its antecedent –

(a) was prevented from obtaining or retaining title to the claimed land because of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 9(3) of the Constitution had that subsection been in operation at the relevant time; and

(b) proves that the registered owner of the land holds title as a result of a transaction between such registered owner or his, her or its antecedents and the claimant or his, her or its antecedents, in terms of which such registered owner or his, her or its antecedents held the land on behalf of the claimant or his, her or its antecedents.'

In ordering that the application for leave to appeal be set down for hearing before this Court the attention of the parties was drawn to this provision and submissions were invited and received on its relevance to the litigation. That emerges from what follows.

[17] The claim for registration of the property into the name of the estate was a claim to title of property that, as a result of the alleged arrangement between Mr Rajah and Mr Balduzzi, was held by Mr Balduzzi as nominee on behalf of Mr Rajah. It was accordingly one that ought to have been brought under section 3 of the Restitution Act rather than under the Abolition Act. Mr Brasg gave no consideration thereto and understandably Wepener J and Matojane J both overlooked the provisions of the Restitution Act, to which they were not referred. The result was that the prescription issue was considered in relation to the incorrect legislative provision, instead of on the basis of a claim under the Restitution Act. It is therefore apparent that the order by Wepener J was granted on an incorrect basis and cannot stand. It stands to reason that Matojane J's conclusions likewise cannot stand.

[18] There was a further material problem which was not addressed. Section 22(1)*(c)* of the Restitution Act gives the Land Claims Court jurisdiction to

adjudicate a claim under section 3 of the Restitution Act and section 22(1) provides that its jurisdiction is exclusive of that of any other court. Therefore neither Wepener J nor Matojane J had jurisdiction to hear the claim by Mr Brasg or to adjudicate any defence to that claim. Counsel for the parties were constrained to concede that the conclusions referred to above meant that the dispute had to be adjudicated in the Land Claims Court.

[19] Mr Brasg was required to demonstrate on all possible readings of his the counter-claim that he had a claim sustainable in law against Mr Balduzzi. I am persuaded from the facts set out above and the pleadings before us that this has been demonstrated. That leaves the issue of condonation.

[20] In addressing the issue of condonation I have already alluded to the lengthy delay in seeking leave to appeal from this court, but that is but one of the factors to be taken into account in exercising a discretion whether to grant or refuse condonation. As the main action is premised on an eviction it would be remiss of me not to take into account section 26(3) of the Constitution in the exercise this discretion. Section 26(3) states: '*No one may be evicted from their home,* or have their home demolished*, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions*.' (Emphasis added).

[21] It is therefore pertinent in terms of section 26(3) to consider all the relevant circumstances in the face of any applicable legislation. In this instance the legislation concerned is section 22 of the Restitution Act. It needed to be considered before Mrs Rajah's fundamental human right to housing was removed. As the estate is claiming title to the property, section 25 of the Constitution may also be implicated. Mrs Rajah and Mr Brasg, have at all times, advanced the same case and there is nothing in the affidavit delivered on behalf of Mr Balduzzi by his attorney, or in his pleadings, to contradict her case or to provide some other plausible explanation for her and her late husband taking occupation of the property in 1990; being put in possession of the title deed in 1999 and remaining there undisturbed at least until 2006 after Mr Rajah's death. In my view the interests of justice dictate that condonation be granted

[22] The issue of peremption was raised by Mr Balduzzi. The law on peremption is trite and restated in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* 2017 (1) SA 549 (CC) at para 26:

'Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self resignation to the unfavourable order that could otherwise be appealed against. *Dabner* articulates principles that govern peremption very well in these terms:

"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it."

The onus to establish peremption would be discharged only when the conduct or communication relied on does "point indubitably and necessarily to the conclusion" that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order.' (Footnotes omitted).

[23] Mrs Rajah and Mr Brasg in their endeavours to sustain the counter-claim were consistent in seeking the transfer and registration of ownership of the property to the deceased estate on the premise of Mr Balduzzi being the nominee. In light of the history of the matter set out above there can be no doubt that there was no acquiescence by Mrs Rajah and Mr Brasg in the orders of Wepener J and Matojane J. Indeed the matter reached trial stage on the basis that they were persisting with the claim that Mr Balduzzi was a mere nominee.

[24] However, in light of the inordinately long delays that have occurred, in order to bring this case to finality, it is necessary to place a time limit on when an action may be brought to vindicate that claim. In my view, it will be reasonable to direct in terms of this Court's powers under section 19*(d)* of the Superior Courts Act 10 of 2013 that the claim in the Land Claims Court be filed within six months of this order, failing which Mr Brasg's claim against the Mr Balduzzi will lapse.

[25] Finally, It is necessary to deal with the issue of Mr Brasg being a witness, a litigant and at the same time representing Mrs Rajah. This in my view may have contributed to the vacillating advice provided to Mrs Rajah. Our courts have repeatedly said that it is undesirable for an attorney, who is also an important witness in the case, to continue to act as attorney of record. (*Hendricks v Davidoff* 1955 (2) SA 369 (C); *Elgin Engineering Co (Pty) Ltd v Hillview Motor Transport* 1961 (4) SA 450 (D) at 454E-I; *Wronsky en ń Ander v Prokureur-Generaal* 1971 (3) SA 292 (SWA) at 293G-294B.) By doing so they imperil their independence and where, as here, the attorney is also a litigant, albeit in the capacity of an executor, the undesirability is compounded.

[24] The following order is made:

1 The application for condonation for the late filing of the application for leave to appeal against both judgments is granted and the first and second appellants are ordered to pay the costs of the application for condonation, the one paying the other to be absolved.
2 Leave to appeal against both judgments is granted.
3 The appeals are upheld with costs, including the costs of two counsel and including the costs of both applications for leave to appeal in the High Court and the application for leave to appeal in this Court.
4 The orders of Wepener J and Matojane J in the high court are set aside.
5 The following order is made:

   (a) The action under case number 17136/2007 in the Gauteng Local Division is stayed pending finalization and determination of an action by to be instituted in the Land Claims Court by the appellants.

   (b) The first and second appellants are directed to institute that action within six months from the date of this order, failing which the second appellants' counter-claim in case number 17136/2007 will lapse and the respondent will be entitled to enrol the said action for trial.

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W Hughes

Acting Judge of Appeal

APPEARANCE

For the Appellants:	S M Katzew with him H R Liphosa
Instructed by:	Stanley Brasg & Associates. Johannesburg
	Lovius Block, Bloemfontein
For the Respondent:	Estelle Kilian SC, with her C McKelvey
Instructed by:	Ellis Coll Attorneys, Johannesburg
	Azar & Havenga Attorneys, Bloemfontein