



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 05/18

In the matter between:

eTHEKWINI MUNICIPALITY

Applicant

and

MOUNTHAVEN (PTY) LIMITED

Respondent

Neutral citation: *eThekwini Municipality v Mounthaven (Pty) Limited* [2018] ZACC 43

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgments: Froneman J (unanimous)

Heard on: 28 August 2018

Decided on: 31 October 2018

Summary: Meaning of debt — Prescription Act 68 of 1969 — Real rights — Limited Real Rights — Personal rights — reversionary clauses

Deeds Registries Act 47 of 1937 — Registration of Personal Rights

ORDER

On appeal from the Supreme Court of Appeal:

1. Leave to appeal is refused with costs.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Basson AJ Cameron J, Dlodlo AJ, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J):

Introduction

[1] The applicant (the Municipality) seeks leave to appeal against a decision of the Supreme Court of Appeal. That Court confirmed the dismissal in the High Court¹ of the Municipality's application to compel the respondent (Mounthaven) to re-transfer a property that it had earlier sold to Mounthaven. The Municipality's case rests on the proper interpretation and effect of a reversionary clause in the original deed of sale and subsequent deed of transfer. The Supreme Court of Appeal upheld the decision of the High Court that the registered right contained in the clause constituted a "debt" that had prescribed under the Prescription Act² and that the application for a re-transfer thus had to be dismissed.

[2] Relying on this Court's decision in *Makate*,³ the Municipality contends that a constitutional issue arises, in that prescription presents a possible bar to access to the courts under section 34 of the Constitution. In addition, it says that the

¹ High Court of South Africa, KwaZulu-Natal Local Division, Durban.

² 68 of 1969.

³ *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 90.

Supreme Court of Appeal judgment has created uncertainty about standard reversionary clauses that advance developmental purposes for many local authorities and that this has serious and potentially unknown ramifications for these organs of state. The legal issue is thus said to be also an arguable one of general public importance.⁴

[3] The Municipality's argument before this Court is that: (1) its claim is not a "debt" under the Prescription Act; (2) the reversionary right under the deed of transfer is a limited real right in the property, not subject to prescription; and, alternatively; (3) it is a claim secured by a mortgage bond that only prescribes after 30 years under the Prescription Act.⁵ Mounthaven supports the decision of the High Court and the Supreme Court of Appeal that the Municipality's claim is a "debt" that has become prescribed under the Prescription Act.

[4] The sale was concluded on 24 May 1985. In August 1986 the property was transferred to Mounthaven by the Municipality, subject to the following special conditions recorded under clause C in the deed of transfer:

"(1) The purchaser shall erect, or cause to be erected on the property, buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100 000.00) and failing the erection of buildings to that value within two (2) years from date of sale, then, for the purpose of levying the general rate and sewer rate payable to the Verulam Town Council by the Purchaser or his successors in title, there shall be deemed to be buildings to such required value on the property and all valuation and rating provisions of section 157 of Ordinance 25 of 1974 or any amendment thereof shall apply to the property and be binding upon the Purchaser or his successors in title.

⁴ Section 167(3) of the Constitution and *Mokone v Tassos Properties CC* [2017] ZACC 25; 2017 (5) SA 456 (CC); 2017 (1) BCLR 1261 (CC) at para 17.

⁵ Section 11(a)(i) provides that—

"[t]he periods of prescription of debts shall be the following:

- (a) thirty years in respect of—
 - (i) any debt secured by mortgage bond."

- (2) If at the expiry of a period of three (3) years from the date of sale the Purchaser has failed to complete buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100 000.00) on the property, ownership of the property shall revert to the Seller which shall be entitled to demand re-transfer thereof to it from the Purchaser who shall be obliged to effect transfer thereof to the Seller against payment by the Seller to the Purchaser of all payments made on account of the purchase price less any costs incurred by the Seller in obtaining re-transfer of the property into its name, including costs as between attorney and client, all costs of transfer, transfer duty, stamp duty and the like.
- (3) The Seller shall have a pre-emptive right to re-purchase the property at the price paid by the Purchaser, if the Purchaser desires to sell the property within five (5) years from the date of sale, provided that this condition shall not apply where buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100 000.00) shall have been erected on the Lot within three (3) years from the date of sale.”

[5] Mounthaven failed to erect and complete the buildings within three years of the date of sale. The Municipality brought the application to compel re-transfer in the High Court only in 2014. If the claim for re-transfer is a “debt”, it would have prescribed three years after the period within which the buildings had to be completed – that is, by May 1991. If it is a real right, then the submission is that prescription does not apply. If it is a right secured by mortgage bond, the submission is that the prescription period of 30 years has not yet elapsed.⁶ All thus turns on whether it is a “debt”, to the exclusion of the latter two possibilities.

Jurisdiction

[6] I accept that in appropriate cases, where the interpretation of the Prescription Act may have impact on the fundamental right of access to justice, that will raise a constitutional issue that clothes this Court with jurisdiction.⁷ I will further accept that

⁶ Section 11(a)(i) of the Prescription Act.

⁷ *Makate* above n 3 at para 29.

this is the case here. I am doubtful that, in addition, a separate arguable point of law of general public importance is at issue, but there is no need to pronounce on this further alleged jurisdictional ground.

Leave to appeal

[7] In order to grant leave to appeal it must be in the interests of justice to do so.⁸ Although not conclusive, it is generally not in the interests of justice to grant leave where there are no reasonable prospects of success on the merits.⁹ Here it is difficult to discern any compelling factor that would justify granting leave if there are no reasonable prospects of success. So the prospects of success are crucial for the Municipality and they are not good, not on any of the legal issues the Municipality relies upon.

Is the claim a “debt”?

[8] In terms of the dictionary meaning of “debt” accepted in *Makate*, an obligation to pay money, deliver goods, or render services is included under the definition and would prescribe within three years under the Prescription Act.¹⁰ Material or corporeal

⁸ *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 29-30. See also section 167(6) of the Constitution.

⁹ See for example, *Marshall v Commissioner, South African Revenue Service* [2018] ZACC 11; 2018 (7) BCLR 830 (CC) at para 14; *Snyders N.O. v Louistef (Pty) Ltd* [2017] ZACC 28; 2017 (6) SA 646 (CC); 2018 (1) BCLR 19 (CC) at para 14; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 3; *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25; *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) at para 18; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12; *Brummer v Gorfil Brothers Investments (Pty) Ltd* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *Fraser v Naude* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7.

¹⁰ *Makate* above n 3 at paras 83 and 85. Paragraph 85 states:

“In *Escom* the Appellate Division said that the word ‘debt’ in the Prescription Act should be the meaning given the meaning ascribed to it in the Shorter Oxford Dictionary, namely:

‘1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated.’”

See also *Food and Allied Workers’ Union obo Gaoshubelwe v Pieman’s Pantry (Pty) Ltd* [2018] ZACC 7; 2018 (5) BCLR 527 (CC) at paras 155-6.

goods consist of property, movable or immovable. Ownership of movable corporeal property is transferred to another by delivery, actual or deemed, of the goods.¹¹ That is practically impossible in the case of immovable property like land. Hence it is an accepted principle of venerable ancestry in our law that the equivalent of delivery of movables is, in the case of immovable property, registration of transfer in the deeds office.¹² A claim to transfer immovable property in the name of another is thus a claim to perform an obligation to deliver goods in the form of immovable property. It is a “debt” in the dictionary sense accepted in *Makate*. It really is as simple and straightforward as that.

A real right?

[9] But, says the Municipality, this “obligation” to deliver the immovable property (even if in the form of registration of transfer) flows from a real, not personal, right. Real rights are concerned with the relationship between a person and a thing, not with the relationship between persons as in the case of personal rights. Real rights give rise to competencies, not correlative personal obligations that translate into a “debt” for the purposes of prescription.¹³ Because of that real rights cannot prescribe, the argument goes.

[10] This argument, however, fails at both a factual and legal level.

¹¹ *Info Plus v Scheelke* [1998] ZASCA 21; 1998 (3) SA 184 (SCA) at 189D-9E:

“It is, of course, trite law that transfer of ownership of corporeal movable property requires delivery, ie transfer of possession, of the property by the owner to the transferee coupled with a real agreement between them.”

¹² *Harris v Trustee of Buissine* (1840) 2 Menz 105 at 107-8 quoted in *Jordaan v Tshwane Metropolitan Municipality* [2017] ZACC 31; 2017 (6) SA 287 (CC); 2017 (11) BCLR 1370 (CC) at para 34:

“[T]he *dominium* [title] or *jus in re* [real right] of immovable property can only be conveyed by transfer made *coram legi loci* [formally according to the law of the place concerned], and this species of transfer is an essential to divest the seller of, and invest the buyer with, the *dominium* or *jus in re* of immovable property as actual *traditio* [handing over or conveyance] is to convey the *dominium* of movables.”

See further *Jordaan* at paras 31-8 for a crisp discussion on the history of registration of immovable property in South Africa.

¹³ *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd* [2011] ZASCA 164; 2011 (2) SA 157 (SCA) at para 31 which was cited with approval in *Absa Bank Ltd v Keet* [2015] ZASCA 81; 2015 (4) SA 474 (SCA) at para 21.

[11] The Supreme Court of Appeal has endorsed a test to determine whether a right is real, as opposed to being personal. Two requirements must be met: (1) the person who created the right must have intended the present owner as well as successors in title to be bound; and (2) the right must result in a subtraction from the *dominium* of the land against which it is registered.¹⁴ The Municipality stumbles on the facts at the first hurdle. Clause C(2) contains no provision that it is binding on successors-in-title, unlike the express provision to that effect in clause C(1).

[12] Does the registration of clause C(2) under the Deeds Registries Act¹⁵ make any difference?

[13] Section 63 of the Deeds Registries Act provides that no condition in a deed of transfer “purporting to create or embodying any personal right”, nor one which “does not restrict the exercise of any right of ownership in respect of immovable property”, is capable of registration. But the section comes with a proviso: “[A] deed containing such a condition . . . may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed”.

[14] It may be accepted that registration of the reversionary clause was proper in terms of the section, as being complementary or ancillary to transfer of ownership of the property to Mounthaven. But registration of this kind, in conjunction with a real right, or by mistake, does not convert an ordinary personal right into a real right.¹⁶

¹⁴ *Willow Waters Homeowners Association (Pty) Ltd v Koka N.O.* [2014] ZASCA 220; 2015 (5) SA 304 (SCA) at para 16; and *Cape Explosive Works Ltd v Denel (Pty) Ltd* [2001] ZASCA 28; 2001 (3) SA 569 (SCA) at para 12. See also Van der Merwe “Things” in *LAWSA* 2 ed (2014) vol 27 at paras 63-8.

¹⁵ 47 of 1937.

¹⁶ *Nel N.O. v Commissioner for Inland Revenue* 1960 (1) SA 227 (A) at 235A; *Low Water Properties (Pty) Ltd v Wahloo Sand CC* 1999 (1) SA 655 (SE) at 662A-H; *Ex parte Menzies et Uxor (Ex parte Menzies)* 1993 (3) SA 799 (C) at 806F; *Lorentz v Melle* 1978 (3) SA 1044 (T) at 1055E; *Fine Wool Products of SA Ltd v Director of Valuations* 1950 (4) SA 490 (E) at 499A-C.

[15] Against that is a remark made by Lord De Villiers CJ, in *Ferreira Deep Ltd*,¹⁷ to the effect that a certain class of rights – the so-called *jura in personam ad rem acquirendam* (loosely translated, personal rights to delivery of things) – is personal until registration, when the rights are converted into real rights by registration:

“That personal rights, *jura in personam*, are not capable of registration is a truism. The definition of such rights excludes their registration. But that does not apply to the class of personal rights which are known as *jura in personam ad rem acquirendam*. As contracts, with few exceptions, give rise only to personal rights, this 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.”¹⁸

[16] The reversionary clause creates a reversionary right for the Municipality. That a reversionary right has the effect of restricting the landowner’s exercise or full enjoyment of her right of ownership, like keeping it undeveloped as long as it so wishes or building a structure worth R100 000.00, does not in any way detract from its true character as a personal but not a real right:

“Not only recognised real rights but also personal rights can impose an obligation on a landowner, which restricts the free exercise of his or her right of ownership. An owner’s right of disposal of his or her property is for instance restricted by a prohibition on alienation, a right of pre-emption, *a reversionary right*, an option and a fideicommissary right. Ostensibly such rights are only binding on a landowner in his or her personal capacity since his or her successors in title are by no means involved if the landowner fulfils his or her obligations. Historical practices and policy considerations have however resulted in some of these rights, such as an option, being placed in the category of personal rights whereas others, such as a prohibition on the alienation of land, are recognised as registrable real rights. Moreover, rights of pre-

¹⁷ *Registrar of Deeds (Transvaal) v Ferreira Deep Ltd* 1930 AD 169 (*Ferreira Deep Ltd*).

¹⁸ *Ferreira Deep Ltd* id at 180. Professor Van der Merwe comments that “[t]his remark probably accounts for the peculiar definition of a real right in [section 102 of] the Deeds Registries Act as comprising any right which becomes real on registration”, Van der Merwe above n 14 at para 69. See also *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 (1) SA 600 (O) at 607-8; and *Ex parte Menzies* above n 16 at 806F.

emption, reversionary rights and fideicommissary rights are registered on account of established practices or usage in spite of the prohibition on the registration of personal rights in the Deed Registries Act”.¹⁹ (Footnotes omitted.)

It follows that though registrable, a reversionary right is not by mere reason of registration in any way elevated from a personal right to a real right. Because this matter involves a reversionary right, the decision in *Ferreira Deep Ltd* does not find direct application here.

[17] One should in any event be careful not to elevate the practical judicial sanction of the then usage and practice in the then Transvaal in relation to claim and stand licences²⁰ as fundamentally impacting on the legal conceptualisation of the difference between real and personal rights. A more acceptable and logical explanation is “that although these rights are not converted into real rights and although they do not constitute real burdens on land their registration nevertheless has certain practical consequences”.²¹ One of these may be that, because of registration, the doctrine of notice may operate in appropriate circumstances to prevent a third party from establishing a real right in respect of the land in question.²²

[18] The “right to delivery of a thing” remains a personal obligation between persons – the one who owes the obligation to deliver the thing to another – until actual delivery (in the form of registration of transfer) of the “thing”, in this case the immovable property itself:

¹⁹ Van der Merwe above n 14 at para 68.

²⁰ *Ferreira Deep Ltd* above n 17 at 180-1.

²¹ Van der Merwe above n 14 at para 69.

²² Id. In *Meridian Bay Restaurant (Pty) Ltd v Mitchell SC N.O.* [2011] ZASCA 30; 2011 (4) SA 1 (SCA) at para 14, Ponnann JA explains:

“Under the doctrine of notice, someone who acquires an asset with notice of a personal right to it which his predecessor in title has granted to another, may be held bound to give effect thereto. Thus a purchaser who knows that the merx has been sold to another, may, in spite of having obtained transfer or delivery, be forced to hand it over to the prior purchaser. Reverting to my earlier example: if C had purchased with knowledge of the prior sale to B, B would be entitled to claim that the transfer to C be set aside and that transfer be effected from A to B, or B may perhaps even claim transfer directly from C.”

“The moment registration takes place, A’s personal right, in terms whereof he may claim transfer, is terminated and he becomes owner of the land because B’s right of ownership has been *transferred* to him, and not because of the registration of any *ius in personam ad rem acquirendam*.”²³

This is the change from personal to real rights upon registration that *Ferreira Deep Ltd*, properly construed, speaks to. Before that happens the doctrine of knowledge may operate against new purchasers, nothing more.

[19] Put differently, before registration there is as yet no relationship between the person who holds the right to delivery and the object of the right, the thing or property. There is no real right, in the sense of a relationship between the person who holds the right to delivery and the object of the right, the property.²⁴ Upon registration the real right becomes that of ownership, a relationship between the owner and the property. The initial personal right to acquire the property from another person has then served its purpose and comes to an end.²⁵

[20] This is of little assistance to the Municipality. The reversionary clause in C(2) creates a personal obligation on Mounthaven to complete buildings to a certain value within a limited time. The clause is not of a kind that creates a real burden (*modus*) on the property itself, in which case the real right might exist in the relationship between the holder and the burdened object of the right.²⁶ There is no third party involved

²³ Badenhorst et al *Silberberg and Schoeman’s The Law of Property* 5 ed (LexisNexis Butterworths, Durban 2006) at 67.

²⁴ See *National Stadium South Africa (Pty) Ltd* above n 13 at para 31.

²⁵ A sale agreement to sell immovable property to another is also a “personal right to delivery of a thing”, but is not registrable for that reason. The intermediate class of rights known as *iura in personam ad rem acquirendam* has its origin in feudal law and its only analogy in South African law may be the right created by virtue of section 20 of the Alienation of Land Act 68 of 1981, where the seller of land is compelled to have the contract of sale recorded in the Deeds Office. The effect is that the purchaser will upon execution or insolvency of the seller have a preferent claim in respect of the proceeds of the sale. See Van der Merwe above n 14 at para 69.

²⁶ Compare *Benoni Town Council Minister of Agricultural Credit and Land Tenure* 1978 (1) SA 978 (T) and the discussion of real security in *Jordaan* above n 12 at para 38:

“Real security in property is a limited real right with the purpose of ensuring satisfaction of a debt or obligation to another, usually ahead of other, unsecured creditors. This is important

here. Had there been, an argument could perhaps have been made that the third party should be held to the condition if the property was acquired before 1991, when the debt created by the reversionary clause prescribed, but for nothing more. It is not, however, an issue that arises for decision here.

[21] This also effectively disposes of the alternative argument that the registration of the reversionary right created a mortgage bond to secure compliance with its provisions, which only prescribed after thirty years. A mortgage bond creates accessory liability as security for compliance with the principal debt. It does not extend the accessory liability beyond that of the principal liability.²⁷ For as long as the obligation to comply with clause C(2) existed – until 1991 – Mounthaven was liable to re-transfer in the event of non-compliance. But once the period for compliance with the principal debt or obligation to complete the buildings lapsed because of prescription, so did the accessory obligation.²⁸

[22] There are thus no reasonable prospects on appeal. It is not in the interests of justice to grant leave under these circumstances.

for it illustrates the difference between real security rights specifically of security (which are designed to shore up debt, and are a sub-category of limited real rights) and limited real rights in the broader sense. It moves us away from asking whether a real security right is in principle enforceable against a third party – which, as a sub-species of limited real rights, it must in principle be – and towards focusing on the purpose for which the limited right was created. The point of the right of security in property is to ensure payment of a debt. Then the question becomes the one at issue here: if that debt could be satisfied by execution upon the property before the debtor disposes of the property – or even later – why should it be enforceable against innocent third parties who are unconnected with the debt and may not even know of its existence?”

²⁷ See *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa* [2015] ZASCA 70; 2016 (1) SA 202 (SCA) at para 24 (and the further authorities cited there):

“A mortgage bond is of course always accessory to an obligation, no matter its origin. If the obligation is unenforceable the security in respect of it is unenforceable too.”

²⁸ *Id* at para 25:

“[W]hen enforcement of the bond is sought it must be in respect of a valid obligation. And when determining whether an obligation is secured by a bond, one must have regard to its particular terms.”

Order

[23] Leave to appeal is refused with costs.

For the Applicant:

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For the Respondent:

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