THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 802/2016

In the matter between:

BONDEV MIDRAND (PTY) LIMITED **APPELLANT**

and

PULING PULING **FIRST RESPONDENT**

TAPIWANASHE PULING **SECOND RESPONDENT**

And in the matter between:

Case No: 803/2016

BONDEV MIDRAND (PTY) LIMITED **APPELLANT**

and

PETRUS KGOSI RAMOKGOPA **RESPONDENT**

Neutral citation: *Bondev Midrand (Pty) Ltd v Puling* (802/2016); *Bondev Midrand (Pty) Ltd v Ramokgopa* (803/2016) [2017] ZASCA 141 (2 October 2017)

Coram: Leach, Tshiqi and Seriti JJA and Tsoka and Ploos van Amstel AJJA
Heard: 6 September 2017
Delivered: 2 October 2017

Summary: Immovable property : title deed : registered condition entitling developer to have property re-transferred to it in certain circumstances : this a personal not real right, capable of prescribing.

ORDER

On appeal from: Gauteng Division, Pretoria (Makhubele AJ sitting as court of first instance):

In each case, the following order will issue:
The appeal is dismissed with costs.

JUDGMENT

Leach JA (Tshiqi and Seriti JJA, Tsoka and Ploos van Amstel AJJA concurring)

[1] In both these appeals, the appellant is Bondev Midrand (Pty) Ltd, a property developer. In both cases the appellant unsuccessfully sought an order obliging the respondent to re-transfer to it a piece of immovable property it had earlier purchased from the appellant as it had failed to comply with a condition registered against the title deed obliging the respondent to erect a building on the property within a prescribed period. And in both cases its claim was dismissed by the Gauteng Division, Pretoria on the basis that the appellant was seeking to enforce a debt as envisaged in s 11*(d)* of the Prescription Act 68 of 1969 which had prescribed and become unenforceable as more than three years had elapsed after it had become due. Leave to appeal was granted by this Court in both instances and, as the issue of prescription is common to each, the appeals were argued together. Consequently for convenience, and although the appeal involving the respondent Puling (SCA case number 802/2016) involves

additional issues, I intend to give a single judgment dealing with both matters. For convenience I intend to use the respondents' surnames when referring to them.

[2] The appellant has developed more than 4000 residential dwellings in what is known as the Midstream Estate. Both appeals relate to pieces of immovable property in this estate sold by the appellant. Transfer in case nr. 803/2016 was effected to the respondent in that case, Mr Ramokgopa, in November 2006 and to the respondents in case nr. 802/2016, Mr and Mrs Puling, in March 2000. The Deed of Transfer in Mr Ramokgopa's case records the following condition imposed and enforceable by the appellant as developer:

'The Transferee or his Successors in Title will be liable to erect a dwelling on the property within 18 (eighteen) months from 16 November 2006, failing which the (appellant) will be entitled, but not obliged to claim that the property is transferred to the (appellant) at the cost of the Transferee against payment by the Transferee of the original purchase price, interest free. The Transferee shall not within the said period so transfer the property without the (appellant's) written consent. This period can be extended at the discretion of the (appellant).'

The title deed in the case of Mr and Mrs Puling is in identical terms save that the date by when the dwelling was to be erected, in their instance, was given as 7 March 2007.

[3] It is accepted that Mr Ramokgopa failed to comply with this condition. As a result, in January 2014 the appellant instituted action against him seeking an order that he transfer the property he had bought back to it and tendering payment of the original purchase price. In opposing this relief, Mr Ramokgopa relied solely upon a point in limine that the claim against him had arisen 18 months after 18 November 2006 (ie on 15 May 2008) and had therefore prescribed three years later on 16 May 2011, well before the appellant had instituted proceedings against him.

[4] In the case of Mr and Mrs Puling, they had bought the immovable property known as Erf 2268, Midstream Estate Extension 26 Township. The 18 month period ending 6 September 2008 by when they ought to have built a dwelling on that property in terms of the condition registered on the title deed elapsed without them doing so. This condition remains unfulfilled to this day. Consequently, when the period elapsed, the appellant became entitled, but not obliged, to claim re-transfer of the property against repayment of the purchase price. For some reason it did not do so. However things were brought to a head more than four and a half years later when, on 5 April 2013, an attorney acting on behalf of Mr and Mrs Puling wrote to the appellant's attorney, stating that his clients had no intention of erecting a building on the property but wished instead to consolidate it with the adjoining erf which they had also purchased. The appellant was not prepared to agree to this and, in March 2014, instituted proceedings on notice of motion seeking an order obliging Mr and Mrs Puling to re-transfer the property to it against payment of the original purchase price of R510 000.

[5] Mr and Mrs Puling opposed the grant of this relief. The first defence they offered was the same as that of Mr Ramokgopa, namely, that as more than three years had elapsed since the date upon which the appellant's claim for re-transfer of the property had become due, it had prescribed. However they also relied on certain additional defences, namely: that the appellant had consented to the proposed consolidation in terms of a tacit term of the sale; and that the appellant should be estopped from relying on the fact that the property had not been developed within the building period of 18 months. They also contended that the condition registered against the title deed of their property differed from what had been agreed upon in the deed of sale, and regard should therefore be had to the sale terms. However rectification of the title deed was not fully ventilated in the papers nor was it claimed in the proceedings in the court a quo. For present purposes the matter must therefore be decided having regard to the title deed.

[6] As appears from this, common to both appeals is the issue whether the appellant's claim for re-transfer of the property prescribed three years after its claim became due when the respondents failed to erect a dwelling on their respective properties within the 18 month building period. The respondents allege it did. It is their contention that the claim for re-transfer constitutes a 'debt' for the purposes of the Prescription Act 68 of 1969, but not one envisaged in ss 11*(a)*, *(b)* or *(c)* of that Act. They therefore submit that, in terms of s 11*(d)* of the Act, the prescriptive period is three years. On the contrary, the appellant argues the registered condition gives rise to a real right which does not prescribe within three years and not merely a personal right in favour of the appellant.

[7] Before turning to deal with these opposing contentions, it is first necessary to mention the recently reported decision in *Bondev Midrand (Pty) Ltd v Madzhie & others* 2017 (4) SA 166 (GP) which the parties' legal representatives most correctly drew to our attention. In that case the court concluded that a similar repurchase clause was grossly unfair to a purchaser intending to build a residential home, that it infringed the constitutional right to adequate housing and that enforcing it would be against public policy. Relying upon this, the respondents in the present case suggested that the appellant's claims against them were similarly not enforceable.

[8] As appears from the judgment in *Madzhie*, the application to re-transfer the property was unopposed and the matter came before court for judgment by default. When the matter was initially called on 12 August 2016, the learned acting judge informed counsel for the applicant that he was inclined to dismiss the application as he had reservations relating to the question 'whether this type of retransfer clause is consistent with public policy and with the provisions of s 26(1) of the Constitution'. The matter was then postponed until 19 August 2016 for counsel to prepare heads of argument relating to the issue. However, on that date counsel for the applicant indicated in chambers that the applicant

had filed a notice of withdrawal, tendering costs. Uniform rule 41(1)*(a)* provides that once a matter had been set down a party may withdraw proceedings with the leave of the court, and such leave was granted. That should have been the end of the matter as it is not ordinarily the function of a court to force a party to proceed with an action against its will or to investigate why the party wishes to abandon such action – see *Levy v Levy* 1991 (3) SA 614 (A) at 620B. But four months later the learned acting judge gave reasons for consenting to the withdrawal. He dealt with various constitutional issues, stating that the clause was grossly unreasonable towards a purchaser 'that wishes to pursue the suburban dream incrementally'[1] and that a repurchase clause is 'not central to the business of a developer or the operations of a homeowners association,'[2] before concluding that the present type of repurchase clause is an instance where enforcement should be refused.[3]

[9] With due respect, the least said about this judgment is probably the better. It obviously reflects the learned acting judge's personal viewpoint but it was inappropriate, to say the least, to have pronounced upon the issue in the circumstances. As I have said, the applicant wished to abandon an application for default judgment and all that was required was the court's consent. This was not an instance that required a formal judgment, let alone one in respect of constitutional issues that had not been raised or canvassed in the papers and in respect of which interested parties had neither been forewarned nor heard. A court should refrain from dealing with legal issues unnecessary to determine in order to properly deal with a matter before it. This is all the more so in Constitutional matters. As the Constitutional Court said in *Albutt*[4] a passage to which it subsequently referred with approval in *Aurecon*:[5]

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[1] Para 35.
[2] Para 47.
[3] Paras 53 and 54.
[4] *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC); [2010] 5 BCLR 391; [2010] ZACC 4 para 82.
[5] *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC) para 35.

'Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so.'

[10] In the light of the paucity of the information before it, and not having heard the various parties who may well be interested in a matter such as this, it was inappropriate for the court in *Madzhie* to reach the conclusion that it did in regard to the constitutionality and lack of enforceability of the repurchase clause that was registered against the title deeds of the property.

[11] We were informed from the bar that the Registrar of Deeds now views the judgment in *Madzhie* as binding and, consequently, now refuses to register deeds containing such clauses. This is extremely unfortunate, bearing in mind that clauses of this nature are relatively common and are regularly registered at the instance of developers and local authorities. In the light of what I have said above, those employed in the Deeds Office should not regard the judgment in *Madzhie* as an authoritative judgment, binding upon them.

[12] I return to the issue at hand, namely, whether the claim for re-transfer constitutes a debt capable of prescribing or a real right. The condition in question consists of two clauses. The first obliges the transferee or its successors in title to erect a dwelling on the property within a period of 18 months. The second provides that in the event of a dwelling not being erected within that period, the appellant is entitled but not obliged to have the property retransferred to it against return of the purchase price.

[13] The first clause reflects an intention to bind not only the transferee but its successors in title. Moreover, the requirement that a dwelling be erected on the

property results in an encumbrance upon the exercise of the owner's rights of ownership of its land. Accordingly, in the light of authority such as *Willow Waters*,[6] this first clause gives rise to a real right. Indeed, I did not understand the respondents to contend otherwise.

[14] On the other hand, the right of the appellant to claim re-transfer of the property against repayment of the original purchase price as set out in the second clause does not amount to such an encumbrance. It is a right which can only be enforced by a particular person, the appellant, against a determined individual, and does not bind third parties. Not only is this the hallmark of a personal right,[7] but it is a right which the appellant can exercise at its sole discretion. In these circumstances I understood that both sides were agreed that if that clause had been standing alone, it would not have carved out a portion of the respondents' dominium and would therefore be regarded as creating a personal right.[8]

[15] Section 63(1) of the Deeds Registries Act 47 of 1937 prescribes that no condition in a deed 'purporting to create or embodying any personal right . . . shall be capable of registration'. But although only real rights and not personal rights should be registered against a title deed, the fact that a personal right becomes registered does not, in itself, convert that right into a real right. Almost 100 years ago, Innes CJ observed that '(a) *jus in personam* does not become a *jus in rem* because it is erroneously placed upon the register'[9] and this remains the position to this day.[10] The appellant argued, however, that although the second clause appeared to create a personal right, it is so inextricably wound up

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[6] *Willow Waters Homeowners Association (Pty) Ltd v Koka NO & others* 2015 (5) SA 304 (SCA) para 16 and 22 and the authorities there cited.
[7] See eg *Absa Bank Ltd v Keet* 2015 (4) SA 474 (SCA) para 20. H Mostert and A Pope *The Principles of the Law of Property in South Africa* (2010) at 45.
[8] Compare: *National Stadium South Africa (Pty) Ltd & others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) para 33.
[9] *British South Africa Company v Bulawayo Municipality* 1919 AD 84 at 93.
[10] See eg *Fine Wool Products of South Africa, Ltd, & another v Director of Valuations* 1950 (4) SA 490 (E) at 499B-C, *Nel, NO v Commissioner for Inland Revenue* 1960 (1) SA 227 (A) at 34H-35A, *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & others* 1974 (4) SA 362 (T) at 367H and *Lorentz v Melle & others* 1978 (3) SA 1044 (T) at 1049.

with the first clause, which clearly created a real right, that the two clauses were to be read together as creating a real right which is capable of registration.

[16] The appellant relied upon the decision of this court in *Cape Explosive Works Ltd & another v Denel (Pty) Ltd & others* 2001 (3) SA 569 (SCA) to support this argument. In that matter the first appellant, Capex, had sold and transferred two pieces of land to Armscor. The deed of transfer contained two restrictions imposed upon Armscor and its successors in title in favour of Capex: first, that the land was to be used only for the manufacture of armaments and, second, that if the land was no longer required for that purpose, Armscor was to advise Capex of that fact and Capex would have the 'first right to repurchase' the land. If it did not avail itself of that right, the restriction on ownership would fall away. In due course Armscor transferred the properties to Denel but in circumstances unnecessary to detail, the second condition was not registered against their title deeds while the first condition was registered only in respect of a small portion of one property. Denel sought an order declaring its ownership of both portions to be unencumbered by condition 2. Capex, in turn, brought a counter-application seeking rectification of the title deeds of both properties to reflect both conditions.

[17] It was argued on behalf of Denel, that the second condition constituted a personal right in the nature of an option to repurchase which could not constitute a valid real right as it imposed an obligation on the part of the transferee, Denel, to notify Capex when the property was no longer required for the use to which it had been restricted. Denel therefore submitted that the second condition could not validly be registered against the title deed, so that it was entitled to the relief it sought and that the title deed could not be rectified in this regard. In rejecting this, Streicher JA, writing for a unanimous court, stated:

'In my view, the stipulation referred to was not intended to burden the transferee with an obligation. Condition 1 contained a use restriction and condition 2 provided that in the event of the property no longer being required for the use to which it was restricted Armscor or its

successors in title would advise Capex accordingly, whereupon Capex would become entitled to repurchase the property, failing which the property would no longer be subject to the use restriction. Upon the property no longer being required for the restricted use it would be useless to the owner thereof unless Capex repurchased it or the use restriction could be terminated. Condition 2 was intended to provide Armscor and its successors in title with a mechanism for such termination. Hence, although framed as an obligation, the giving of notice was as much a right as an obligation. . . .

The use restriction according to condition 1 was materially different from the use restriction according to condition 1 read with condition 2. The two conditions were not independent of one another and they could not be separated. They formed a composite whole. They were specifically stated to be binding on the transferee, being Armscor, and its successors in title. Furthermore, they constituted a burden upon the land or a subtraction from the *dominium* of the land in that the use of the property by the owner thereof was restricted. The right embodied in conditions 1 and 2, read together, therefore constituted a real right which could be registered in terms of the Deeds Registries Act.'[11]

[18] As appears from this, Denel's right as transferee under condition 2 to give notice to the transferor, Capex, that the property was no longer being used for the specified purpose, provided a mechanism to terminate the restriction upon the rights of ownership. Either Capex would repurchase the property or, if it was not inclined to do so, Denel would retain its ownership, free of the restriction. The encumbrance of the land created by condition 1 could only continue until such time as Denel gave Capex a notice under condition 2. Thus the restriction on ownership in condition 1 was inseparably bound up with condition 2.

[19] But that is a far cry from the circumstances in the present cases. The burden created by the first clause, namely the obligation to build a dwelling on the property, is binding on the transferees (the respondents) and their successors in title. The latter have no right under the second clause to bring that restriction to an end. All clause two provides is that in the event of a failure to build a dwelling in the requisite time the appellant, as the transferor, can recover the

[11] Paras 14-15.

land against the payment of the purchase price if it so chooses. This is akin to providing the appellant with an option to purchase which is essentially a personal right.[12] But the appellant is not obliged to demand or claim re-transfer of the land and the obligation to build will remain extant as long as the respondents retain their ownership. Thus the restriction upon ownership created by clause 1 remains binding and will not be terminated should the appellant elect not to seek retransfer. The two clauses read together therefore do not constitute what Streicher JA referred to as 'a composite whole' restricting the respondents' use of the property. [13]

[20] In the circumstances, the first clause of this condition must be regarded as providing a real right and a restriction upon the ownership of the property of the respondents and their successors in title. On the other hand, the second clause under which the appellant has the election to claim re-transfer of the property, creates no more than a personal right akin to an option to purchase which is not inseparably bound up with the first clause. As the appellants sought to enforce this second clause, the issue then becomes whether the debt which is the subject of such a claim has prescribed.

[21] Until fairly recently, it was accepted that the term 'debt' used in the Prescription Act 68 of 1969, but not defined in that Act, should be interpreted as having a wide meaning – see eg *Desai NO v Desai & others* 1996 (1) SA 141 (A) at 146I-J. However, in a series of judgments of the Constitutional Court it has now been held that in the modern constitutional era the term must be interpreted more narrowly than what was previously the case – see *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) paras 87-93 and *Off-Beat Holiday Club & another v Sanbonani Holiday Spa Shareblock Ltd & others* CCT 106/16 (23 May 2017) para 44. However although these decisions have been somewhat

[12] *Barnhoorn NO v Duvenhage & others* 1964 (2) SA 486 (A) at 494F-H
[13] *Cape Explosive Works* para 14.

controversial,[14] and it may well be that the 'precise boundaries of the husk left by the *Makate* axe'[15] may not yet have been determined, it appears to be settled that even on a narrow meaning a 'debt' includes the right to claim the return of property. Indeed, in the present case I understood the appellant to accept that if its right to claim re-transfer of the immovable property is to be regarded as a personal right, not only would prescription have begun to run on the date by when the title deed reflected a dwelling had to be erected, but that the appellant's claim in each case had prescribed before proceedings were commenced.

[22] In the light of our conclusion that the second clause of the condition does indeed create no more than a personal right, the appellant's claim in each case was therefore correctly dismissed by the court a quo on the basis of prescription. This renders it unnecessary to deal with the other issues raised by the respondents, Mr and Mrs Puling, in case 802/2016.

[23] Accordingly, in each of these cases, the appeal must be dismissed. There is no reason for costs not to follow the event.

[24] In each case the following order will issue:
The appeal is dismissed with costs.

L E Leach
Judge of Appeal

[14] See eg F Snyckers 'Prescription Under Siege' (2017) 29 *Advocate* Vol 30 No 2 at 30.
[15] The phrase is plagiarised from Snyckers op cit.

Appearances: (Case No: 802/2016)

For Appellant:	S J Grobler SC (with him N J Horn)
Instructed by:	Tim Du Toit Attorneys, Johannesburg
	Phatshoane Henney Inc, Bloemfontein
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Appearances: (Case No: 803/2016)

For Appellant:	S J Grobler SC (with him N J Horn)
Instructed by:	Tim Du Toit Attorneys, Johannesburg
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Instructed by:	Mothle Jooma Sabdia Inc, Pretoria
	Matsepes Inc, Bloemfontein