IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 15/12/16

Case Number: 24135/2010

(1) REPORTABLE: [redacted] / NO
(2) OF INTEREST TO OTHER JUDGES: [redacted]/NO
(3) REVISED.

15/12/2016 ..... DATE

..... SIGNATURE

Changing Tides 17 (Pty) Ltd N.O.	**Applicant**
AND	
Portion 3 Erf 366 Wapadrand CC	**First Respondent**
(Registration Number: CK 2002/062477/23)	
Edward George Scott	**Second Respondent**
Frederick Albert Muller	**Third Respondent**
Louise Jennifer Muller	**Fourth Respondent**
Maryn van Staden N.O.	**Fifth Respondent**
In his Capacity of judicial manager of T.T Gushman & Son (Pty) Ltd	
Espe Izak Steyl	**Sixth Respondent**
City of Tshwane Metropolitan Municipality	**Seventh Respondent**
The Registrar of Deeds, Pretoria	**Eight Respondent**

JUDGMENT

MOLEFE J

[1] The Applicant seeks from the First Respondent a clearance certificate pertaining to a property described as Portion 1 of Erf 336 Wapadrand Extension 4 Registration Division J.R., Gauteng Province held by Title Deed T 10784/2004, failing which the Registrar of Deeds is ordered to affect transfer of the property into the name of the Sixth Respondent.

Factual Background

[2] Erf 366 Wapadrand was originally owned by the Second Respondent who sub-divided the property into:

2.1 Portion 1 – currently owned and registered in the names of the Third and Fourth Respondents;

2.2 Portion 2 – owned by T T Gushman & Sons (Pty) Ltd represented by the Fifth Respondent as judicial manager;

2.3 Portion 3 – representing the access road and certain communal attributes, owned and registered in the name of the First and Second Respondents;

2.4 The remaining extent – currently owned and registered in the name of the Second Respondent.

[3] The Seventh Respondent imposed a condition that Portion 3 had to be vested in a close corporation, and the owners of the remaining extent, portion 1 and portion 2 to be members of the Close Corporation (similar to the concept of a homeowners association). The owners would be liable to contribute a third of the common expenditure which include bulk water derived from Portion 3, security features, rates

and taxes and maintenance. A title condition was imposed in the title deeds of all the properties with a view to facilitate and to administer the communal portion 3. The aforesaid condition is a so-called restrictive title deed condition which was registered in the office of the Eighth Respondent. It is alleged that since the subdivision, the Second Respondent financed all the expenditures of the First Respondent up to 2010. Therefore, the Second Respondent is owed by the First Respondent on loan account whilst First Respondent has a claim against the Third and Fourth Respondents.

[4] The Third and Fourth Respondents caused several indemnity bonds to be registered over portion 1 ("the property") in favour of the Applicant as security for monies lent and advanced. As a result of the Third and Fourth Respondents defaulting on their payment obligations towards the Applicant, the Applicant obtained judgment against the Third and Fourth Respondents and the property being judicially attached.

[5] Subsequent to the attachment of the property, Applicant sold the property in execution on 23 April 2014 in realization of its security. The property was sold to the Sixth Respondent in an amount of R1 710 000, 00 (One Million Seven Hundred and Ten Thousand Rand).

[6] The Seventh Respondent issued a rates clearance certificate in terms of Section 118 (1) of the Local Government Municipality Act, Act 32 of 2000, indicating that no further amounts were due in terms of the property after the outstanding balance of R23 621, 30 was paid by the Applicant.

[7] On 23 June 2014, the Applicant received correspondence from R Lippi, attorneys acting on behalf of the First Respondent that an amount of R277 575, 73 is

owed to the First Respondent as Homeowners Association, duly represented by the Second Respondent. The Applicant requested a breakdown of the amount of R277 575, 73 on 1 July 2014, in order to present it to the Sixth Respondent for consideration.

[8] On 11 September 2014, the requested breakdown which contained the following information was provided to the Applicant:

> 8.1 The Second Respondent subsidized the contributions towards the First Respondent due to it by the Third and Fourth Respondents until October 2010, after which he elected not to further subsidise the contributions of portions 1 and 2 and independent services were installed on each respective property.
>
> 8.2 The Second Respondent claimed an amount of R319 562, 22 up to October 2010 was due and payable to the Second Respondent. A further amount of R115 555, 50 which constituted the Third and Fourth Respondents' contribution towards water consumption and R51 482, 00 for electricity use was due to the Seventh Respondent, which allegedly was erroneously billed to the Second Respondent.

[9] On 12 February 2015, R Lippi attorneys directed a letter to the Applicant's bond foreclosure attorneys wherein the Applicant's vested interest as bondholder was emphasized and in an attempt to safeguard the Applicant's interest, it had to be made aware of the issues pertaining to the outstanding levies, municipal billings and certain security aspects.

[10] On 12 March 2015, the Applicant's attorneys of record were presented with an updated statement reflecting the amount owed in the sum of R524 614, 63 of which R205 052, 41 constitutes interest charged. Applicant's counsel Advocate P I Oosthuizen submitted that notwithstanding a formal demand of all the accounts and all documentation in relation to the amount claimed for inspection and debate, no response was received from the Second Respondent.

[11] Counsel for the First and Second Respondents ("the Respondents"), Advocate J Eastes contends that in view of the fact that the Second Respondent subsidized all the expenditures, Second Respondent is owed by the First Respondent on loan account, while the First Respondent has substantial claims against the remaining owners being the Third and Fourth Respondents. It was argued that the Second Respondent cannot therefore issue a consent form for transfer and change of ownership whilst there are still amounts owing. It is submitted on behalf of the Second Respondent that this application is an attempt to circumvent the restrictive title condition which is registered against the title deeds of the properties.

No Locus Standi

[12] The Respondents raised a point *in limine* that the Applicant lacks the necessary and required *locus standi* to institute the application as the Applicant is merely a creditor that obtained judgment against the Third and Fourth Respondents. It was argued that when the Sheriff sells immovable property in terms of Rule 46 of the Uniform Rules of Court, he does not act as an agent of the judgment creditor or judgment debtor but does so as an executive of the law. He becomes a party to the contract *suo nomine* and he is bound to perform his obligation thereunder. In this

regard Respondents' counsel relied on **Sedibe and Another v United Building Society & Another 1993 (3) SA 671 (T) at 676 D** where a full bench held "*the obligation created in casu by Clause 5, by which vacua possession was guaranteed, was that of the sheriff. He had to make good his undertaking and he was answerable ex contractu if he failed to ensure that the appellant obtained undisturbed possession*".

[13] Respondents' counsel contends that the Conditions of Sale in execution of the property indicates that the Sixth Respondent as purchaser is liable to pay rates and taxes and charges due to the First Respondent and not the Applicant. If the Sixth Respondent is not in a position to pay same, the correct procedure would be for the Sheriff to cancel the sale in terms of Rule 46 of the Uniform Rules of Court. It was argued that there is therefore no *nexus* for the Applicant to seek the relief it seeks in this application as the Applicant lacks the necessary *locus standi* to institute the application.

[14] As a general rule the requirements for *locus standi* are as follows:

14.1 The applicant for relief must have an adequate interest in the subject matter of the litigation, which is not a technical concept, but is usually described as a direct interest in the relief sought;

14.2 The interest must not be too far removed;

14.3 The interest must be actual, not abstract or academic;

14.4 The interest must be current interest and not a hypothetical one[1].

[1] See Public Protector v Mail & Guardian Ltd 2011 (4) SA 420 (SCA) at 427F – 428 A

[15] I have noted that this application is brought under the very same case number, under which the judgment was obtained, a warrant of attachment was issued and the subsequent sale in execution. Applicant's counsel argued that the Respondents' objection is unmeritorious considering that the Respondents engaged the Applicant's bond foreclosure attorneys during February 2015 wherein the Applicant's vested interest in the subject matter was highlighted and that the Applicant should safeguard its interest by urgently addressing *inter alia* the issue of the alleged outstanding levies[2].

[16] I am of the view that the point *in limine* is ill-conceived. I am satisfied that the Applicant has an adequate vested interest in the subject matter and the necessary *locus standi* to bring this application and the point *in limine* fails and is dismissed.

[17] It is the Applicant's contention that it is evident and not disputed that no formal account system was conducted by the First Respondent nor were any financial statements kept[3]. No meetings were held between the members nor did the Second Respondent open a separate bank account for the First Respondent. It was argued on behalf of the Applicant that there are currently no monies due and owing to the First Respondent; the monies claimed are in actual fact owed to the Second Respondent and the Second Respondent uses the First Respondent as a vehicle to claim same. I agree with this argument; on the Second Respondent's own version, he personally paid for services and subsidized all the expenditures due to the Seventh Respondent until about October 2010 when he refused to pay all the expenses on his own. Therefore, any monies claimed are owed to the Second Respondent and not to the First Respondent.

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[2] Founding Statement Annexure "NS15" page 78
[3] Founding Affidavit page 33 par 37

[18] The defences raised by the Respondents against the Applicant is firstly that the amount claimed by the Respondents is not disputed and secondly that the claim is not susceptible to prescription. The Applicant was informed on 23 June 2014 that an amount of R277 575, 73 is due to the First Respondent and Applicant's attorneys of record responded as follows[4];

> *"Kindly note that as we are in possession of a valid rates clearance certificate, we will proceed with lodgment once we have your homeowners association consent".*

Respondent's counsel contends that on a proper interpretation of the abovementioned response that neither the Applicant nor Applicant's attorneys of record failed to lay a sufficient basis to dispute the correctness of the amount. Furthermore, it was argued on behalf of the Respondents that the Applicant was informed that the clearance figures issued by the City of Tshwane are incorrect and a breakdown indicating how the outstanding amount was calculated, was forwarded to the Applicant as requested. However, Applicant failed to make payment despite the aforesaid.

[19] It is evident from Annexure "NS13" that the Applicant's conveyancing attorneys requested a breakdown of the amount of R244 757, 73, specifically how the amount was calculated and that the breakdown would be submitted to the Sixth Respondent ("purchaser") for consideration. In my view, it is an incorrect interpretation to conclude on the basis of Annexure "NS 13" that the amount claimed was not disputed and that no issue was taken with the amount owed.

[20] It is common cause that the Respondents are not in possession of the relevant documentation to support the calculation of the amount claimed. If regard is

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[4] Founding Affidavit, Annexure NS13, pages 73-74

had to the contents of Annexure "NS16"[5] the following is placed on record by the Respondents' then attorneys of record:

> *"Our client has available for inspection the relevant source documents. . . The documents are approximately 400 in number and are at present with our clients' accountant. Copies could be made available. . . "*

The Respondents' attorneys then later informed the Applicant that the First Respondent's bookkeeper Charlene Enslin, had all the substantiating documentation in relation to the amounts as set out in the breakdown. It was then submitted by Respondents' counsel that based on the aforementioned, the Applicant is well aware of the amount due, owing and payable and also the calculation thereof and does not have a right to subject the Respondents to a forensic audit. I do not agree with this submission and in my view, this defence does not make sense and is untenable as the breakdown is not a substantiated by any documentation.

Prescription

[21] Applicant's Counsel submitted that the debt owing to the Respondents by the Third and Fourth Respondents was with effect from October 2010 and is now prescribed. The issue to be determined is whether the claim is susceptible to prescription or not. Applicant's Counsel submitted that levies or penalties due to the First Respondent do not enjoy any special legal protection as far as the running of prescription is concerned. It was further submitted that the restrictive title deed condition conflates two distinct rights.

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[5] Record p 85

21.1 The First Respondent's claim for payment of the amounts due to it by the Third and Fourth Respondents which is a personal contractual right; and

21.2 The First Respondent's right to *veto* in terms of the restrictive title deed condition which restrict the Third and Fourth's Respondent's *ius disponendi* i.e. a real right[6].

[22] It cannot be argued that the indebtedness *in casu* is a continuing wrong as no further charges were levied against the property after October 2010. The Court in **Slomowitz v Vereeniging Town Council** [7] accepted the description of a continuous wrong as one which is still in the course of being committed and is not wholly past. This is not the case in the indebtedness *in casu*.

I agree with the submission by the Applicant's Counsel that the position of the First Respondent is akin to that of the embargoes contained in the *Local Government: Municipal Systems Act 32 of 2000*[8] and of the *Sectional Titles Act 95 of 1986*[9]. These provisions respectively, prohibit the Registrar from registering the transfer of immovable property, except on production of a certificate issued by the municipality or a conveyancer confirming that all moneys due to the municipality or a body corporate have been fully paid.

That being the case, even charges levied under the Municipal Systems Act are susceptible to prescription. (See **City of Johannesburg v Kaplan and Another 2006 (5) SA 10 (SCA) par 25**.

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[6] Willow Waters Homeowners Association (Pty) Ltd v Koka N.O. and Others 2015 (5) SA 304 (SCA)
[7] 1966 (3) SA 317 (A)
[8] Section 118
[9] Section 15 B (3) (9) (i) (aa)

[23] I fully agree with the submissions made by the Respondents' Counsel that in the **Willow Waters Homeowners Association supra**, the Supreme Court of Appeal confirmed that a restrictive title deed condition is in fact a real right and not a personal right. However, I disagree with the contention that the Applicant in this application is attempting to circumvent the restrictive title deed conditions.

This application is based on the debt which stems from a restrictive title deed condition which has the same effect as a servitude which only prescribes after 30 years. In addition it is a continuing wrong which also prevents prescription. The debt claimed which arose from the restrictive title deed however is susceptible to prescription. The fact however, that the Second Respondent has a loan account in the First Respondent does not warrant the First Respondent to withhold the clearance certificate if the rates and taxes are fully paid up. The debt owed to the First Respondent is a normal debt subject to a three year prescription period. I am not satisfied that the grounds listed by the Respondents in this matter disclose any defence against the relief sought.

[24] In the premises, the following order is made:

> *1. The First Respondent acting through it sole and managing member the Second Respondent, is ordered to provide the Applicant with a clearance certificate pertaining to the property described as Portion 1 Erf 336 Wapadrand Extension 4 Registration Division J.R. Gauteng Province held by Title Deed T10784/2004 within 10 days of this order being granted.*

2. In the event of the First and/or Second Respondents failing to comply with prayer 1, the Eighth Respondent is authorized and ordered to effect transfer of the property absent the clearance certificate envisaged in condition D of the Title Deed pertaining to the property described as PORTION 1 OF ERF 366 WAPADRAND EXTENSTION 4 REGISTRATION DIVISION J.R., GAUTENG PROVINCE HELD BY TITLE DEED T10784/2004 into the name of the Sixth Respondent.

3. Costs of this application to be paid by the Second Respondent.

D S MOLEFE
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	**Adv. PI Oosthuizen**
Instructed by	:	**Vilele Tinto & Associates**
Counsel on behalf of 1st & 2nd Respondents	:	**Adv. J Eastes**
Instructed by	:	**M E Eybers Attorneys**
Date Heard	:	**22 November 2016**
Date Delivered	:	**15 December 2016**