REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF ORDER: 19 AUGUST 2016
DATE OF SIGNED REASONS: 19 DECEMBER 2016
CASE NO: 63297/15

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED

SIGNATURE

DATE: 19 DECEMBER 2016

CASE NO: 63297/15

In the matter between:-

BONDEV MIDRAND (PTY) LTD Applicant

and

MULATEDZI ALTON MADZHIE First Respondent

THE REGISTRAR OF DEEDS, PRETORIA Second Respondent

THE STANDARD BANK OF SOUTH AFRICA LTD Third Respondent

JUDGMENT

19 December 2016

Before: C R Jansen AJ

[1] On 19 August 2016 I made an order permitting the applicant to withdraw its application, after I had initially indicated that I was inclined to dismiss the application. The following are the reasons for my order.

[2] The applicant, a property developer, sold an unimproved residential erf to the first respondent in January 2012. The applicant was duly paid the full purchase price after the first respondent raised the money through a bank loan, secured by a mortgage bond over the property in favour of the third respondent.

[3] The applicant now seeks the retransfer of the property from the first respondent in the following terms:

> ***"1. That the First Respondent is ordered to take the necessary steps to retransfer the property described as Erf 3180 Midstream Estate Extension 37, Registration Division JR, Gauteng, measuring In Extent 1016 m², held by Deed of Transfer T76698/12 to the Applicant.***
>
> ***2. That the First Respondent bear the costs associated with the relief in 1 above.***
>
> ***3. That the Applicant is to pay to the First Respondent the amount of R680 000,00 (six hundred and eighty thousand rand) against transfer of the property in paragraph 1.***
>
> ***4. That the First Respondent is directed to sign all documents and take all steps reasonably required to give effect to the order in 1***

above, within a period of 7 days from date of such request by the Applicant and/or on its behalf.

5. ***That should the First Respondent refuse and/or fail to sign the relevant documentation to give effect to the order in 1 and 4 above, then the Deputy Sheriff of the above Honourable Court, Pretoria, be authorised and directed to sign all necessary documents on their behalf to effect retransfer of the aforementioned property from the First Respondent to the Applicant, against payment of the amount of R680 000,00 (six hundred and eighty thousand rand), less the costs payable to the Sheriff's transfer fees, clearance fees at the local authority and homeowners association in respect of the transfer, or the Third Respondent, to discharge any indebtedness in respect of the bond secured over the property.***

6. ***That the Applicant be entitled to register this order at the Registrar of Deeds.***

7. ***The relief in paragraphs 1 to 6 of this order is without prejudice to the rights of the Third Respondent as bond holder over the property.***

8. ***That the First Respondent be ordered to pay the costs of this application."***

[4] The reason for seeking the retransfer is that the first respondent did not complete the building of his house within eighteen months as required by the deed of sale.

[5] The first respondent did not oppose the application and the matter came before me for default judgment. The matter was initially on the roll on 12 August 2016. When the matter was called, I informed counsel for the applicant that I was satisfied that the matter was procedurally properly before me but that I was not prepared to grant the order for reasons that relate to the substance of the claim.

[6] I informed counsel that I was inclined to dismiss the application subject to any arguments he may wish to advance. My reservations related to the question whether this type of retransfer clause is

consistent with public policy and with the provisions of section 26(1) of the Constitution.

[7] As a result the matter stood down to 19 August 2016 for counsel to prepare heads of argument on the propriety of the relief sought in this matter. On 19 August 2016 counsel for the applicant indicated in chambers that the applicant had filed a notice of withdrawal and had tendered costs in the same notice. Applicant requested that the notice of withdrawal be formally noted and filed of record.

[8] In terms of Rule 41(1)(a), withdrawal cannot occur unilaterally once a matter has been set down. This applies to both opposed and unopposed matters by virtue of the plain language of the rule that applies in general terms to "all proceedings".[1]

[9] I consented to the withdrawal for the reasons set out below. I assume that it is unlikely that the applicant will renew the application. However, in the event that it does, I believe it is important that I state my reasons for being of the view that a purchaser of a residential stand in a township should not be forced to return such a property on the grounds which it is sought in this matter. It would be a different matter if the purchaser were a property speculator or a builder seeking to build and sell for commercial gain. If the latter applied, it would be for the seller to present evidence that the purchaser is not a person who seeks to buy land for purposes of building a residence for him/herself.

[10] From the founding affidavit of a Mr Botma, a director of the applicant,

[1] The only limitation being that the Rule may possibly not apply to criminal proceedings or to proceedings where no *lis* exists between the parties. *De Lange v Provincial Commissioner of Correctional Services* 2002(3) SA 683 (SE) at p 686 D to p 687 G.

it appears that the immovable property is an erf in a so-called security estate. The applicant is the developer of this estate.

[11] The first respondent, on the other hand, appears to be an individual who purchased an urban stand for purposes of eventually building a dwelling house for himself and his family. That the first respondent is probably a retail purchaser flows from the fact that he entered into an extension agreement which required of him to appoint a building contractor within a specified period. He therefore did not intend selling the stand, neither did he intend building the house himself. From his identity document number it appears that he was thirty nine years old on the date of purchase.

[12] The relief sought was based on the following clause which forms part of the original agreement of sale between the applicant (as seller) and the first respondent (as purchaser):

> ***"11. <u>BUILDING PERIOD</u>***
>
> ***11.1 The Transferee or his Successors in Title will be liable to erect a dwelling on the property within 18 (eighteen) months from 16 January 2012, failing which the Transferor will be entitled, but not obliged to claim that the property is transferred to the Transferor <u>at the costs of the Transferee</u> against payment by the Transferor of the original purchase price, <u>interest free</u>. The Transferee shall not in the said period sell or transfer the property, without the Transferor's written consent. This period can be extended <u>at the discretion of the developer</u>."***
>
> ***12.1 The PURCHASER acknowledges that he is required upon registration of transfer of the PROPERTY into his name, to become a member of the Home Owners Association ('the Association') and agrees to do so, subject to the Memorandum and Articles of Association of the Association."***

(my underlining).

[13] Other provisions in the agreement must also be considered. I quote from the agreement dated 16 January 2012:

"1.1 The Purchase Price of the erf is the sum of R680 000,00 (six hundred and eighty thousand rand) … payable as follows:

1.2 A deposit of R50 000,00 (fifty thousand rand) within 20 days after acceptance of this offer."

and further

"2.1 This agreement is subject to the granting of a loan for not less than R630 000,00 (six hundred and thirty thousand rand) and the Purchaser hereby undertakes to make every effort to raise such a loan."

and further

"5.1 The property is sold subject to all the conditions, restrictions and servitudes, set out or referred to in the Title Deed of the property or which may be applicable or exist in respect of the property at any time …"

[14] Clause 11.1 eventually found its way onto the title deed where it was registered as clause B, and so obtained the status of a real right (or limited real right) and thus enforceable against the successors in title of the purchaser.

[15] An extension agreement was later entered into which contained similar terms, only the dates changing and some specific deadlines stipulated for progress.

[16] As stated, I had serious difficulties with enforcing the type of contractual term found in clause 11 of the sale agreement against an ordinary retail purchaser who wants to buy the erf in order to build a home for him/herself. I am of the view that such a clause is either against public policy as the term is used in the law of contracts, alternatively is inconsistent with the rights of an ordinary purchaser in terms of section 26(1) of the Constitution, and possibly even section 25(1) of the Constitution.

[17] If the applicant wishes to re-institute proceedings against the first respondent, it would be important for it to show that the facts of the

matter fall outside of the ambit of my objection, in other words, that it does not offend public policy, and neither transgresses any rights of a purchaser/owner provided for in either section 25(1) or section 26(1) of the Constitution.

[18] I am mindful of the fact that the present matter comes before me as an unopposed application and that, by definition, no objections or defences are raised by the first respondent. The concerns which I have with the repurchasing clause must, of necessity, be found on the face of the wording thereof. It is akin to an abstract challenge. In my view this type of clause is prima facie repugnant and a contracting party who wishes to enforce it bears an onus to show that the facts of the matter are such that enforcement does not offend as described above. In this sense it differs from time-limitation clauses as discussed in *Barkhuizen v Napier* 2007(5) SA 323 CC.[2]

[19] Ninety days to instruct a lawyer and to issue summons is considered prima facie reasonable in our law, unless evidence is adduced to show that it is unreasonably harsh, or that it was not possible to comply with the time limitation. The ninety days at issue in *Barkhuizen* was, of course, ninety days after a claim had been repudiated. The assessment of reasonableness in that case is specific to an insurance claim, and to the time required to institute legal proceedings against an insurance company. When an insurance company requires ninety days for the institution of legal proceedings, the principle of *pacta sunt servanda* is enough to get it past the initial threshold for enforceability. Insurance companies have a very real commercial interest in ensuring

[2] at paras 58 to 60 (per Ngcobo J). In that matter the majority (per Ngcobo J), found that the time-limitation clause was reasonable on the face thereof, allowing for a 90 day period to institute legal proceedings after a claim had been repudiated.

that claims are lodged and pursued promptly. Generally, it would also be easy for an insured to institute litigation within ninety days. There is nothing *prima facie* repugnant in the ninety day requirement which is common in the insurance industry. The present type of property transaction is very different.

[20] This case deals with an obligation to build a house on a purchased property within eighteen months.[3] The seller is a developer. It makes its money from the sale of vacant township stands. What commercial interests it seeks to protect by this type of contractual clause is not apparent from the contract. On the other hand, the interests of the typical purchaser are obvious, and they involve the realisation of a very important constitutional right. For many people the purchase of land is the first step in the realisation of the right to adequate housing. The purchase of the land and the subsequent building of a house involve the single biggest investment that most people will make during their lives.

[21] Depriving someone of the realisation of this right seems to me to be *prima facie* unfair and contrary to public policy.

[22] It is important for judges dealing with unopposed matters to be vigilant in ensuring that objectionable contractual clauses not be enforced. Judges do so *mero motu* when contractual provisions violate statutory provisions.[4] They should also do so when the values and provisions of

[3] The record is somewhat unclear as to when the time period started running, as the affidavit contains contradictory allegations, probably as a result of a "cut and paste" exercise that went wrong. From the allegations as a whole, it would appear that proclamation of the township had occurred during February 2010, the contract signed in January 2012 and that the eighteen months expired in July 2013. The first letter of demand was sent in September 2013.
[4] *Smit v Bester* 1977(4) SA SA 937.

the Constitution are at issue.[5]

[23] Our law is still developing rapidly. It is understandable that respondents in the position of the first respondent do not oppose the enforcement of the retransfer clause. They obviously receive legal advice that this type of clause is regularly enforced by our courts and that any opposition would be costly and ultimately fruitless. This advice would be given on the basis of case law that did not scrutinise such clauses in terms of the normative value system of the Constitution. I analyse the existing case law below.

[24] I acknowledge that a Judge must be cautious when intruding on the voluntary concluded arrangements between parties.[6] But that does not mean that when the occasion arises, a Judge must not do so in unopposed matters. If Judges do not *mero motu* raise the propriety of contractual clauses in unopposed matters, untransformed law will become self-perpetuating. For this reason I believe this is a case where the clause sought to be enforced should be scrutinised through the provisions and normative value system of the Constitution.

[25] On the face of it, it would appear that the transaction between the applicant and the first respondent was one in which the first respondent sought to purchase a residential stand in a security estate and later to build his house thereon. There is nothing on the papers to suggest that the first respondent is a property speculator or a commercial builder who buys such erven as part of his business. As I noted above, the indications are to the contrary.

[5] *Barkhuizen (supra)* at para 184.
[6] *Barkhuizen* at para 70 (per Ngcobo J).

[26] As a result, it is safe to assume that the first respondent is busy following his suburban dream, namely to build a home for himself and his family in which they will one day live. Our Constitution is not silent about this set of facts. Section 26(1) of the Constitution provides that:

"Everyone has the right to have access to adequate housing."

[27] It is generally known that state assistance for the acquisition of housing comes to an end when a person earns above a certain level of income.[7] It is probable that the first respondent falls into the category of the middle class who must access housing through the ordinary market mechanism. The Constitutional Court, in the seminal case of *Grootboom*[8], confirmed that access to housing through the market mechanism falls squarely within the ambit of section 26(1) of the Constitution, and that the acquisition of land also falls within the broader concept of housing.[9]

[28] It also follows that persons must desist from preventing or impairing a person's attempts to gain access to adequate housing.[10]

[29] A person similarly situated to the first respondent must of necessity obtain housing by purchase agreement with an existing owner, or as is often the case, with a developer. In this way developers fulfil an important social function, namely facilitating access to housing for those who are required to pay for their own housing. The public role that private corporations play in the provision of fundamental rights, determines the type of constitutional scrutiny that their actions

[7] At present the limit for assistance in terms of the Finance Linked Individual Subsidy Programme (FLISP) of the National Housing Finance Corporation (NHFC) is a monthly family income of R 20 000.
[8] *Government of the Republic of South Africa v Grootboom* 2001(1) SA 46 CC.
[9] *Op cit* at para 35.
[10] *Op cit* at para 34

attract.[11] The relationship between private corporations and their clients will always primarily be a contractual relationship. The constitutional scrutiny will therefore almost always involve a scrutiny of the contract between the parties, or their conduct in terms of the contract.

[30] Considering recent developments in the area of bond foreclosure by banks, as well as the section 26 *jurisprudence* in general, it is well established that section 26 of the Constitution finds strong horizontal application.[12] From a doctrinal point of view, the issue becomes complicated by the debate whether horizontal application in the law of contract is achieved through sections 8(2) and (3) of the Constitution or through application of section 39(2). For purposes of this judgment, I assume that the outcome will be the same, whichever jurisprudential route is taken.[13]

[31] I am not aware of how common this type of repurchase clause is, however, it is most certainly not uncommon and is often also strengthened by the so-called *"Homeowners Association Rules"* which provide for excessive penalties if a stand owner does not build within a certain period of time.

[32] Persons such as the first respondent can face severe consequences as a result of this type of clause. First time home buyers face many difficulties in pursuit of their suburban dream. It is not uncommon for a young purchaser of a residential stand to wait for a period of time to

[11] *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014(3) SA 439 (CC) at para 37
[12] *Grootboom (supra)* at para 34 and ftn 32; *Maphango and others v Aengus Lifestyle Properties* 2012(3) SA 531 (CC) at paras 26 to 33; *Governing Body of the Juma Musjid Primary School and others v Essay NO and others* 2011(8) BCLR 761 (CC) at paras 54 to 58; *Nomsa Nkata v FirstRand Bank Ltd* 2016(4) SA 257 (CC) at para 96; *Gundwana v Steko Development and other* 2011(3) SA 608 (CC) at para 40 (per Froneman J).
[13] *Barkhuizen(supra)* at para 186;

ensure that the bond repayments become more affordable and until the large costs associated with the approval of building plans and the construction of a house can be managed.

[33] I accept that I cannot make any statement in respect of what is a reasonable period to allow a person to get his or her affairs in order in this regard. I would imagine that between 5 and 10 years is often what is needed. I simply fail to see what is the pressing commercial need, if any, of the developer in wanting the house to be built within a certain time.

[34] The comparative interests should be considered. The developer appears to want to protect some vague interest in the prompt completion of the houses in the development where it will eventually disappear as an interested party once all the stands have been sold. On the other hand, the purchaser is busy acquiring access to housing. In other words, he/she is exercising a right which enjoys constitutional protection. The interests of the developer simply cannot be allowed to crush the rights of the purchaser as a result of unthinking application of *pacta sunt servanda*.

[35] What I am certain of, is that the clause in the present agreement is grossly unreasonable towards a purchaser that wishes to pursue the suburban dream incrementally. The purchaser must complete the building of the home within eighteen months of the date of purchase. Considering the usual delays in obtaining building plan approval and time taken up by the building process itself, the effect of the clause is that the purchaser must start the process of obtaining building plan approval immediately.

[36] For all intents and purposes, the purchaser is forced to build immediately. Many people simply cannot afford this. In fact, only the wealthy, the high income earners, or the lucky ones who possess some landed wealth can do so immediately.

[37] In this way, many people who would be able to access this type of market, which by all accounts is a modest middle class market, would be unable to do so. In this way, the developer breaches the negative aspect of section 26(1), namely the obligation not to infringe the quest for access to adequate housing.[14] I am also of the view that developers, considering the overall context of planning legislation and the relationship they have with the system of housing finance, are bearers of a positive duty under section 26(1). Clause 11 of the agreement in this matter infringes on all these rights.

[38] And the consequences of breach add insult to injury. The first respondent has expended considerable sums to purchase the property. First, he had to pay a R50 000,00 deposit. Thereafter he presumably had to pay all municipal taxes as well as homeowner levies in regard to the stand. He further loses all the capital gain on the property as a result of the enforcement of clause 11. Considering how little capital is paid off on the typical bank loan in the first number of years, he is certain to come out empty handed. If fact, considering all the rates and levies paid, the first respondent is almost certain to suffer a severe financial blow.

[39] In addition, once the clause is enforced, he is mulcted in further costs. He has to pay all the transfer duties and legal costs. This is unfair, if

[14] *Jaftha v Schoeman and others;Van Rooyen v Stoltz and others* 2005(2) SA 140 (CC) at para 34.

not grossly unfair.

[40] The question is whether the law of contract concerns itself with unfairness in this context at all. Also, whether this type of clause can be brought within any of the grounds on which the common law, as developed by the Constitution, would refuse to enforce a contract, or would allow a party to resile from a contract, because it offends public policy, or is inconsistent with the norms and values of the constitution.[15]

[41] It is trite law that all things honourable and possible can be the subject of a contract.[16] The principle expressed in the maxim *pacta sunt servanda* remains the bedrock of the law of contract. At the same time, the legislature has made radical incursions into the law of contract and through various measures aimed at the protection of consumers[17]. Contractual freedom no longer means what it used to mean in previous times. In fact, statutory measures such as contained in chapter 2 of the *Alienation of Land Act 68 of 1981* and the *Conventional Penalties Act 15 of 1962* predate the present era of consumer protection and much of it was specifically aimed at protecting purchasers of property against oppressive contractual clauses and *rouwkoop* forfeitures.

[42] The question that arises is what is the role of the courts in

[15] The terminology used when applying section 39(2) of the Constitution in cases such as *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*2001(4) SA 42 CC at para 56, and *Brisley v Drotsky* 2002(4) SA 1 at para 93 and *Barkhuizen v Napier* 2007(5) SA 323 at paras 28 to 30, 57 and 73. In *Loureiro and others v iMvula Quality Protection Services (Pty) Ltd* 2014(3) SA at para 34 reference is made to the *normative imperatives of the Bill of Rights.*

[16] Voet 2.14.16 as quoted in Farlam & Hathaway Contract - Cases, Materials and Commentary, by Lubbe & Murray, 3rd edition, Juta p238.

[17] Such as the National Credit Act 34 of 2005, the Consumer Protection Act 68 of 2008, The Housing Consumers Protection Measures Act 95 of 1998, The Rental Housing Act 50 of 199, Financial Advisory and Intermediary Services Act 37 of 2002 and a host of other laws aimed at protection and regulation of the consumer environment.

strengthening the protection that consumers enjoy.

[43] The legislature has not been alone in developing rules for the protection of ordinary consumers. The courts have bolstered legislative provisions by the application of rules of interpretation that infuse legislative provisions with the spirit, purport and objects of the Bill of Rights, as they are required to do by section 39(2) of the Constitution.[18]

[44] Our courts have repeatedly stated that the law of contract, and contractual provisions, must yield to the provisions and values of the Constitution[19].

[45] The law of contract still stands strong on most of its common law footing. Challenges to the so-called *"schiffren"* rule as well as time bar periods in insurance claims have not been successful. These judgments, being *Brisley v Drotsky (supra)* and *Barkhuizen v Napier (supra)* illustrate the strong survival of principles underlying the doctrine of *pacta sunt servanda*. To quote from *Barkhuizen v Napier (supra)* at para 30 (per Ngcobo J):

> ***"The proper approach to the Constitutional challenges to contractual terms is to determine whether the term is contrary to public policy, in particular those found in the bill of rights. This approach leaves space for the doctrine of pacta sunt servanda to operate, but at the same time allows Courts to decline to enforce contractual terms that are in conflict with the values even though the parties may have consented to them."***

[46] The *"schiffren*" rule in the law of contract, as well as time bar clauses in insurance law, are central to the general law of contract and insurance law respectively. That cannot be denied.

[18] Thebus; Kubyana; Maphanga 2012(3) SA 531 CC;
[19] *Brisley v Drotsky* 2002(4) SA 1 SCA at para 88 (per Cameron JA)

[47] A repurchase clause such as the present one, is respectfully not central to the business of a developer or the operations of a homeowners association. I accept that a developer and homeowners associations have strong interests in seeing that a development comes to a conclusion in the sense that the erven are sold and ultimately developed. Only then is the final community established and is the community life settled. There may even be certain interests relating to aesthetics and security in this regard.

[48] On the other hand, there are very real and important interests of purchasers such as the first respondent to bear in mind. These interests are constitutionally protected. As such, public policy would tend to protect such purchasers against unfair terms, especially ones that are grossly unfair. As a result, the conflicts between the comparative interests must be answered in favour of the purchaser of the residential stand.

[49] This case involves a constitutionally protected socio-economic right. Professor Sandra Liebenberg, in her textbook on socio-economic rights, cautions against the extension of the reasoning in *Brisley v Drotsky (supra)* to contracts involving the procurement of basic needs[20]:

> **"*The bargains which the majority of people make are seldom an expression of private freedom in a context of systemic, intertwined class, race and gendered power disparities. The judgment does not consider the implications of constitutional values for the weaker party in a contractual relationship,***

[20] S Liebenberg; *Socio-economic rights: Adjudication under a transformative constitution* (2010) Juta & Co Ltd, at page 360

particularly where their economic survival and basic needs are at stake. …… In developing the content and role of these doctrines in the constitutional era, a more rigorous engagement with constitutional values such as social justice and the other values underpinning socio-economic rights is required than occurred in the Brisley judgment."

[50] In addition, one cannot be blind to certain phenomenon in the built environment and in the development of suburbs such as what is referred to as *"residential class segregation"*.

[51] As with so many other things in life, one must probably accept that the rich and the super-rich segregate themselves simply by making stands in their favourite estates completely unaffordable to the ordinary man or woman. However, this cannot be countenanced under all circumstances simply on the basis that the phenomenon must be accepted to some extent as a result of purblind deference to the doctrine of *pacta sunt servanda*.

[52] The planning authorities are obviously the primary institutions that must ensure a more class and race integrated built environment, but that does not mean that the courts have no role to play. The contrary is true.

[53] In appropriate circumstances, our courts have not hesitated to interfere with contractual or trust provisions which it considered inimical to public policy.

[54] I believe that the present type of repurchase clause represents an instance where a court should refuse enforcement.

[55] The position may be different if the facts show that the purchaser is a

speculator or is in some way involved in the business of the purchase and sale of residential properties. It may also be different if the time allowed were considerably more than provided for in the present clause.

[56] If a longer period might save such a clause, it should give the full benefit of any capital growth to the purchaser. In other words, it should operate no differently than a pre-emption clause where the purchase price is determined by market value.

[57] My attention was drawn to a number of matters where similar clauses have been enforced in this division. The first case was that of *Bondev Developments (Pty) Ltd v Mosikare and Others* (case number 50391/2008) [2010] ZAGP PHC 305 (22 April 2010) per Du Plessis J**.** The inequity of the enforcement of this contractual clause that becomes a real right registered against the title deed is well illustrated by the Mosikare matter. The respondents were second purchasers, who paid R 750 000,00 for the property to the original purchaser, but received back only R 390 000,00, as the right being enforced was the developer's right contained in the title deed.

[58] I have also noted other unreported judgments such as *Bondev Midrand(Pty) Ltd v Letsholo and Others* (59/2014) [2015] ZAGPPHC 677 (21 September 2015), *Bondev Midrand (Pty) Ltd v Puling* (58/2014) [2015] ZAGPPHC 1127 (27 October 2015), *Bondev Midrand (Pty) Ltd v Rasalanavho and Others* (47616/2014) [2015] ZAGPPHC 538 (10 June 2015), *Bondev Midrand (Pty) Ltd v Ndlovu and Others* (47619/2014) [2016] ZAGPPHC 137 (7 March 2016), *Bondev Midrand (Pty) Ltd v Phalandwa and Others* (47615/2014)

[2016] ZAGPPHC 956 (2 November 2016), *Bondev Midrand v (Pty) Limited v Ndlangamandla NO and Others* (38331/2015) [2016] ZAGPPHC 939 (11 November 2016).

[59] The reported case of of *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007(6) SA 87 SCA in which this type of retransfer clause came before the Supreme Court of Appeals deals with the question whether default judgments were granted in error. The enforceability of the retransfer clause was not in issue, and its effect on the rights provided for in section 26(1) of the Constitution was not raised. The case therefore cannot be regarded as authority for the uncritical enforcement of the retransfer clause.

[60] I accept for purposes hereof that this type of clause has generally been enforced by this court. I further accept that such clauses have generally been considered, once registered against the title deed, to constitute limited real rights as opposed to personal rights. From a reading of all the unreported cases above, it is clear that there is some discomfort with this type of provision. Respondents regularly try to oppose the enforcement of the clause on the basis of prescription, the existence of disputes of fact or other somewhat more contrived defences.

[61] None of these cases have considered the enforceability of these clauses as tested against the provisions of section 26(1) of the Constitution. I have no hesitation to assert that a court is obliged to test the enforceability of such provisions against the provisions of the Constitution and I have further no hesitation to find that, generally,

they do not pass constitutional muster. Cases in this court that would suggest otherwise, I respectfully regard as having been wrongly decided.

[62] As a result, I was not willing to make an order on the facts as they appear from the papers. I was, however, willing to accede to the withdrawal of the application, which would mean that the Applicant could renew the application on a supplemented set of facts, if it so wished.

C R JANSEN AJ
ACTING JUDGE OF THE
HIGH COURT OF SOUTH AFRICA
PRETORIA

Date of order: 19 August 2016

Date of signed reasons: 19 December 2016

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