IN THE HIGH COURT OF SOUTH

AFRICA GAUTENG DIVISION, PRETORIA

Case Number: 72637/2013

DATE: 14 APRIL 2016

In the matter between:

BONDEV MIDRAND (PTY) LIMITED Applicant

and

PETRUS KGOSI RAMOKGOPA First Respondent

THE REGISTRAR OF DEEDS, PRETORIA Second Respondent

NEDBANK LIMITED Third Respondent

Case Number: 58/2014

In the matter between

BONDEV MIDRAND (PTY) LIMITED Applicant

and

PULING PULING First Respondent

TAPIWANASHE PULING Second Respondent

THE REGISTRAR OF DEEDS Third Respondent

FIRSTRAND BANK LIMITED Fourth Respondent

JUDGMENT ON LEAVE TO APPEAL

MAKHUBELE AJ

INTRODUCTION

[1] The applicant in the two matters, Bondev Midrand (Pty) Limited is one and the same entity and is a property developer. It instituted application proceedings against the respondents and sought similar orders; namely; to compel the first respondent ("Ramokgopa") in case number 72637/2013 ("Ramokgopa matter") and the first and second respondents ("Puling Puling") in case number 58/2014 ("Puling matter") to re-transfer to it certain property , being vacant stands (erfs) that they purchased from it in a township development known as Midstream Estate [Extension 2…, Registration Division J.R, Gauteng held by deeds of transfer TI 8…/2007 and T60../2007] respectively. The re-transfer was sought against payment of the original purchase price paid for the relevant erfs.

[2] Ramokgopa and Puling opposed the applications. Ramokgopa raised one defence only, a special plea of prescription in terms of the provisions of section 10(1) read with 1 1 (d) of the Prescription Act, 68 of 1969. Puling also raised the same special plea, but went further and raised certain defences on the merits of the claim. The arguments[1] on the

[1]Paragraph 18 of Ramokgopa judgment reads as follows:
[18] As a result, and for the sake of convenience, and on my request, all counsel involved agreed to argue the special plea together. The arguments of the counsel for the applicant are basically similar in both matters.

special plea were heard together and after hearing argument, I upheld the special plea in the both matters. The reasons for my judgment which only dealt with the special plea were captured in the judgment of the Ramokgopa matter and confirmed in the Puling matter.[2]

[3] In this application, the applicant seeks leave to appeal certain parts of my judgments (and the whole orders) delivered on 27 October 2015. The parties are referred to as they were cited in the main application.

There was no appearance for Ramokgopa when the application for leave to appeal was heard. However, a representative of his attorneys of record was present in court. The parties accepted that the outcome of this application for leave to appeal is binding in the both matters.

THE NOTICE AND GROUNDS OF APPEAL

[4] According to their respective Notices , the applicants seek leave to appeal *" against certain parts of the jud gment* and *the whole of"* my orders. However, they did not identify the relevant paragraphs in the

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[2] Save for the manner, extent and style of presentation, the arguments of counsel for the respondents in both matters on the point in limine overlap to a greater extent"

2 Paragraphs 59 and 60 of the Puling judgment read as follows: (59] The special plea of prescription is upheld.
The reasons, which I do not intend to reproduce, appear in my judgment in the similar matter of Bondev v Ramokgopa 2 that was heard together with this matter as I have explained above.
After examining the law (statutory and cases), and applying it to the facts of the matters before me, I came to the conclusion that the applicant's claim constitutes a debt as contemplated in the Prescription Act and that it is a debt that prescribes in three years in terms of Section l l (d) thereof.

[60] I have also considered the judgments 2 in this division where applications for re-transfer of properties were either granted or refused. I agree with respondents' counsel's submissions that it would only be binding on subsequent purchasers if the transferor enters into further agreements with them. This was the rationale of the decisions in the judgment of Dodson AJ in the matter of Bondev V Rasalanavho 2 . This is in line with Section 68 of the Deeds Act. It is also a sensible reading of the title condition because , as I have already stated, the restrictions with regard to selling and transfer to third parties only apply within the 18-month period.

judgments, which is problematic because certain "findings" attributed to me were not findings, but merely restatement of submissions made by the parties.

Findings

[5] The findings on which leave to appeal is sought are, save for one item[3], identical in the both applications. I proceed to quote from the application in the matter of Ramokgopa.

> "I. *The finding of fact that the title condition in* favour *of the applicant* does *not limit the first respondent 's right of ownership in the property* or *subtracts from the first respondent 's dominium in the property.*
>
> 2. *The finding of law that the applicant 's right to claim retransfer of the property in terms of the title condition is not* a *real right, but* a *personal right that* was *registrable in terms of the provisions of section 63 of the Deeds Registries Act 47 of 1937 (,,the Deeds Registries Act")*
>
> 3. *The finding of law that the applicant' s right to claim retransfer of the property in terms of the title condition does not constitute* a *personal servitude.*
>
> *4. The finding of law that the applicant 's claim* for *retransfer of the property constitutes* a *debt* as *contemplated in section* II *of the Prescription Act 68 of 1 969 (,,the Prescription Act").*

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[3] Paragraph J of the application in the Puling matter.

5. The finding of law that the applicant 's claim for retransfer of the property had become *prescribed 3 years after expiry of the 18 month period referred to in the title condition.*

[6] In the Puling application[4], the following finding was added;

" I. *The finding of Jaw that the title condition will only* be *binding on subsequent owners if the applicant enters into further agreements with such owners" .*

Grounds of appeal

[7] Except for issues arising from paragraph [6] above, the remainder of the grounds of appeal in the both matters is also identical and in the main, they are argument and criticisms of the findings made by the court

[4] Paragraph l of the Notice of application

and in certain instances incorrect analysis of the findings. For this reason, I will only confine myself to the findings that were identified during oral argument and only in as far as they are indeed findings, and not counsel's interpretation of the judgment.

[8] There is ample authority to the effect that the notice for leave and grounds thereof must be set out in succinct and unambiguous terms for it to comply with the requirements of Rule 49(l) (b) . On whether the notice of leave and its contents complied with the requirements of Rule 49(1) , **Leach J** had the following to say in the matter of **Songono v Minister of Law and Orders**[5]**,**

> *"In attempted compliance therewith the applicant filed* a *document headed*
> *'Application for Leave to Appeal' , in which he* purported *to set out the* grounds upon *which leave to appeal was to be sought. These so-called* 'grounds ' *constitute* a *diatribe of some 1 7* pages *criticizing the judgment, analysing (at times incorrectly) certain of the evidence and the findings* made, *putting* forward *certain submissions and quoting various authorities. This lengthy, convoluted and at times disjointed criticism of the judgment did not clearly and succinctly spell out the* grounds *upon which leave to appeal is sought in clear and unambiguous terms – indeed, it served* more *to deceive, particularly* as, *during course of argument,* there *were several points which applicant' s counsel, Mr Bursey, sought* to *raise which were not indicated in the document.*
> I am *not* aware *of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(l) (b); however, Rule 49(3) is couched in similar terms and also requires the filing of* a *notice of appeal which shall specify ' the grounds upon which the appeal is founded' . In regard to that sub-rule it is now well established that the provisions*
> *thereof* are *peremptory* and *that the grounds of appeal are required, inter alia, to* give *the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet* and *to notify the Court of the points to be raised. Accordingly, insofar as Rule 49(3) is concerned, it has been held that grounds of appeal are* bad *if they are so widely* expressed *that it leaves the appellant free to canvas every finding of fact and every ruling of law* made *by the court* a *quo,* or *if they specify the findings of fact* or *rulings of law appealed against so vaguely as to be of* no *value to either the Court* or *the respondent,* or *if they, in* general, *fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet – see, for example, Harvey* v *Brown 1964 (3) SA 381 (E) at 383; Kilian* v Geregsbode, *Uitenhage, 1980 (1) SA 808 (A) at 815 and Erasmus Superior Court Practice B l -356-357 and the various authorities there cited.*

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[5] 1 996 (4) SA 384 (E) at p. 385 C

It seems to me that, by parity of reasoning, the grounds of appeal required under Rule 49(l) (b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to *enable the Court and the respondent* to *be fully and properly informed* of *the case which the* applicant seeks to make *out and which the respondent* is to meet *in opposing the application* for *leave* to *appeal. Just as Rule 49(3) is peremptory in that regard, Rule 49(l) (b) must also be* regarded *as being peremptory. In my view the lengthy and rambling* notice *of appeal* file in *casu falls woefully short of what is required.* Mr *Bursey suggested that grounds of* appeal *could be gleaned from the notice but that is* not *the point – the point is that the notice must clearly set out the grounds and it is* not for *the Court* to *have* to *analyse* a *lengthy document in an attempt* to *establish what grounds the applicant intended* to *rely upon but did* not *clearly set out.* On *this basis alone the application seems* to me to me *fatally defective and must be dismissed."*

[9] I now proceed to summarize the grounds of appeal and where necessary highlight whether indeed there is such a finding or not. The applicants contend that I erred by;

[9.1] making a finding that the only limitation of ownership imposed by the title condition is the prohibition against selling the property within the period of 18 months.

The applicant chose one aspect of the findings I made after a somewhat detailed analysis of the title condition in question. I did not make a finding that this is the ONLY limitation.

[9.2] making a finding that the applicant 's right was personal in nature but registrable in terms of section 63 of the Deeds Registries Act.

The issue about registration of personal rights is dealt with in the proviso to section 63(1) of the Deeds Registries Act. The applicant's

counsel in his heads of argument chose to ignore this proviso, which I found to be very important.

[9.3] holding that the distinction between Condition B (in favour of the applicant *)* and Condition C (in favour of the Home Owners Association) is that the latter extends into perpetuity whilst the former does not.

[9.4] making a finding that the applicant is required to exercise its discretion *" with* regard *to certain matters that could see the condition existing beyond the 18 months period"* within the said 18 month period.

[9.5] relying on the judgment of Road Accident Fund and Another v Mdeyide 201 1 (2) SA 26 (CC) to support a contention that the applicant' s claim constitute a debt for purposes of prescription.

[9.6] Relying on the broad meaning afforded to the term "debt" for purposes of determining the nature of the applicant' s right.

It is contended that I should have relied on the two requirements as set out in the Supreme Court of Appeal decision in the matter of Willow Waters Homeowners Association (Pty) Ltd 2015 (5) SA 304 ("Willow Waters judgment") to make a finding that *"an*

obligation that may otherwise conform *to the* broad *definition* of *"debt" is servitudinal in nature"* if it meets the two requirements set in that decision"

[9.7] relying on the decisions of Barnett and Others v Minister of Land A f fairs and Others 2007 f 6) SA 313 and Leketi v Tladi NO & Others [201O] 3 ALL SA 519 . These decisions were overturned by the Supreme Court of Appeal on 28 May 2015 in Absa Bank Ltd v Keet 2015 (4) SA 474 (SCA) at para [26]. In para [23] , the SCA found that "an *obligation in respect of a personal right* does *not consist of causing something to* become *the creditor 's property"*

This allegation is completely misleading. I will deal with it later on.

[9.8] in finding that the applicant ' s claim of the property is " *not a personal servitude* and *therefore a limited real right in respect of which the prescription period is* 30 years *as provided* for *in section* 7 *of the Prescription Act" .*

[10] With regard to the additional ground of appeal in the Puling matter; it is alleged that the court erred in finding that *"the title condition will only*

be binding on subsequent owners if the applicant enters into further agreements with such owners".

The argument is that this finding is wrong because the *" title condition expressly provides that it binds successors in title"* and because I made a finding in the Ramokgopa judgment that *"one of the characteristics* of *the present title condition in* favour of *the applicant is that it is binding on successors in title".*

The characteristics in question are not my findings, but what the condition in question purports to provide for. The reason for interpretation is to determine whether on a proper construction , the condition should bind successors in title or not.

Grounds of appeal tendered during oral submissions

[1 1] The grounds of appeal tendered during argument focused on two main issues, namely; that

> [1 1 .1] Mr Horn argued that certain findings I made are in contradiction with the judgment of Du Plessis J in the matter of **Bondev Development (Pty) Ltd v Mosikare and Others**[6] ("Mosikare judgment") which I should have followed.
>
> The finding in question relates to the fact that the condition limits

[6] (50391/ 2008) [2010] ZAGPPHC 305 (22 April 2010)

ownership. In my view, agreeing on this issue does not mean that I should follow the conclusion reached by Du Plessis J. In my judgment, I found that such limitation of ownership is only for a limited period, namely, the first 18 months. Du Plessis J appears to think that the limitation is in perpetuity because according to him, subsequent buyers , even those who purchase the property after the expiry of the 18-month period are in mora and must build the dwelling within a reasonable time. The period of limitation of ownership is important.

The applicant contends that there are now two conflicting judgments on the issues that were before me and Du Plessis J, and on this ground alone, leave to appeal should be granted to the Supreme Court of Appeal to resolve this conflict. I do not agree.

[1 1 .2] The applicant contends that I relied on decisions of Barnett and Others v Minister of Land Affairs and Others[7] ("Barnett ") and Leketi v Tladi NO and Others[8] ("Leketi") that were overturned by the

[7] (304/ 06) [2007] ZASCA 95; [2007] SCA 95 (RSA); 2007 (6) SA 313 (SCA) (6 September 2007)
[8] (117/ 2009) [2010] ZASCA 38; [2010] 3 All SA 519 (SCA) (30 March 2010)

Supreme Court of Appeal in the matter of Absa Bank Limited v Keet[9] ("Keet judgment") .

For this reason alone, leave to appeal should be granted to the Supreme Court of Appeal.

I will deal with this ground of appeal later on.

ORAL SUBMISSIONS

Applicants

[12] As I have already indicated above, the submissions during argument were centered around two issues; (a) the conflict between my judgment and the judgment of Du Plessis J in the Mosikare judgment and (b) reliance on the Barnett and Leketi decisions that have been overturned by the Supreme Court of Appeal in the Keet judgment.

[13] Mr Horn argued that I should have applied the judgment of Du Plessis J to determine the nature of the right in the title condition. Du Plessis J found that the right in the title condition limits ownership and binds successors in title.

[14] He argued further that paragraph 60 of my judgment in the matter of Puling Puling where I stated that: *"[60] have also considered the*

[9] (817/ 2013) [2015] ZASCA 81; 2015 (4) SA 474 (SCA); [2015] 4 All SA 1 (SCA) (28 May 2015)

judgments [10] in this division where applications for re-transfer of properties were either granted or ref used. I agree with respondents' counsel's submissions that it would only be binding on subsequent purchasers if the transferor enters into further agreements with them. This was the rationale of *the decisions in the judgment* of *Dodson AJ in the matter* of *Bondev V Rasalanavho [11]. This is in line with Section 68* of *the Deeds Act. It is also* a *sensible reading* of *the title condition because* , *as I have already stated, the restrictions with regard to selling and transfer to third parties only apply within the 18 month period"* is in conflict with what Du Plessis J stated in page 7 of his judgment that *"On the facts, therefore, the applicant did not prove that the parties had* agreed *on an extended time for performance by the respondents* of *the condition* of *title"*

[15] It was further contended that should have found that the condition in question is a real right as the Supreme Court of Appeal did in the Willow Waters judgment[12].

[16] Furthermore, it was argued that my reliance on Barnett and Leketi decisions in paragraphs 66 and 68 of my judgment in the Ramokgopa matter is enough reason to justify leave to appeal to the Supreme Court of Appeal.

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[10] Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd, case number 05/ 8878 (Witwatersrand Local Division), Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd (128/ 06) [2007] ZASCA 85; [2007] SCA 85 (RSA) ; 2007 (6) SA 87 (SCA) (1 June 2007), Bondev Developments (Pty) Ltd v Plenty Properties 60 (Pty) Ltd and Others (43602/ 08) [2009] ZAGPPHC 346 (2 December 2009), Bondev Development (Pty) Ltd v Mosikare and Others (50391/ 2008) [2010] ZAGPPHC 305 (22 April 2010)Bondev Midrand (Pty) Limited v Rasalanavho and Others (47616/ 2014) [2015] ZAGPPHC 538 (10 June 2015)

[11] Supra.

[12] Supra

[17] The Barnett and Leketi decisions were overturned by the Keet judgment in paragraph 26 where the following was stated.

> *[26] I am aware that we are differing from a* view *that has been expressed in three judgments of this court, albeit in my* view *none of those decisions was dependent upon the correctness of that* view for *the ultimate result. However, to the extent that this* view *could be seen as the ratio decidendi of those decisions, I would hold that it was incorrect. I am aware* of *the restricted basis upon which this Court departs from its earlier decisions, but am of the* view *that this is one of those rare cases in which it is appropriate to* do *so. First, the decision (Barnett) is of reasonably recent* origin *so it cannot be said that people have organised their affairs on the basis that it was correct. Second, the author of the decision has indicated that it should be* reviewed *by this Court. Third, the perpetuation of that* view gives *rise to absurdity in the construction of an important statute and would cause uncertainty in a multitude of relationships.*

[18] The finding I made in paragraph 32 of Ramokgopa matter is wrong. Paragraph [32] of my judgment in the Ramokgopa matter is not a finding though. It is a summary of what was argued before me and it reads as follows " *[32] He argued further that failure to erect a dwelling within the prescribed time frame is a* trigger *event that entitles the applicant to claim re-transfer of the property. This right is not a servitude* . A *servitude is a right to use. Furthermore, not all rights of benefits are a right of servitude.*

[19] The finding that *"the obligation in the title condition* B *to claim*

retransfer of property is *a debt as contemplated in the Prescription Act"* is wrong .

First and second respondents (Puling Puling matter)

[20] Counsel for the first and second respondents, Advocate Wagener SC ("Mr. Wagener") submitted that:

[21J The issue of prescription was not before Du Plessis J in the Mosikare matter, and as such he did not interrogate it. He only deals with it at the bottom of page 3 of the judgment where he stated that "Being a *condition of title, the clause that I have quoted constitutes a limitation* on *the respondents' rights of ownership. If it should* for some reason *not have been part of the title deed there* are *remedies that the respondents could pursue, probably against their seller".*

[221 Du Plessis J did not interrogate the question of what is a "real right".

[23] The fundamental distinction between real and personal rights is found in Paragraph 21 of the Supreme Court of Appeal judgment in the Absa v Keet judgment where the following was stated:

> *"[2 1] That distinction between real rights and personal rights has consistently been* recognised in *our case law [24] and was recently explained by this Court* in *National Stadium South* Africa *(Pty) Ltd* v *Firstrand Bank Ltd [25] para* 3 1:

'The first concerns the distinction between real and personal rights. Real rights have as their object a thing (Latin: res; *Afrikaans: soak). Personal rights have as their object performance by another, and the* duty to *perform may (for present purposes] arise from a contract. Personal rights may give rise to real rights; for instance, a personal obligation to grant someone a servitude matures into a real right on registration. Real rights give rise to competencies: ownership of land entitles the owner to use the land* or *to give others rights in respect thereof. Others may say that ownership consists of a bundle of rights, including the right to use the land, but it* does *not really matter who is right on this point.' "*

[24] The applicant seeks performance of an obligation, namely, re-transfer of the property. The object of the applicant's right in the title condition is not a thing. The personal right in this matter did not mature into real right on registration because its object does not change. The applicant does not obtain any competency, but mere performance by a third party.

[25] The Barnett case is a classic case of Rei Vindicatio because the applicant { the State) as land owner wanted to evict certain persons from its land. The owner, in the Keet decision too wanted to enforce its rights as owner.

[26] The applicant in this matter seeks to elevate its right into a vindicatory claim by contending that the right arises from ownership. It does not have ownership of the property, but a personal right.

[27] Keet judgment is in no way a conflicting judgment because the owner therein was exercising its competency.

[28] The applicant seeks to enforce a claim arising from an obligation to build which gave rise to a choice whether to enforce the condition or not. It is important to make this choice and act within a reasonable time.

[29] Acquisitive prescription has nothing to do with this case.

[30] The only other decision of the High Court on a similar issue as the one in this matter is the judgment of Mbatha J in the matter of **EThekwini Municipality v Mounthaven (pty)** Ltd[13] (Mounthaven judgment)

[31] In conclusion, Mr. Wagener submitted that there are no prospects of success on appeal and that if I were inclined to grant leave, it should be to the Supreme Court of Appeal.

[32] **In reply,** Mr Horn submitted that the fact that there is another judgment on the same point (Mounthaven judgment) is enough reason why leave to appeal should be granted.

[33] He also countered the argument about the object of the applicant 's right being performance and not a thing by stating that the

[13]

[13] (1985/ 2014) [2015] ZAKZDHC 78 (30 September 2015)

obligation relates to the property which is a thing. In conclusion he reiterated that this is acquisitive prescription because the land in question is burdened.

[34] With regard to costs, he submitted that if I grant appeal, costs should be in the appeal.

ANALYSIS AND EVALUATION OF GROUNDS OF APPEAL AND ARGUMENTS ADVANCED

[35] The issues for decision were clearly summed up in paragraph [43] of my judgment in the Ramokgopa matter, and it reads as follows:

> ***"ISSUES FOR DECISION***
>
> *[43] According to the respondent, the issues that I* am *required to determine* are *whether, the applicant 's claim for retransfer of the propert y to itself constitute* a *debt* as *contemplated in the Prescription Act 68 of* 1969 *("the Prescription Act")* and *if* so, *whether the debt has prescribed in terms of section* 1 1 *(d) thereof.*
>
> *The applicant denies that the right is* a *debt* and *contends that the question of prescription should be determined by first examining the nature of the right that is* conferred *by the title condition. The issue here is whether its registration in the* Deed *of Transfer means that it is*

a real right, and is *incapable of prescription. An additional or alternative argument is whether the right is a personal servitude that expires after* 30 *years in terms of section* 7*(1) of the Prescription Act.*

[36] It is important to note that there is no attack on how I arrived at the conclusion that;

(a) registration in the title deed does not elevate the condition to a real right when one takes into account (i) the construction (phrasing) of the title condition in question, (ii) the provisions of the Deeds Registries Act, and (iii) the origins of the subtraction from the dominium test (the background on how such conditions became registrable) ,

(b) the decision of the SCA in the Willow Waters judgment is not applicable (binding on me) in the facts before me,

(c) the issues before me were distinguishable from what Du Plessis J was confronted with in the Mosikare matter. In fact, and as far as I could establish, and as counsel for the respondents in the Puling matter (Mr. Wagener) correctly submitted, Du Plessis J did not go into the discussion with regard to the distinction between real and personal rights. He simply stated that the title condition is a real right.

(37J The only issue, in *my* view that on a flirting glance of the grounds of appeal appears to have merit is whether the reference to the Barnett and Leketi decisions vitiated the findings that I made with regard to the issues that were before me.

[38) It is misleading to contend that I relied on decisions *I* judgments that were overturned by the Supreme Court of Appeal.

The judgments in question came about when I quoted from the decision of the Constitutional Court in the matter of **Road Accident Fund and Another v Mdeyide[14].**

Paragraph [65) of *my* judgment in the Ramokgopa matter reads as follows:

"In the RAF v Mdeyide matter para 1 1[15] Van Der Westhuizen J stated the following

> *"Generally under the* ***Prescription Act, prescription*** *applies to a debt. For the purposes* of *this Act, the term debt has been given a broad meaning to* refer *to an obligation to do something, be it payment* or *delivery* of goods or *to abstain* from *doing something. Although it may on occasion be doubtful whether an obligation* is *indeed a debt in terms* of *the Act, there* is *no doubt that a claim under the RAF Act constitutes a debt. However, the RAF Act regulates the prescription* of *claims under it and*
>
> some *of the differences between the two statutes have been placed at the* core *of this matter.*

[39] In the subsequent paragraphs (66 – 69) of my judgment, I then highlighted the issues that were considered by the courts in the matters that were referred to in the Constitutional Court judgment of RAF v Mdeyide and concluded in paragraph 69 that the claim was a debt.

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[14] (CCT 10/10) [20101 ZACC 18; 2011 (1) BCLR 1 (CC) ; 2011 (2) SA 26 (CC) (30 September 2010 .

[15] With reference to the following authorities: Barnett and Others v Minister of Land Affairs and Others 2007 (6) SA 313 (SCA); 2007 (11) BCLR 1214 (SCA) at para 19 and Desai NO v Desai and Others (19951 ZASCA 113; 1996 (1) SA 141 (SCA) at 146H. Further see section 1 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002

[40] I was aware of the Absa v Keet decision when I wrote my judgment, hence I referred to it right after making reference to the Barnet and Leketi decision.

My view though was that the title condition before me is different from credit agreement clauses such as the one in the Absa v Keet judgment, hence my finding that the applicant's claim is not vindicatory in nature.

[40.1] The applicant has already passed ownership of the property to the respondents in the matters before me for the simple reason that all conditions in that regard have been fulfilled, but has reserved a right to re-claim ownership if the purchaser does not build a dwelling within 18 months of transfer.

This is not the case with clauses such as the one in the Absa v Keet matter. The credit grantor remains owner until the full amount is

paid . In the event of default, it exercises its rights as owner of the property in question.

[41] In defending the Special Plea, the applicant submitted that in order to decide the question of prescription, I should first look at the nature of the right that is conferred on it by the title condition in question. The applicant relied on the fact that the condition to claim re-transfer of the property was registered in the title deed and as such it is a real right and will only expire after 30 years.

It is clear from the analysis I undertook with regard to the law, the phrasing (construction) of the title condition, the history of the subtraction of from the dominium test that the applicant' s contentions in this regard cannot stand.

As I indicated above, there is no attack on this part of the judgment.

[42] The applicant contends without substantiating, that I should not have preferred the wide meaning of the word "debt ".

TEST FOR LEAVE TO APPEAL

f 43] I am not required at this stage to justify, supplement or re-write my judgment. On the same breath, the applicant is not at liberty, at this stage to present a new case, new arguments or supplement its case.

The purpose of the exercise I undertook above was to place in proper context the findings that I made which constitute the grounds of appeal. The applicants seem to have extracted certain words / sentences from certain parts of the judgments, and in certain instances, attributed to the judgments certain findings that were never made.

I may have gone overboard by quoting many authorities and in some instances not indicating the reason for making such references. This does not detract from the findings I made on the issues before me. The applicant does not agree that the word "debt" must be given a wide meaning. However, no submissions were made with regard to interpretation of this word, other than reliance on the fact that the title condition is registered in the Deeds Registry and that it is a real right.

[44] It is a serious misdirection to rely on authorities that have been overturned by higher a court and as correctly submitted by Mr. Horn, the Supreme Court of Appeal would be entitled to interfere.

However, the reference or rather mentioning of those authorities was incidental as they were referred to by the Constitutional Court[16] whilst laying down the principles on the meaning of the word "debt" in the Prescription Act by referring to earlier authorities.

The relevant paragraph is [11] which reads as follows:

[16] RAF V Mdeyide supra

"Generally under the **Prescription Act, prescription** applies to a debt. For the purposes of this Act, the term debt has been given a broad meaning to refer to

on obligation to do something, be it payment or delivery of goods or to abstain from doing something. [12] Although it may on occasion be doubtful whether on obligation is indeed a debt in terms of the Act, [13] there is no doubt that a claim under the RAF Act constitutes a debt. However, the RAF Act regulates the prescription of claims under it and some of the differences between the two statutes hove been placed at the core of this matter"

Footnotes 12 and 13 read as follows:

"**12** See Barnett and Others v Minister of Land Affairs and Others **2007 (6) SA 313** (SCA); **2007 (1 J) BCLR 1214** (SCA) at para 19 and Desai NO v Desai and Others **[19951 ZASCA 113; 1996 (I) SA 141** (SCA) at l46H. Further see **section 1** of the **Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002** for a similarly brood definition of debt, with the additional requirement that the debt must be owed by on organ of state:

"'debt' means any debt arising from any cause of action-

I. which arises from delictuol, contractual or any other liability, including a cause of action which relates to or arises from any-

(i) act performed under or in terms of any low: or

(ii) omission to do anything which should have been done under or in terms of any low: and

(b) for which on organ of state is liable for payment of damages . . .

13 This issue was raised for instance in Njongi v M EC, Deportment of Welfare, Eastern Cope **[20081 ZACC 4: 2008 (4} SA 237** (CC): **2008 (6) BCLR 571** (CC), where this Court raised but ultimately left open the question of whether a constitutional obligation could be considered a debt. In Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd **2009 (3) SA 447** (SCA) at para 13, it was held that a claim for rectification of a contract was not a debt in terms of the **Prescription**

[45] In the matter of Mtirara v Landmark Mthatha (Pty) Ltd [17], Petse ADJP reiterated the test for leave to appeal and stated the following:

> *[14] The requirements* for *leave to appeal have, in a long fine* of *cases, been held to be existence* of *a reasonable prospect* of *success on appeal. (See: R v Baloi 1949* (1) *SA 523 (AJ at 524, R v Nxumalo 1939 AD 580 at 582, R v Ngubane & Others 1945 AD 185 at 187, Capital Building Society v De Jager & Others, De Jager and Another v Capital Building Society 1964* (1) *SA 247 (AJ, Afrikaanse Pers Bpk v Olivier 1949* (2) *SA* 890 *(OJ at* 892 – 893, *S v Ackerman en* 'n *Ander 1973* (1) *SA 765*
> *(AJ and S v Sikosana 1980* (4) *SA 559 (AJ at 562.J*
>
> *[15] Although some* of *the cases cited in the* preceding *paragraph* were *criminal cases it has been held that the test is the same and the same need* for *the test to be applied properly applies also in* civil *cases. (See* : *Botes & Another v Nedbank Limited 1983 (3J* 27 *at 28* C *(ADJ)*
>
> *[16] In* giving *consideration to the application* I *am therefore enjoined by judicial authority to take cognisance* of *the test which is* of *application in matters of this nature. This necessarily entails that* I *should* consider *the application objectively and to the extent that human nature allows disabuse my mind* of *the fact that* I *reached the conclusion that I did in the main application. Indeed judicial authority enjoins* me *to* reflect *dispassionately upon my decision and* decide *whether there is a reasonable prospect that the* Appeal *Court may disagree with my decision.*

[46] am required to consider. objectively, whether there are reasonable prospects of another court coming to a different conclusion than that I arrived at in my judgment.

[47] I have to the best of my ability, now and when writing [18] the judgments on which leave to appeal is sought, considered all the judgments in this Division and elsewhere that dealt with similar issues. As I

[17] 607/2007) [2007) ZAECHC 1 16 (20 December 2007)
[18] Paragraphs 37 to 41 of the Ramokgopa judgment.

indicated in the Ramokgopa judgment, all of them are distinguishable because they were decided on different considerations, even though prescription was initially raised as a defence in some.

[48] I am aware of at least one more judgment that was delivered few weeks before my judgment. This is the judgment of Manamela AJ in the matter of Bondev Midrand (Pty) Ltd v Letsholo and Others[19]

The issue before Manamela AJ is captured in paragraph 2 and it reads as follows:

> *[2] I henceforth refer to the condition quoted above as the building time limit. The applicant has decided to exercise the option in the building time limit and seeks re- transfer of the property back* from *the first and second respondents. As required as part of exercising this option, the applicant tenders the ref und of the purchase price, but accordingly requires the re-transfer to be at the first and second respondents' expense. The application is opposed only by the first and second respondents, but is without prejudice to the rights of the fourth respondent as bondholder over the property.[4] The first and second respondents (the respondents) contend that the applicant is reneging from the latest arrangement or agreement to extend the building time limit, which couldn't be consummated due to a supervening impossibility. Therefore, a brief factual background of the matter is necessary'*

[49] Manamela AJ considered the judgments of Fabricius J and Du Plessis J like I did. In paragraph [l8], he stated, amongst others the following:

> *However, in my view, this does not justify derogation from the principles shared* and *conclusion reached by Du Plessis J in Mosikare. I agree with the decision in Mosikare that the obligation remains despite the lapse in the building time limit* and *therefore the requirement to erect* a *dwelling will* - in *the absence of stipulated time period – have to be within* a *reasonable time. However, as stated above, all these appear to be superfluous because the parties have decided to locate their arguments elsewhere, despite my views at first blush about impossibility of performance relating to the building time limit.*

[19] (59/2014) [2015] Z AGPPHC 677 (21 September 2015)

He then ordered the respondent to re-transfer the property to the applicant. The reasons appear in paragraph [20] where he concluded that:

> *[20) Once I have decided* against *that the existence of the caveat [against the property in the deeds records] does not avail the respondents,* it *follows that the respondents did not fulfil the third condition in the February 2014 arrangement to extend the building time limit. Therefore, there is breach in this* regard, *and the applicant is entitled to exercise the option for a re-transfer of the property back* from *the respondents. The ancillary orders sought* are *in terms of the contract* or *in case the respondents do not cooperate with the* ordered *process.*

[50] I must concede though that the uncertainty that is caused by matters being decided on technicalities and leaving open serious questions of law are not in the interest of justice.

[50.1] The applicant has been party to almost all the judgments that I was referred to during the hearing and those that I considered on my own.

[50.2] As I have already stated above, the only other judgment where a plea of prescription under similar circumstances was upheld and after consideration of the merits thereof is in the judgment of Mbatha J in the Mounthaven matter. The fact that the judgments of Mbatha and I are decisions of single judges does not entitle the applicants to create non-existing conflicts

with an earlier judgment (Du Plessis J) with a view to attract the attention of the Supreme Court of Appeal.

[51] The applicant also criticizes my judgment on the basis that I should have, but did not follow the SCA judgment of Maya JA in the Willow Waters matter to make a finding that "an *obligation that may otherwise* conform *to the* broad *definition of " debt" is servitudinal in nature if it meets the two requirements set in that decision"*

[52] I considered the judgment of Maya JA. I also examined the differences between the title condition that was before Maya JA and the one before me. The former, known as CONDITION C in the title deed has no end because membership of the Home Association is compulsory whereas in the one before me the condition to re-transfer falls off once fulfilled, within the 18-month period or any extended period as the parties may agree.

In paragraphs 55 and 56 of Ramokgopa judgment I stated the following:

> *"[55] Title* ***condition*** C *links ownerships of the erf with perpetual membership of the Home Owners Association . This has no* end *. As Mr. Manalo has put it, it is performance in perpetuity.*
>
> *In coming to the conclusion that* a *similar condition constitutes* a *real right, Maya JA in the Willow Waters matter pointed out the requirements that*

> *must be met (subtraction from the dominium test} and went further to state that "... Whether the title condition embodies a personal or real right which restricts the* exercise *of ownership* is *a matter of interpretation"*[20]
>
> *[56] I* do *not* agree *with the* submission *that registration of personal obligations in the Deed of Transfer determines whether a right* is *real or personal. As I have indicated above, a title condition that* imposes *mere obligations are registrable* in *terms of the* proviso *to section 63(1).*
>
> *As I have already observed above, counsel for the applicant* and *the Learned JA have omitted to quote the proviso*[21] .

[53] There was no plea of prescription in the matter that was before Maya AJ. In paragraph 16, the Learned JA emphasized that irrespective of whether the title condition is a real or personal right, what is important is how it is interpreted.

Accordingly, and f or reasons stated in the judgments, I still do not believe that I should have simply followed the Willow Waters judgment.

[54] With regard to whether registration of the condition in the title deed is of any significance, I also noted in my judgment (bottom of paragraph 56 of the Ramokgopa judgment) that Maya JA did not take into account the proviso to section 63(l) of the Deeds Registries Act,

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[20] Last sentence of paragraph (16] and with reference to the matter of First National Stadium South Africa (pty) Ltd & Others v Firstrand Bank Ltd 2011 (2) SA 157 (SCA) para 33

[21] See paragraph 21 of the judgment. In paragraph 31 the Learned JA indicated that registration is however not decisive.

which in my view is very important in as far as the issues that were before me were concerned, namely, whether registration of a title condition elevates it to real rights. This was not before Maya JA.

Paragraph [21] of the Willow Waters judgment reads as follows:

> *For a condition to be capable* of *valid registration as a real right, the* second *aspect requires that it must carve out a portion* of, or *take away something* from, *the dominium.[IM This principle is embodied* **in** *of the* **Deeds** ***Registries Act 47 of 1 937*** *in terms of which* ***'[n]o deed, or condition in a deed, purporting* to *create or embodying any personal right, and* no *condition which does not restrict the exercise of any right of ownership in respect* of *immovable property, shall be capable* of *registration'."*** (quotation of Section 63(1) as it appears in the Willow Waters judgment) .

[55] The applicant chose how to defend the special plea of prescription. I may re-iterate the applicant's contentions[22] in this regard;

> " *The applicant denies that the right is a debt and contends that the question* of *prescription should be determined by first examining the nature* of *the right that is* conferred *by the title condition. The issue here is whether its registration in the Deed of Transfer* means *that it is a real right, and is incapable* of *prescription.* An *additional* or *alternative argument is whether the right is a personal servitude that expires after 30 years in terms* of *section 7(1)* of *the Prescription* Act."

[56] I did not on my own start an enquiry about Section 63(1) of the Deeds Act. The defence was raised in the Replying Affidavit. If anything, it is the applicant that should have proved that the condition complies with all the requirements of Section 63(1) of the Deeds Act and not the other way round. As I have already noted in my judgment,

[22] Paragraph [43] of Ramokgopa matter.

the applicant's (and Maya JA's) reading of Section 63(1) of the Deeds Act does not take into account the proviso thereof.

[56.1] It is therefore disingenuous on the part of the applicant at this stage to allege that I erred by[23];

> "5. *finding that the applicant's right in terms of the title condition* was personal in *nature, but registrable in terms of section* 63 *of the Deeds Registries Act in circumstances where*
>
> 5.1 *the first respondent did not contend* or prove *that the applicant's right in terms of the condition* was *"complimentary or otherwise to* a *registrable condition".*
>
> 5.2 a *registrable condition to which the applicant's right in terms of the condition may* be *complimentary* or *ancillary has not* been *shown to exist;* and
>
> 5.3 *the applicant is entitled to* become owner *of the property in the event of non-compliance with the title condition"*

[23] Grounds of appeal, paragraph 5.

CONCLUSION AND ORDER

[57] Having considered all the arguments and the grounds of appeal , I am not convinced that there are reasonable prospects of another court coming to a different conclusion than that I arrived at in my judgment. Accordingly, I make the following order:

[58] In case number 72637/2013;

[58.1] The application for leave to appeal is refused; and

[58.2] There is no order of costs.

[59] in case number 58/2014;

[59.1] The application for leave to appeal is refused; and

[59.2] The applicant is ordered to pay the first and the second respondents' costs.

Acting Judge of the High Court

APPEARANCES:

Case number: 72637/2013:

APPLICANT:	**Advocate N.J Horn**
Instructed by:	Tim Du Toit & CO. Inc

Lynnwood, PRETORIA

FIRST RESPONDENT : **None**

Case number: 58/2014:

APPLICANT: **Advocate N.J Horn**

Instructed by: Tim Du Tait & CO. Inc

Lynnwood, PRETORIA

RESPONDENT: **Advocate S.D Wagener SC**

Instructed by: Gerhard Wagenaar Attorneys

Lynnwood Glen, PRETORIA