**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**
**WESTERN CAPE HIGH COURT, CAPE TOWN**

**CASE NUMBER: 24065/2010**

In the matter between:

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| **IVAN KARL STAEGEMANN** | Applicant |
| and | |
| **CORNEL LANGENHOVEN** | First respondent |
| **STANDARD BANK OF SOUTH AFRICA** | Second respondent |
| **JOSEPH CHRISTOFFEL DU PLESSIS** | Third respondent |
| **THE CITY OF CAPE TOWN** | Fourth respondent |

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**JUDGMENT DELIVERED ON 1 JULY 2011**

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**BLIGNAULT J:**

[1] The principal issue in this application is whether the *rei vindicatio* (vindicatory action) becomes prescribed after a period of thirty years or three years.

[2] Applicant, Mr Ivan Karl Staegemann, brought the application against Mr Cornel Langenhoven as first respondent for the recovery of a maroon Nissan Almera motor vehicle bearing

registration number CEY 57510 and engine number QG16337154 ("the Nissan"). The application was launched on 3 November 2010.

[3] Applicant cited three other respondents, namely The Standard Bank of South Africa (second respondent), Mr Josef Christoffel du Plessis (third respondent) and the City of Cape Town (fourth respondent). Second respondent apparently at some stage provided finance for the vehicle to first respondent, third respondent perpetrated the fraudulent scheme that gave rise to this application and fourth respondent will be required to register the Nissan in applicant's name if the application succeeds. No substantive relief is sought against any of these three respondents and they do not oppose the application.

[4] According to applicant he purchased the Nissan on 11 February 2005 from Hertz, a motor vehicle rental company. The Nissan was then registered in his name. He wanted to keep it as his own property or sell it at a profit. Third respondent was his neighbour at the time and offered to assist him in selling the Nissan by showing it to a prospective purchaser. Applicant agreed to this but subject to the condition that he would personally

negotiate the sale with such purchaser. To enable third respondent to show the vehicle to the prospective purchaser, applicant delivered the vehicle and its registration papers to him.

[5] Third respondent, however, sold the Nissan to a third party without applicant's consent and appropriated the proceeds of the sale. The third party sold the vehicle to first respondent. He acquired it in February 2006 and is still in possession thereof. The Nissan was registered in his name. It is common cause that first respondent was an innocent purchaser of the vehicle.

[6] Applicant laid a complaint of fraud against third respondent with the South African Police Service. He was subsequently arraigned in the regional court at Blue Downs on a charge of fraud.

[7] On 27 May 2010 third respondent concluded a plea agreement with the prosecutor (representing the Director of Public Prosecutions) in terms of section 105A of the Criminal Procedure Act 51 of 1977 ("the CPA"). In terms of the agreement third respondent pleaded guilty to the charge of fraud and made admissions as to the facts on which his plea was based. These facts are consistent with applicant's allegations in the present

application. It was recorded in the preamble to the plea agreement that applicant was satisfied with the proposed sentence. The parties agreed that the following sentence would be fair: Imprisonment for a period of 5 (five) years which would be suspended for 5 (five) years on the following conditions:

(i) that third respondent is not convicted of fraud committed during the period of suspension;

(ii) that he pays the amount of R72 500,00 to applicant by way of 10 (ten) monthly instalments of R7 250,00 each as from 1 July 2010.

[8] On 27 May 2010 third respondent was duly convicted and sentenced in terms of the plea agreement. He did not, however, pay any money to applicant and the suspended sentence was put in operation. To the best of applicant's knowledge he was incarcerated in Buffelsjagriver Prison, Swellendam.

[9] Applicant said that he was under the impression that he would get the Nissan back after third respondent had been convicted. This did not happen and he was advised that he would have to take legal action to recover the vehicle. His attempts to

recover the vehicle from first respondent have, however, not been successful. Hence the present application.

[10] First respondent opposed the application. He did not dispute applicant's original ownership of the Nissan but he raised two substantive defences. The first defence is that applicant's claim to recover the vehicle had become prescribed in that a period of more than three years had elapsed from the date on which he obtained knowledge of his claim until this application was launched.

[11] The second defence is one of abandonment, alternatively waiver. It is based, first, on the fact that applicant did not attempt to recover the Nissan from the South African Police Service and, secondly, the recordal in the preamble to the plea agreement that applicant was satisfied with third respondent's sentence. Applicant, so runs the argument, elected to receive the agreed monetary compensation for the Nissan thereby abandoning the vehicle and waiving any right to recover the vehicle from first respondent.

[12] In his replying affidavit applicant contended that the prescription period in respect of his claim to recover the Nissan was 30 (thirty) years and not 3 (three) years. As to the defence of abandonment or waiver he said that prior to the conclusion of the plea agreement he had enquired from the state prosecutor about the return of his vehicle as this was not apparent from the terms of the agreement. He was informed that the agreement did not deal with the question of the return of the vehicle and that he would have to pursue his claim in a civil court. He then consulted his attorney and the present application was brought.

[13] The application was heard on 13 June 2011. Mr L J van Rensburg of the firm Van Rensburg & Co appeared on behalf of applicant. Mr E J J Spamer appeared on behalf of first respondent.

**Prescription**

[14] The first issue is that of prescription. Mr van Rensburg submitted that applicant's claim is the *rei vindicatio* which is an incident of ownership. He relied on section 1 of the Prescription Act 68 of 1969 ("the Prescription Act") which provides that

ownership of a thing can only be acquired by possession for a period of 30 (thirty) years. This section reads as follows:

> ***"1. Acquisition of ownership by prescription.***—*Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years."*

[15] Mr Spamer, on the other hand, submitted that applicant's claim is a debt which had become extinguished after a period of three years. He relied on section 10(1), read with section 11(d), of the Prescription Act for the contention that such a debt is extinguished by the lapse of a period of three years. He submitted that debt has a wide and general meaning and would include the *rei vindicatio*. He referred, *inter alia,* to *Desai NO v Desai and Others* 1996 (1) SA 141 (A) at 146IJ:

> *"The term 'debt' is not defined in the Act, but in the context of s 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something."*

[16] It seems to me that the solution of the prescription question is to be found in the basic distinction in our law between a real right (*jus in re*) and a personal right (*jus in personam).* The distinction has its origin in Roman law. See Reinhard Zimmerman *The Law of Obligations* pp 6/7:

> *"The essential element of an obligation in developed Roman law, therefore, was the fact that the debtor was directly bound to make performance.*
>
> ... ... ... ...
>
> *(The) remedy, in the case of obligations, was always an actio in personam: the plaintiff was not asserting a relationship between a person and a thing (in the sense that he could bring his remedy against whoever was, by some act, denying the plaintiff's alleged right to the object in question – that was the crucial point in an actio in rem), but rather a relationship between two persons; the plaintiff set out to sue the particular defendant because he, personally, was under a duty towards him, and not because (for instance) he happened to be in possession of some of the plaintiff's property. If one translates this into the language of substantive law, one can say that the law of obligations is concerned with rights in personam, whilst rights in rem are the subject matter of the law of property."*

See also C G van der Merwe in *LAWSA* (first reissue) Vol 27 Things para 232 for a summary of the development of the distinction in Roman law between *actiones in rem* and *actiones in*

*personam* to the modern division between the law of things and the law of obligations.

[17] The distinction between a real right and a personal right has consistently been recognized in our case law. See *Smith v Farelly's Trustee* 1904 TS 949 at 958; *Ex parte Geldenhuys* 1926 OPD 155 at 164; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049 D/E-F; *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 879 (A) at 884I-885A and *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) para [31]:

> *"[31] The first concerns the distinction between real and personal rights. Real rights have as their object a thing (Latin: res; Afrikaans: saak). Personal rights have as their object performance by another, and the duty to perform may (for present purposes) arise from a contract."*

[18] Ownership is the most comprehensive real right embracing a wide spectrum of competencies. The *rei vindicatio* (vindicatory action) is the remedy that is available to an owner for the recovery of the thing from whomsoever is in possession thereof. See *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-E:

*"It may be difficult to define dominium comprehensively (cf. Johannesburg Municipal Council v Rand Townships Registrar and Others, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in Munsamy v Gengemma, 1954 (4) SA 468 (N) at pp. 470H - 471E) that one of its incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res - the onus being on the defendant to allege and establish any right to continue to hold against the owner (cf. Jeena v Minister of Lands, 1955 (2) SA 380 (AD) at pp. 382E, 383)."*

[19] An obligation, on the other hand, is equivalent to a right *in personam* and its correlative duty *in personam*. See the following remarks by L T C Harms in *LAWSA* (second edition) Vol 19 Obligations at paras 217, 218 and 221:

***Para 217*** *"The law of obligations (in the sense of vorderingsreg in Afrikaans and Forderungsrecht in German) is concerned with rights and duties in personam…. … …*

***Para 218*** *"An obligation is a legal or jural bond (jural tie) between two legal subjects in terms of which the one, the creditor, has a right to a particular performance against the other, the debtor, while the debtor has a corresponding duty to render the performance."*

***Para 221*** *"An obligation is always a relation (bond or tie) between two or more legal subjects. For this reason the creditor's right is called a personal right (ius in personam). A real right (ius in rem), on the other hand, primarily constitutes a relation between a legal subject and a legal object (thing)."*

[20] Turning to the Prescription Act one finds an obvious distinction between the acquisitive prescription of real rights (ownership and servitudes) which is dealt with in chapters 1 and 2 and the extinctive prescription of obligations which is dealt with in chapter 3. The underlying principles were described with great clarity by Prof J C de Wet in para 5 of a memorandum which he prepared for the Law Review Commission for purposes of the redrafting of the 1943 Prescription Act. It has been published in J J Gauntlett *J C de Wet Opuscula Miscellanea* at 77-78. It is worth quoting the paragraph in full:

*"Dit is 'n ou strydvraag of mens by verjaring met een regsinstelling te doen het wat twee vertakkings het, tw verkrygende en bevrydende verjaring, dan wel of hier eintlik twee selfstandige regsinstellings is. Na dit my voorkom het mens hier eintlik met twee selfstandige regsfigure te doen en is selfs die*

*uitdrukkings 'verkrygende' en 'bevrydende' verjaring ietwat ongelukkig en misleidend. Dit is waar dat by albei regsfigure tydsverloop 'n rol speel en dat sekere omstandighede, wat verband hou met die persoon teen wie 'verjaring loop', by albei regsfigure te pas kom, maar tog berus die twee regsinstelslings op verskillende grondslae. In die geval van verkrygende verjaring het mens met saaklike regte te doen, waar dit nie net gaan oor die verkryging van 'n reg deur die een en die verlies van 'n reg deur die ander nie, maar ook met die skyn wat derdes in hulle verhoudings met die een of die ander kan raak. Die ratio vir die verkryging van saaklike regte deur verjaring is die bestendiging van 'n feitlike toestand, wat vir 'n lang termyn bestaan het, en waarop derdes ook kan afgaan in hulle verhoudings met die oënskynlike reghebbende. By bevrydende verjaring het mens meer bepaald te doen met die verhouding tussen skuldeiser en skuldenaar, en dien verjaring in die eerste plek om die skuldenaar te beskerm teen eise wat miskien nooit ontstaan het nie of reeds gedelg is. Die verbintenis is uit sy aard en wese 'n tydelike verhouding wat bestem is om deur voldoening tot niet te gaan, en bowendien 'n verhouding tussen skuldeiser en skuldenaar, waarby derdes slegs onregstreeks betrokke is. 'n Saaklike reg, daarenteen, is 'n verhouding van 'n duursame aard, wat teenoor elkeen en iedereen gehandhaaf kan word, en waarby dit in die verkeer stremmend kan werk indien buitestaners nie met vertroue op die skyn kan afgaan nie."*

[21] In my view the scheme of the Prescription Act fits in exactly with this distinction between real rights and personal rights. Real rights are subject to acquisitive prescription and personal rights to

extinctive prescription. There are furthermore *indicia* in the Prescription Act supporting this interpretation. Each of the chapters dealing with acquisitive and extinctive prescription contains a section headed "*Judicial interruption of prescription*". Section 4(1) (which is in the chapter dealing with the acquisitive prescription of ownership) reads as follows:

> *"4(1) The running of prescription shall ... ... ... be interrupted by the service on the possessor of the thing in question of any process whereby any person claims ownership in that thing."*

Section 14(1) (which is in the chapter dealing with extinctive prescription) reads as follows:

> *"14(1) The running of prescription shall ... ... ... be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt* "

The *rei vindicatio* is clearly a claim to ownership in a thing. It can not on any reasonable interpretation be described as a claim for payment of a debt.

[22] The contrary interpretation, furthermore, gives rise to an anomalous situation. If the *rei vindicatio* were to be extinguished

after a period of three years, the owner, *in casu* applicant, would thereafter be an owner in name only. He would never be able to exercise any of the powers that comprise ownership. The possessor of the thing, first respondent in the postulated scenario, would not be the owner of the thing but *de facto* he would be able to exercise all such powers except the institution of the *rei vindicatio* which, as he would not be the owner, would not be available to him.

[23] I am accordingly inclined to the view that applicant's *rei vindicatio* did not become prescribed after a period of three years. There are, however, two *dicta* which appear to contradict my opinion in this regard. They need to be considered.

[24] In *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) van der Westhuizen J made certain general remarks in regard to prescription. In para [11] of the judgment he said, *inter alia*, 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."*

[25] A footnote to this statement (No 12) contains, *inter alia,* a reference to *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) para 19. This paragraph reads as follows:

> *"[19] In my view it is fair to say that the government was aware of the identities of the defendants and of the facts upon which its claims against them rely, more than three years before the present action was instituted. I am also prepared to accept that the vindicatory relief which the government seeks to enforce constitutes a 'debt' as contemplated by the Prescription Act. Though the Act does not define the term 'debt', it has been held that, for purposes of the Act, the term has a wide and general meaning and that it includes an obligation to do something or refrain from doing something (see eg Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd 1981 (3) SA 340 (A) at 344F - G and Desai NO v Desai and Others 1996 (1) SA 141 (A) at 146H - J). Thus understood, I can see no reason why it would not include a claim for the enforcement of an owner's rights to property (see also eg Evins v Shield Insurance Co Ltd 1979 (3) SA 1136 (W) at 1141F - G)."*

[26] On the face of it this statement in the *Barnett* judgment is to the effect that the *rei vindicatio* is a debt that becomes prescribed after a period of three years. The statement, however, requires some analysis. It is apparent from the judgment that the passage in question is *obiter* as the learned judge (Brand JA) assumed that

the claim in question was a debt to which the prescription period of three years was applicable. On that assumption he held that the debt had in any event not become prescribed. For that reason it was not necessary for Brand JA to examine the prescription issue in depth.

[27] The only authority mentioned by Brand JA in regard to the prescription of the *rei vindicatio* is *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F – G where it was said that

> *"the word 'debt' in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property."*

This statement, by a single judge, is also *obiter* and, on the face of it, without any analysis of the issue.

[28] I am of the view, therefore, that I am not precluded by any authority from deciding the question of prescription in favour of applicant. His *rei vindicatio* for the return of the Nissan did not become prescribed.

**Abandonment**

[29] First respondent's second defence is one of abandonment or waiver. Inasmuch as one is dealing with ownership of a thing and not an obligation, the appropriate legal concept would be abandonment and not waiver. In principle, however, the requirements for abandonment and waiver appear to be not dissimilar.

[30] The nature of abandonment in our law has been described in *Reck v Mills en 'n Ander* 1990 (1) SA 751 (A) at 757C-E as follows:

> *"In hierdie verband is dit gewens om daarop te wys dat volgens ons gemene reg word eiendomsreg oor 'n saak deur derelictio verloor wanneer 'n eienaar sy saak prysgee of abandonneer met die bedoeling om nie meer eienaar daarvan te wees nie. Raadpleeg Inst 2.1.47; De Groot 2.1.52, 2.32.3; Vinnius ad Inst 2.1.46 nr1; Van Leeuwen CF 1.2.1.18, 1.2.3.14; Voet 41.1.10; Van der Keessel ad Gr 2.32.3. Sodanige saak is dan 'n res derelicta sonder 'n eienaar (res nullius ). Die persoon wat as occupator fisieke beheer (detentio, corpus, factum ) daarvan verkry met die bedoeling om eienaar daarvan te wees, word besitter sowel as eienaar daarvan deur occupatio of toe-eiening. Raadpleeg Voet 41.1.2, Groenewegen ad Inst 2.1.47."*

[31] The onus is upon first respondent to prove abandonment. See the oft-quoted statement in Laws v Rutherfurd 1924 AD 261 at 263:

> *"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."*

See also the remark of Leach JA in *Meintjes NO v Coetzer and Others* 2010 (5) SA 186 (SCA) at 195A:

> *"… …it is inherently improbable that a person will lightly waive the right of ownership in valuable property out of which he or she has been defrauded."*

[32] The relevant facts in this regard are the following:

(a) Shortly after the Nissan had been stolen one Viljoen contacted first respondent on behalf of applicant and informed him that applicant wanted the vehicle back. First respondent refused to return the vehicle to him.

(b) Applicant was under the impression that he would only get the vehicle back once third respondent had been convicted in the criminal case.

(c) When applicant laid criminal charges against third respondent he asked the police to seize the vehicle and return it to him. The police did not comply with this request.

(d) At the magistrate's court in May 2007 applicant told first respondent that the vehicle had been stolen and that he wanted it back. First respondent refused to hand it back to him.

(e) After the conclusion of the criminal proceedings applicant consulted an attorney and then launched this application.

[33] First respondent's defence of abandonment is primarily based on the statement in the plea agreement that applicant was satisfied with the sentence. The argument is founded upon the doctrine of election. Counsel for first respondent submitted that applicant was faced with a choice. He could either agree to the

compensation awarded to him by way of the suspensive condition to be imposed as part of third respondent's sentence or he could have attempted to recover the vehicle from first respondent. He chose to accept the monetary compensation.

[34] It seems to me that first respondent's argument faces two difficulties. The first is that the doctrine of election can only apply where the remedies in question are truly inconsistent. See *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 626H-627B:

> *"These are two separate and distinct rights of action, each with its own valid causa. No question of election arises, either from the wording of the agreement or by operation of law. Where remedies are not inconsistent the pursuit of one cannot per se exclude the other. In this respect the words of Beyers JA in Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another 1965 (4) SA 373 (A) at 380 in fine are particularly apposite where he said:*
>
> > *'I am not aware of any general proposition that a plaintiff who has two or more remedies at his disposal must elect at a given point of time which of them he intends to pursue, and that, having elected one, he is taken to have abandoned all others. Such a situation might well arise where the choice lies between two inconsistent remedies and the plaintiff commits himself*

*unequivocally to the one or other of them. But that is not the case here.'*

*In the present instance Total was not faced with two inconsistent remedies; it had separate remedies against Van Vuuren (based on the settlement order) and Fourie (based on the agreement). It was at liberty to pursue both. An election generally involves waiver: one right is waived by choosing to exercise another right which is inconsistent with the former (Feinstein v Niggli and Another 1981 (2) SA 684 (A) at 698G)."*

See also *Citibank NA v Thandroyen Fruit Wholesalers CC and Others* 2007 (6) SA 110 (SCA) para [12].

[35] In my view the remedies that were available to applicant were not inconsistent. He had at his disposal the *rei vindicatio,* as an incident of his ownership, to recover the vehicle from first respondent. At the same he had a delictual claim for damages against third respondent. The suspensive condition that provided for compensation was imposed in terms of the court's powers in terms of section 300 of the CPA. The relevant parts of this section read as follows:

*"(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to*

*some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss:*

*... ... ...*

*(3) (a) An award made under this section-*

*(i) by a magistrate's court, shall have the effect of a civil judgment of that court;*

*(ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.*

*... ... ...*

*(5) (a) A person in whose favour an award has been made under this section may within sixty days after the date on which the award was made, in writing renounce the award by lodging with the registrar or clerk of the court in question a document of renunciation and, where applicable, by making a repayment of any moneys paid under subsection (4).*

*(b) Where the person concerned does not renounce an award under paragraph (a) within the period of sixty days, no person against whom the award was made shall be liable at the suit of the person concerned to any other civil proceedings in respect of the injury for which the award was made."*

[36] It is clear first that in terms of section 300 of the CPA the compensation order only affected civil proceedings by applicant against third respondent. In effect it replaced applicant's delictual claim against him. The compensation order, however, did not

purport to affect any of applicant's claims against first respondent, which is not surprising as first respondent was not even a party to the plea agreement.

[37] First respondent's second difficulty is that he has not proved that applicant had full knowledge of his rights or intended to abandon such rights. Applicant denies this and his conduct has been consistent with such denial. No evidence was adduced by first respondent to gainsay applicant's testimony in this regard.

[38] I am accordingly of the view that first respondent's defence of abandonment also fails. Applicant is therefore entitled to the relief sought by him.

[39] In the result, I grant the following orders:

(a) It is declared that the Maroon Nissan Almera motor vehicle bearing registration number CEY57510 and engine number QG16337154 (in this order referred to as the vehicle), is the exclusive property of applicant.

(b) The sheriff of this court is authorised and directed to attach and remove the vehicle from the possession of first respondent and deliver the vehicle to applicant.

(c) Fourth respondent is directed to register the vehicle into the name of applicant and provide applicant with validly issued registration papers against compliance by applicant of fourth respondent's normal registration requirements.

(d) First respondent is ordered to pay applicant's costs.

A P BLIGNAULT