

**November 2017**

*Without Prejudice*

The Supreme Court of Appeal (SCA) handed down judgment in the matter of *eThekweni Municipality v Mounthaven (Pty) Ltd* (1068/2016) [2017] ZASCA 129 (29 September 2017). In this matter the eThekweni Municipality (Municipality) sold vacant land to Mounthaven (Proprietary) Limited (Respondent), subject to a reversionary right. The issue before it was whether or not a claim for re-transfer of property from a current owner to the previous owner constitutes a "debt" as contemplated in Chapter III of the Prescription Act 68 of 1969.

Three days after handing down judgment in the *Mounthaven* matter, the SCA also handed down judgment in the matter of *Bondev Midrand (Pty) Limited v Puling and Another, Bondev Midrand (Pty) Limited v Ramokgopa* (802/2016, 803/2016) [2017] ZASCA 141 (2 October 2017). In this matter Bondev Midrand (Proprietary) Limited (Developer) is the developer who developed Midstream Estate and imposed a reversionary condition in the Deeds of Transfer for the properties in the estate. In terms of such a condition the transferees, or their successors in title, are liable to erect dwellings on the properties within a specified time, failing which the Developer will be entitled, but not obliged, to claim re-transfer of the properties.

The cases relate to the interpretation "debt" as specified in the Prescription Act and in arriving at the interpretation thereof the SCA had to ultimately decide whether a reversionary condition, as appearing in a Deed of Transfer, constitutes a limited real right or a personal right.

## **Reversionary rights and registration thereof**

A reversionary right is a registered condition embodied in a Deed of Transfer that on the happening of a particular event, or the non-happening thereof, ownership of the property concerned reverts to the enforcer.

More often than not when municipalities sell vacant land they do so subject to a reversionary condition that the new owner must erect a dwelling within a specified period, failing which the property must revert to the municipality. Improvements built on any land increases the value thereof, translating to municipalities valuing the property higher than when it was vacant. Similarly, when developers sell vacant land they do so subject to a reversionary condition to ensure that the required aesthetics in a particular estate are complied with and maintained.

Section 65(1) of the Deeds Registries Act 47 of 1937 provides that conditions, which restrict the exercise of any right of ownership in a property, may be included in any Deed of Transfer, if they are capable of being enforced by a person who is mentioned and has accepted such right. In practice, a reversionary right is created first in a Power of Attorney to pass transfer and then embodied as a condition in a Deed of Transfer.

### **Mounthaven judgment and reasoning thereof**

In the *Mounthaven* matter the property was sold by the Municipality to the Respondent at a public auction with a reversionary right embodied in a sale agreement, and such reversionary right was incorporated as a condition in a Deed of Transfer in terms of section 65(1) of the Act. The Respondent failed to develop the property sold by the Municipality within the period of three years as specified in the reversionary condition.

Some 27 years after the property was sold, the Municipality purported to invoke the reversionary condition and demanded re-transfer from the Respondent. The Respondent refused to re-transfer the property and the Municipality responded by launching a court action against the Respondent to compel re-transfer. In court, the Respondent took the point that the claim to re-transfer constituted a debt as contemplated in Chapter III of the Prescription Act, and since three years had passed the claim had prescribed. The Municipality submitted that the Prescription Act was not applicable because the claim to re-transfer did not constitute a debt.

The court of first instance found that a claim to re-transfer constitutes a debt and as such the claim by the Municipality prescribed after three years. The Municipality took the decision on appeal.

To arrive at its decision, the SCA discussed case law regarding the Prescription Act. The court observed that an interpretation that restricts the meaning of debt to delivery of goods confines it to the delivery of movables to the exclusion of immovable property, and this created baseless distinction between movable and immovable property. That being so, this led to the question whether a reversionary condition constitutes a limited real right or personal right?

In arriving at an answer, the SCA observed that a right to claim re-transfer required the Respondent to do something in favour of the Municipality. Such a right in favour of the Municipality, it was held, is not absolute but rather a relative one because it can only be enforced against a determined individual and not against the whole world. The SCA went as far as to state that one is concerned with the relationship between the two parties and their successors in title, and this is akin to a relationship between a creditor and debtor.

It must be emphasised, for reasons to follow below, that the SCA concluded that a reversionary right is enforceable against the Respondent or its successor in title. Surely as soon as successor in title is able to enforce then such is enforcement "against the whole world"?

### **Bondev Midrand judgment and reasoning thereof**

The respondents in the *Bondev Midrand* matter failed to erect dwellings on the properties within the period specified in the reversionary condition contained in the Deeds of Transfer. Some 17 years after the properties were sold to the respondents the Developer purported to invoke the

reversionary condition and demanded re-transfer from the respondents.

The respondents refused and the Developer responded by launching court actions against them to compel the re-transfer. In court, and similar to the *Mounthaven* matter, the respondents took the point that the claims to re-transfer constituted a debt and, since three years had passed, the claims had prescribed. The Developer argued that the registered condition gave rise to a limited real right, which does not prescribe after three years.

The courts of first instance found that the Developer was seeking to enforce a debt, as envisaged in section 11(d) of the Prescription Act, which had prescribed and became unenforceable because more than three years had lapsed after the "debt" became due. The Developer took the courts of instance's decision on appeal.

To arrive at its decision the Supreme Court of Appeal also discussed case law regarding the Prescription Act, but unlike the *Mounthaven* matter discussed case law regarding the distinction between personal rights and real rights in greater detail.

The SCA held that a reversionary condition consists of two parts – in the first part of the condition the obligation is on the transferee, or its successor in title, to erect a dwelling on the property within a specified time. In the second part of the condition it is provided that in the event that a dwelling is not erected within such a specified time then the Developer, and no one else, is entitled to have the property re-transferred to it.

The SCA thus held that on the one hand the first part of the condition, that is the obligation to erect a dwelling within a specified time, reflects an intention to bind not only the transferee, but also his/her/its successors in title. That being so the obligation to erect a dwelling is a limited real right that is not capable of prescribing. On the other hand the second part of the condition - the right a developer has to claim re-transfer of a property is a right that may only be enforced by a particular developer and no one else. That being so, the right to claim re-transfer is a personal right that is capable of prescribing.

## **Conveyancing practice**

In conveyancing practice, one has always looked at a reversionary condition from the perspective of the registered owner and not the enforcer. One distinguishes between a reversionary right that binds successors in title of the registered owner of the property concerned and one that merely binds only the existing owner. The distinction then comes down to careful reading of the wording of a particular condition. Once the distinction is made, one is better able to decide whether a reversionary right is a personal right or a limited real right.

It has always been understood in practice that where a condition embodying a reversionary right is worded to not bind successors in title of the existing owner then such a right will lapse on the death of the existing owner, making the right to be a personal right. In the registration of transfer process the condition will be deemed to have lapsed once documentary evidence that a dwelling has been erected on the property, or that the existing owner is dead, is produced to a Registrar of

Deeds concerned. Should a dwelling not have been erected within the specified time then the enforcer must waive the right and produce documentary evidence thereof, failing which the Registrar will not allow for registration of transfer to take place.

Where a condition embodying a reversionary right is worded to bind successors in title of the existing owner then such a right does not lapse on death of the owner, making for the right to be a limited right. In the registration of transfer process the condition will lapse once documentary evidence that a dwelling has been erected is produced. Should a dwelling not have been erected within the specified time then the enforcer must waive the right, failing which the Registrar will not allow for transfer to take place unless the property is re-transferred back to the enforcer.

In conclusion, in light of the *Bondev Midrand* and *Mounthaven* matters, in future one will have to look at the particular wording of a reversionary condition from the perspective of both the registered owner of the property and the enforcer.

In the *Bondev Midrand* matter the SCA arrived at the same conclusion as the *Mounthaven* matter, but better reasoned the conclusion. Unlike the *Mounthaven* judgment the SCA in the *Bondev Midrand* matter unpacked the issue by looking at whether or not there is a successor in title who is obliged to perform on the one hand, and whether or not there is a successor in title who is entitled to the performance on the other hand.

More often than not a reversionary clause is drafted so that a successor in title of the transferee is bound by the condition. However, as is seen in the *Bondev Midrand* matter, unless the clause is drafted to also allow a successor in title of the enforcer to be able to enforce the right then such a right is personal and thus capable of prescribing. In such a scenario, as is the law currently, reversionary rights are without any consequence – that is, the registered owner is compelled to erect a dwelling within the specified time and if he/she/it does not erect the dwelling within such time then the enforcer will not be entitled to a re-transfer, and worse the right to claim re-transfer is capable of prescribing after three years.

In light of the two SCA judgments the Registrars and/or Chief Registrar will most likely issue circular/s giving direction as to how examiners must handle reversionary rights, especially in instances where such rights have lapsed due to them having prescribed. In the interim, it is suggested that going forward reversionary clauses should be drafted so that both successors in title of the transferee and the enforcer are bound/entitled by/to the reversionary obligation/right. In other words, over and above the transferee, or his/her/its successor in title, having the obligation to erect a dwelling within a specified period the clause should also state that the transferor, or his/her/its successor in title, is entitled to re-transfer in the event that a dwelling is not erected within a specified time.

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