

SUMMARY OF THE JUDGMENT

DEVELOPER'S REVERSIONARY RIGHT PRESCRIBES

Bondev Midrand (Pty) Limited v Ramokgopa (72637/2013) [2015] ZAGPPHC (27 October 2015)

Developers often include a clause in their agreements requiring purchasers to erect buildings on the stands bought within a given time, so as to prompt establishment of a township without vacant lots. Depending on the wording employed, and despite this provision being registered in a title deed and granting the developer the right to claim re-transfer if the buildings were not timeously erected, the right to claim re-transfer can prescribe in the hands of the developer, as this judgment shows.

FACTS

In January 2007, Bondev Midrand (Pty) Ltd (Bondev), a property developer, and Ramokgopa entered into an agreement for sale of immovable property in respect of a vacant stand in a proposed development. The agreement contained a clause that obliged the purchaser to erect buildings on the property within 18 months of the date of proclamation of the township, "failing which the SELLER shall be entitled (but not obliged) to claim that the PROPERTY be retransferred to the SELLER at the cost of the PURCHASER against repayment of the original purchase price to the PURCHASER, interest free."

Ramokgopa took transfer of the property on 30 May 2007, subject to the title deed condition which provided that the "Transferee or his Successors in Title will be liable to erect a dwelling on the property within 18 (EIGHTEEN) months from 16 November 2006, failing which the Transferor will be entitled, but not obliged to claim that the property is transferred to the Transferor at the cost of the Transferee against payment by the Transferor OF THE ORIGINAL PURCHASE PRICE, INTEREST FREE. The Transferee shall not within the said period sell or transfer the property without the Transferor's written consent. This period can be extended at the discretion of the Developer."

Ramokgopa did not erect a dwelling on the property within the 18 months period referred to in the title deed and neither was the building period extended. After initial exchange of correspondence, Bondev issued summons in January 2014 in which it sought an order to compel Ramokgopa to re-transfer the property to it.

In response, Ramokgopa raised a point *in limine* arguing that Bondev's claim had prescribed. He argued that Bondev's claim arose at the expiry of the 18 months period referred to in the title deed, which was 16 November 2006. The claim, being a debt in terms of the provisions of the Prescription Act, prescribed three years thereafter on

16 May 2011.

Bondev denied that its claim for re-transfer of the property constituted a debt as defined in the Prescription Act. It argued that its right was registered against the property's title deed, and as such constituted a real right enforceable between the parties and against the general public. The fact that it is a real right means that it was not capable of prescription until it was complied with.

HELD:

Was the claim for re-transfer of the property to Bondev a debt as contemplated in the Prescription Act? If so, did the debt prescribe?

- The issue here was whether registration of the condition in the title deed meant that it was a real right and incapable of prescription. An alternative argument was whether the right is a personal servitude that expires after 30 years in terms of section 7(1) of the Prescription Act.
- It is clear from a proper reading of the provisions of the Deeds Registries Act that registration of conditions that create personal obligations in a title deed does not elevate them to real rights.
- A personal right does not limit the right of ownership in the property. The holder thereof has a right to claim specific performance from another person. The right may be created by agreement.
- The mere fact that a personal right has been registered in the deed of transfer does not change its nature. The effect of the provision is a matter of interpretation, taking into account the wording of the relevant clause.
- The condition in the deed of transfer in the matter before the court here, in terms of which the contracting parties inserted a clause to claim re-transfer of property upon the happening of a specific condition, are known as reversionary clauses and whether or not they are a burden on the land or a specific person depends on how they have been constructed.
- The characteristics of the title condition in the present matter are the following:
 - It can only be enforced by Bondev against the transferee and successors in title.
 - Bondev is entitled, but not obliged, to claim re-transfer if no dwelling is erected on the property within 18 months from 16 November 2006.

- Within the said 18 months, the transferee may not sell or transfer the property without Bondev's consent.
 - The period can be extended at the discretion of Bondev.
- Thus, if for any reason Bondev ceased to exist, its successor(s) in title will not have legal standing to enforce it against the transferees and their successors in title. Furthermore, the restriction with regard to selling and transfer of the property is only applicable within the 18 month period.
- A transferee (such as Ramokgoba) is restricted from selling and transferring the property without the transferor's consent within the stipulated period, namely 18 months from 16 November 2006. Nothing would however have prevented Ramokgoba from validly selling and transferring the property without the consent of Bondev after the expiry of the 18 months period.
- It is also clear from a reading of the title condition that Bondev is required to exercise its discretion with regard to certain matters that could see this condition existing beyond the 18 months period, such as:
 - deciding whether or not to claim re-transfer of the property if no building is erected within 18 months from 16 November 2006.
 - deciding whether or not to extend the 18 month period.
- With regard to the decisions that Bondev is required to make, on a reading of the title condition, it appears that they must be made before the expiry of the 18 months period.
- Clearly therefore, this was a personal right enforceable between Bondev and Ramokgoba only.

Was Bondev's claim a debt as contemplated in the Prescription Act?

- Yes, indeed, the obligation in the title condition to claim re-transfer of property is a debt as contemplated in the Prescription Act, as was held in previous case law.
- Clauses such as the one under consideration must be distinguished from clauses in credit agreements in terms of which the credit grantor reserves its rights to claim return of the object on breach of the contract. Applications to claim return of property (such as motor vehicles on breach of a credit agreement) are claims based on ownership of the property (*rei vindicatio*) and the courts have correctly held that the Prescription Act is not applicable in the latter.

- Bondev's claim for re-transfer of the property to itself constituted a debt as contemplated in the Prescription Act 68 of 1969.

Did the debt prescribe?

- Yes, Bondev's claim indeed prescribed as the summons was issued after three years.

Ramokgoba's plea of prescription was upheld with costs.

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