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SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

TITLE DEED CONDITION ALLOWING RE-TRANSFER OF PROPERTY IF OWNER DOES NOT BUILD ON TIME: CAN THIS REVERSIONARY RIGHT PRESCRIBE?

eThekwini Municipality v Mounthaven (Pty) Ltd (CCT 05/18) [2018] ZACC 43 (31 October 2018)

Municipalities regularly sell vacant property to developers for commercial and residential development. Often a title deed condition is imposed that the property must be improved within a certain time period and, if this is not done, then the municipality may claim re-transfer of the property back to itself. This reversionary right, the Constitutional Court confirmed here, is a personal right which is susceptible to prescription after three years.

The Judgment can be viewed here.

FACTS

In May 1985, the eThekwini Municipality (the Municipality) sold immovable property to Mounthaven (Pty) Ltd (Mounthaven) at a public auction. In the deed of sale a special condition was included to the effect that Mounthaven was to erect buildings on the property to the value of R100,000.00 within three years of the purchase date. In the event that Mounthaven failed to do so, the Municipality would be entitled to the re-transfer of the property. The conditions read as follows:

> *"C. (1) The purchaser shall erect, or cause to be erected on the property, buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100,000.00) and failing the erection of buildings to that value within two (2)years from date of sale, then, for the purpose of levying the general rate and sewer rate payable to the Verulam Town Council by the Purchaser or his successors in title, there shall be deemed to be buildings to such required value on the property and all valuation and rating provisions of section 157 of Ordinance 25 of 1974 or any amendment thereof shall apply to the property and be binding upon the Purchaser or his successors in title.*
>
> *(2) If at the expiry of a period of three (3) years from the date of sale the Purchaser has failed to complete buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100 000.00) on the property, ownership of the property shall revert to the Seller which shall be entitled to demand re-transfer thereof to it from the Purchaser who shall be obliged to effect transfer thereof to the Seller against payment by the Seller to the Purchaser of all payments made on account of the purchase price less any costs incurred by the Seller in obtaining re-transfer of the property into its name, including costs as between attorney* and client, all costs of transfer, transfer duty, *stamp duty and the like.*

> *(3) The Seller shall have a pre-emptive right to re-purchase the property at the price paid by the Purchaser, if the Purchaser desires to sell the property within five (5) years from the date of sale, provided that this condition shall not apply where buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100,000.00) shall have been erected on the Lot within three (3) years from the date of sale."*

Mounthaven failed to erect the buildings within three years. In 2012 the Municipality approached the High Court, relying on the special condition in the Deed of Sale, claiming the re-transfer of the property. In response, Mounthaven argued that the claim for re-transfer constituted a debt for purposes of the Prescription Act, and that the Municipality cannot succeed in its claim, as the debt had prescribed after three years in terms of the Prescription Act.

The High Court found in favour of Mounthaven and when leave to appeal was refused, the Municipality approached the Constitutional Court. The Municipality argued that: (1) its claim is not a "debt" under the Prescription Act; (2) the reversionary right under the deed of transfer is a limited real right in the property, not subject to prescription; and, alternatively; (3) it is a claim secured by a mortgage bond that only prescribes after 30 years under the Prescription Act.

HELD:

Is the claim a "debt"?

- In terms of the dictionary meaning of "debt" (as accepted in previous constitutional jurisprudence), an obligation to pay money, deliver goods, or render services is included under the definition and would prescribe within three years as provided for in the Prescription Act. ("Deliver goods" in the case of immovable property, refers to registration of transfer in the deeds office.)

- A claim to transfer immovable property in the name of another is thus a claim to perform an obligation to deliver goods in the form of immovable property. It is therefore a "debt" in the dictionary sense.

A real right?

- But, so the Municipality argued, this "obligation" to deliver the immovable property (registration of transfer) flows from a real, not personal, right. Real rights are concerned with the relationship between a person and a thing, not with the relationship between persons as in the case of personal rights. Real rights give rise to competencies, not correlative personal obligations that translate into a "debt" for the purposes of prescription. Because of that, real rights cannot prescribe, the

argument goes.

- The argument however fails. This is because the right in question is a personal right and not a real right. (The test to determine whether a right is real, as opposed to being personal, has two requirements: (1) the person who created the right must have intended the present owner as well as successors in title to be bound; and (2) the right must result in a subtraction from the *dominium* of the land against which it is registered.) Clearly, in the present matter, the condition in C(2) contains no provision that it is binding on successors-in-title (unlike the express provision to that effect in clause C(1)).

Does the registration of clause C(2) in a title deed in accordance with the Deeds Registries Act make any difference?

- Section 63 of the Deeds Registries Act provides that no condition in a deed of transfer "purporting to create or embodying any personal right", nor one which "does not restrict the exercise of any right of ownership in respect of immovable property" is capable of registration. But the section comes with a proviso: "[A] deed containing such a condition . . . may be registered if, in the opinion of the registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed".

- It may be accepted that registration of the reversionary clause was proper in terms of the section, as being complementary or ancillary to transfer of ownership of the property to Mounthaven. But registration of this kind, in conjunction with a real right, or by mistake, does not convert an ordinary personal right into a real right.

The Constitutional Court accordingly refused the Municipality's application for leave to appeal the High Court ruling.

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