Part 7 (2017)

Commercial Law Reports

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The Law Publisher CC CK92/26137/23

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eTHEKWINI MUNICIPALITY v MOUNTHAVEN (PTY) LTD

An obligation created in an agreement constituting a personal right in favour of one party against another as a debt as defined in the Prescription Act (no 68 of 1969)

Judgment given in the Supreme Court of Appeal on 29 September 2017 by Tshiqi JA (Seriti JA, Saldulker JA, Govern AJA and Ploos van Amstel AJA concurring)

The Ethekwini Municipality sold immovable property to Mounthaven (Pty) Ltd for an R60 000.00. The sale agreement contained two special terms in favour of the Town Council of the Borough of Verulam as Local Authority.

These were (1) that Mounthaven was to erect on the property buildings to the value of not less than R100 000, 00, (2) if at the expiry of a period of three years from the date of sale Mounthaven had failed to complete the construction of the buildings on the property, ownership of the property would revert to the municipality which would be entitled to demand re-transfer thereof to it from Mounthaven. The terms were recorded in the Deed of Transfer.

Mounthaven failed to develop the land within three years and it remained undeveloped. On 23 May 2012, the municipality wrote a letter to Mounthaven in which it invoked the terms of the conditions in clause 2 of the Deed of Transfer and demanded re-transfer of the property. Mounthaven failed to comply with the demand and on 19 February 2014 the municipality brought an application invoking the conditions and claiming re-transfer of the property.

Mounthaven took the point that that the claim to re-transfer constituted a debt as contemplated in the Prescription Act and that it had prescribed. The municipality submitted that the Prescription Act was not applicable as the claim did not constitute a debt.

Held—

The right to claim re-transfer required Mounthaven to do something in favour of the municipality. The right is not absolute but a relative one because it can only be enforced against a determined individual or a class of individuals, ie Mounthaven or its successors in title, and not against the whole world.

The matter concerned the relationship between the two parties and their successors in title and this was akin to a relationship between a creditor and a debtor. In the event of prescription what was extinguished through the effluxion of time was the contractual right to claim re-transfer against Mounthaven. It followed that the municipality's right of action against Mounthaven was a personal right and not a limited real right.

Prescription therefore ran against it as if it was a debt as defined in the Prescription Act. The appeal failed.

Advocate G D Goddard SC and Advocate S Mahabeer instructed by Berkowitz Cohen Wartski, Durban, appeared for the appellant

Advocate D D Naidoo instructed by:Mervyn Gounden & Associates, Verulam, appeared for the respondent

Tshiqi JA:

[1] The issue in this appeal is whether a claim for the re-transfer of property from the respondent, Mounthaven (Pty) Ltd (Mounthaven) to the appellant, eThekwini Municipality[1] (the Municipality) constitutes a debt as contemplated in Chapter III of the Prescription Act 68 of 1969 (the Prescription Act).

[2] On 24 May 1985 the Municipality sold vacant immovable property described as Lot 2678 Verulam (Extension 25), situated at 6 Magpie Place Verulam, KwaZulu-Natal measuring 771 square meters (the property), to Mounthaven at a public auction for an amount of R60 000. The following special conditions were contained in the Deed of Sale and were in due course incorporated in the Deed Of Transfer:

> 'Subject to the following special conditions in favour of the Town Council of the Borough of Verulam as Local Authority:
>
> (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

[1] It is the successor-in-law to the town council of the Borough of Verulam.

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.'

[3] Mounthaven failed to develop the land within the stipulated period of three years and it still remains undeveloped. It cites the unresolved dispute with the Municipality concerning a 750mm diameter storm water pipe that runs under the property as the reason preventing the effective development of the property. On 23 May 2012, the Municipality wrote a letter to Mounthaven in which it invoked the terms of the conditions in Clause C.2 of the Deed of Transfer (the reversion clause) and demanded re-transfer of the property. Mounthaven failed to comply with the demand and on 19 February 2014 the Municipality launched an application invoking the conditions and claiming re-transfer of the property. Mounthaven took the point that that the claim to re-transfer constituted a "debt" as contemplated in Chapter III of the Prescription Act and that it had prescribed. The Municipality submitted that the Prescription Act was not applicable as the claim did not constitute a debt. The court decided to consider a further ground of defense raised by the Municipality for the first time in its heads of argument: that the claim was founded on the rei vindicatio, was simply a mechanism to perfect the Municipality's ownership of the property and that it did not prescribe.

[4] The high court found that the claim constitutes a debt and concluded

that it had prescribed after a period of three years. Regarding whether the claim was a vindication of a real right the high court held that 'property can only be transferred by registration thereof and does not occur automatically'. It then concluded that the Municipality did not have an absolute real right to the property and that it lost its right of action when it prescribed after three years.

[5] In this appeal the Municipality relies on four grounds for its contention that the claim has not prescribed:

a) That its claim for re-transfer of the property is not a claim for payment of money, goods or services, or an obligation to render something and thus does not constitute a 'debt', as contemplated in Chapter III of the Prescription Act;

b) That the reversion clause constitutes a real right, and thus not a debt;

c) Alternatively, if the claim is a debt, it is secured by a mortgage bond and is not extinguished by prescription for a period of thirty years;

d) Further alternatively, if the claim is a debt, then the respondent's failure to develop the property constitutes a continuing wrong.

[6] The Prescription Act does not define what a debt is. In *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344G-H this court said:

'[A] debt is –

"that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another." '

In a subsequent decision in *Desai NO v Desai & others* 1996 (1) SA)141 (A) at 146G-H the court was called upon to decide whether an obligation to effect transfer of individual shares in two immovable properties had prescribed. The application was for an order directing the appellant, an executor in a deceased estate, to take all steps to sign all the necessary documents. The court said:

'For the reasons which follow I am of the opinion that the appellant's "debt", ie the obligation to procure registration of transfer in terms of clause 13(d), was indeed extinguished by prescription.'

The court went further and said at 146H- 147A:

'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 . . . . It follows that the undertaking in clause 13(d) to procure registration of transfer was a "debt" as envisaged in s 10(1).'

[7] Recently in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) and *Makate v Vodacom (Pty) Ltd* [2014] ZAGPJHC 135 Mr Makate, the plaintiff, a former employee of Vodacom, instituted a high court action to enforce an agreement with Vodacom which, according to his undisputed evidence, was that the parties would enter into bona fide negotiations for determining reasonable compensation for the profitable use of his idea in developing the 'Please Call Me' service. Vodacom raised two special pleas, including a plea of prescription. The high court, whilst accepting that Mr Makate had proved the compensation agreement between himself and Vodacom, upheld the special pleas. Regarding prescription, the high court held that the word 'debt' had to be widely interpreted to include a claim that Vodacom comply with its obligations under a contract and it dismissed his claim.

[8] The Constitutional Court said in paras 83-85:

'For the conclusion that a debt contemplated in section 10(1) of the Prescription Act includes a claim to negotiate terms of an agreement, the trial Court relied on Desai, a judgment of the Appellate Division (now the Supreme Court of Appeal) and LTA Construction, a decision of the Cape of Good Hope Division (now the Western Cape Division of the High Court) . . .

On this construction of Desai, every obligation, irrespective of whether it is positive or negative, constitutes a debt as envisaged in section 10(1). This in turn meant that any claim that required a party to do something or refrain from doing something, irrespective of the nature of that something, amounted to a debt that prescribed in terms of section 10(1). Under this interpretation, a claim for an interdict would amount to a debt. However, the Appellate Division in Desai did not spell out anything in section 10(1) that demonstrated that "debt" was used in that sense…

The absence of any explanation for so broad a construction of the word "debt" is significant because it is inconsistent with earlier decisions of the same court that gave the word a more circumscribed meaning . . .'

The Constitutional Court then referred to the meaning ascribed to the word 'debt' in Escom and Desai and said the following in para 86:

'It is unclear whether the court in *Desai* intended to extend the meaning of the word "debt" beyond the meaning given to it in *Escom*. If it did, it does not appear that this followed either from any submissions made to the court by the parties or any issue arising in the case. Nor, if that was the intention, did the court give consideration to the constitutional imperatives in regard to the interpretation of statutes in section 39(2) of the Constitution.'

It then concluded:

'However, in present circumstances it is not necessary to determine the exact meaning of "debt" as envisaged in section 10. This is because the claim we are concerned with falls beyond the scope of the word as determined in cases like Escom which held that a debt is an obligation to pay money, deliver goods, or render services. Here the applicant did not ask to enforce any of these obligations. Instead, he requested an order forcing Vodacom to commence negotiations with him for determining compensation for the profitable use of his idea.

To the extent that *Desai* went beyond what was said in *Escom* it was decided in error. There is nothing in Escom that remotely suggests that "debt" includes every obligation to do something or refrain from doing something, apart from payment or delivery. It follows that the trial court attached an incorrect meaning to the word "debt". A debt contemplated in section 10 of the Prescription Act does not cover the present claim. Therefore, the section does not apply to the present claim, which did not prescribe.' (Paras 92 and 93).

[9] In a subsequent decision in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus & others* 2017 (4) BCLR 473 (CC) the Constitutional Court said:

'*Desai*, on which the Labour Appeal Court relied for holding that "debt" means an obligation to do something or refrain from doing something, was overruled by this court in *Makate*.'

[10] **In this appeal the Municipality contends that the Constitutional Court in *Makate* and in *Myathaza* effectively rejected what it submits was a wider meaning this court ascribed to the word 'debt' in *Desai*. That the Constitutional Court endorsed the narrower one in *Escom*, in**

terms of which debt is confined to an obligation 'to pay money or deliver goods or render services'. The Municipality submits therefore that the right to demand re-transfer is not an obligation 'to pay money, deliver goods, or render services and [is] thus not a debt'.

[11] In reading the Constitutional Court decision in *Makate* one should not overlook what the court did not say. It did not say that *Desai* was incorrect in its finding that a claim for transfer is a debt. It simply said that *Desai* was decided in error '[t]o the extent that [it] went beyond what was said in *Escom*'. Had the court wished to overrule *Desai* in the manner contended for by the Municipality, it would have said so explicitly. As the Constitutional Court said, it is inconceivable that every obligation to do or refrain from doing something can be described as a debt. The example of an interdict postulated by that court illustrates this absurdity.

[12] Earlier, the Constitutional Court in *Road Accident Fund & another v Mdeyide* 2011 (2) SA 26 para 11 expressed doubt on whether an obligation is indeed a debt in terms of the Act. In *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) it raised, but left open, the question whether a constitutional obligation could be considered a debt. An interpretation that restricts the meaning of 'debt' to 'delivery of goods' confines it to the delivery of movables to the exclusion of all immovable property. This would create a baseless distinction between movable property and immovable property for the purposes of prescription. In cases where the legislature has sought to make this distinction, ie in cases of prescription of debts by mortgage bond, it has done so expressly. The dictum in *Myathaza* must thus be understood in this context.

[13] This then leads me to whether the reversionary clause constitutes a limited real right or a personal right. In *Absa Bank Ltd v Keet* 2015 (4) SA 474 SCA the court explained the distinction between a real right and a personal right as follows in para 20:

> '[R]eal rights are primarily concerned with the relationship between a person and a thing and personal rights are concerned with a relationship between two persons. The person who is entitled to a real right over a thing can, by way of vindicatory action, claim that thing from any individual who interferes with his right. Such a right is the right of ownership. If, however, the right is not an absolute, but a relative right to a thing, so that it can only be enforced against a determined individual or a class of individuals, then it is a personal right.'

[14] It then continued in paras 23-25:

> 'The obligation which the law imposes on a debtor does not create a real right (jus in rem), but gives rise to a personal right (jus in personam). In other words, an obligation does not consist in causing something to become the creditor's property, but in the fact that the debtor may be compelled to give the creditor something or to do something for the creditor or to make good something in favor of the creditor.
>
> [I]n the case of extinctive prescription one is more specifically concerned with the relationship between creditor and debtor and prescription serves in the first instance to protect the debtor against claims that perhaps never came into existence or had already been extinguished. The obligation is by its nature and substance a temporary relationship that is destined to terminate through performance and moreover a relationship between creditor and debtor in which third parties are only indirectly involved. A real right, by contrast, is a relationship of a durable nature, that can be maintained against anyone and everyone, and which can impede commerce if outsiders cannot with confidence rely on the appearance thereof.
>
> [I]n the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a "debt", becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing . . .'

(See also *National Stadium South Africa (Pty) Ltd & others v Firstrand Bank Ltd* 2011 (2) SA 157 SCA para 31).

[15] **In this matter the right to claim re-transfer required Mounthaven to do something in favour of the Municipality. The right is not absolute but a relative one because it can only be enforced against a determined individual or a class of individuals, ie Mounthaven or its successors in**

title, and not against the whole world. 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 a debtor. In the event of prescription what is extinguished through the effluxion of time is the contractual right to claim re-transfer against Mounthaven. It follows that the Municipality's right of action against Mounthaven is a personal right and not a limited real right.

[16] The two alternative grounds of appeal raised by the appellant have no merit. The reversionary clause is not a security clause and is thus not a mortgage bond. The other alternative contention that the failure to develop the property is a continuing wrong and that it cannot prescribe suggests that every debt, as long as it remains unpaid, would constitute a continuing wrong and would not be extinguished by prescription. This cannot be so. For all these reasons it follows that the claim for re-transfer constitutes a debt, and it prescribed after the effluxion of the three year period. The appeal must thus fail.

[17] I make the following order:

The appeal is dismissed with costs.

BONDEV MIDRAND (PTY) LIMITED v PULING
BONDEV MIDRAND (PTY) LIMITED v RAMOKGOPA

Prescription running against a personal right embodied in the conditions of a Deed of Transfer

Judgment given in the Supreme Court of Appeal on by Leach JA (Tshiqi JA, Seriti JA, Tsoka AJA and Ploos van Amstel AJA concurring)

Bondev Midrand (Pty) Limited sold immovable property to Ramokgopa. In November 2006 transfer of the property was effected to him under a Deed of Transfer which recorded that Ramokgopa would be liable to erect a dwelling on the property within eighteen months from 16 November 2006, failing which Bondev would be entitled, but not obliged to claim that the property be transferred to it at Ramokgopa's cost against payment of the original purchase price, interest free.

Bondev also sold immovable property to Mr and Mrs Puling. The Deed of Transfer contained the same term, the date by when their dwelling was to be erected being a later date.

Ramokgopa failed to comply with this condition. As a result, in January 2014, Bondev brought an action against him seeking an order that he transfer the property he had bought back to it and tendering payment of the original purchase price. Ramokgopa defended the action on the grounds that the claim against him had arisen 18 months after 18 November 2006 (ie on 15 May 2008) and had therefore prescribed three years later on 16 May 2011, well before the appellant had instituted proceedings against him.

Bondev brought a similar action against the Pulings.

In an appeal, the issue was whether Bondev's claim for re-transfer of the property prescribed three years after its claim became due when the respondents failed to erect a dwelling on their respective properties within the 18 month building period.

Held—

Whether or not prescription began to run from the dates contended for by the respondents depended on whether the claim for re-transfer constituted a debt capable of prescribing or a real right. The obligation created in the transfer deeds consisted of two clauses. The first obliged the transferee or its successors in title to erect a dwelling on the property within a period of 18 months. The second provided that in the event of a dwelling not being erected within that period, Bondev was entitled to have the property retransferred to it against return of the purchase price.

The burden created by the first clause, namely the obligation to build a dwelling on the property, was binding on the transferees (the respondents) and their successors in title. The latter have no right under the second clause to bring that restriction to an end. All clause two provided was that in the event of a failure to build a dwelling in the requisite time Bondev, as the transferor, could recover the land against the payment of the purchase price if it so chose. This was like providing Bondev with an option to purchase which is essentially a personal right. But Bondev was not obliged to demand or claim re-transfer of the land and the obligation to build remained as long as the respondents retained their ownership. Thus the restriction upon ownership created by clause 1 remained binding and would not be terminated should Bondev elect not to seek retransfer. The two clauses read together did not constitute 'a composite whole' restricting the respondents' use of their property.

In the circumstances, the first clause had to be regarded as providing a real right and a restriction upon the ownership of the property of the respondents and their successors in title. On the other hand, the second clause under which Bondev could claim re-transfer of the property, created no more than a personal right akin to an option to purchase which was not inseparably bound up with the first clause. As Bondev sought to enforce the second clause, the issue then became whether the debt which is the subject of such a claim had prescribed.

Prescription began to run on the date by when the title deed reflected a dwelling had to be erected. In each case, the debt had prescribed before proceedings were commenced.

Advocate S J Grobler SC andAdvocate N J Horn instructed by Tim Du Toit Attorneys, Johannesburg, appeared for the appellant

Advocate G Wagenaar instructed by Gerhard Wagenaar Attorneys, Lynnwood Glen, appeared for the respondents (Puling appeal)

Advocate M E Manala instructed by Mothle Jooma Sabdia Inc, Pretoria, appeared for the respondent (Ramokgopa appeal)

Leach JA:

[1] In both these appeals, the appellant is Bondev Midrand (Pty) Ltd, a property developer. In both cases the appellant unsuccessfully sought an order obliging the respondent to re-transfer to it a piece of immovable property it had earlier purchased from the appellant as it

had failed to comply with a condition registered against the title deed obliging the respondent to erect a building on the property within a prescribed period. And in both cases its claim was dismissed by the Gauteng Division, Pretoria on the basis that the appellant was seeking to enforce a debt as envisaged in s 11(d) of the Prescription Act 68 of 1969 which had prescribed and become unenforceable as more than three years had elapsed after it had become due. Leave to appeal was granted by this Court in both instances and, as the issue of prescription is common to each, the appeals were argued together. Consequently for convenience, and although the appeal involving the respondent Puling (SCA case number 802/2016) involves additional issues, I intend to give a single judgment dealing with both matters. For convenience I intend to use the respondents' surnames when referring to them.

[2] The appellant has developed more than 4000 residential dwellings in what is known as the Midstream Estate. Both appeals relate to pieces of immovable property in this estate sold by the appellant. Transfer in case nr. 803/2016 was effected to the respondent in that case, Mr Ramokgopa, in November 2006 and to the respondents in case nr. 802/2016, Mr and Mrs Puling, in March 2000. The Deed of Transfer in Mr Ramokgopa's case records the following condition imposed and enforceable by the appellant as developer:

> '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 (appellant) will be entitled, but not obliged to claim that the property is transferred to the (appellant) at the cost of the Transferee against payment by the Transferee of the original purchase price, interest free. The Transferee shall not within the said period so transfer the property without the (appellant's) written consent. This period can be extended at the discretion of the (appellant).'

The title deed in the case of Mr and Mrs Puling is in identical terms save that the date by when the dwelling was to be erected, in their instance, was given as 7 March 2007.

[3] It is accepted that Mr Ramokgopa failed to comply with this condition. As a result, in January 2014 the appellant instituted action against him seeking an order that he transfer the property he had bought back to it and tendering payment of the original purchase price. In

opposing this relief, Mr Ramokgopa relied solely upon a point in limine that the claim against him had arisen 18 months after 18 November 2006 (ie on 15 May 2008) and had therefore prescribed three years later on 16 May 2011, well before the appellant had instituted proceedings against him.

[4] In the case of Mr and Mrs Puling, they had bought the immovable property known as Erf 2268, Midstream Estate Extension 26 Township. The 18 month period ending 6 September 2008 by when they ought to have built a dwelling on that property in terms of the condition registered on the title deed elapsed without them doing so. This condition remains unfulfilled to this day. Consequently, when the period elapsed, the appellant became entitled, but not obliged, to claim re-transfer of the property against repayment of the purchase price. For some reason it did not do so. However things were brought to a head more than four and a half years later when, on 5 April 2013, an attorney acting on behalf of Mr and Mrs Puling wrote to the appellant's attorney, stating that his clients had no intention of erecting a building on the property but wished instead to consolidate it with the adjoining erf which they had also purchased. The appellant was not prepared to agree to this and, in March 2014, instituted proceedings on notice of motion seeking an order obliging Mr and Mrs Puling to re-transfer the property to it against payment of the original purchase price of R510 000.

[5] Mr and Mrs Puling opposed the grant of this relief. The first defence they offered was the same as that of Mr Ramokgopa, namely, that as more than three years had elapsed since the date upon which the appellant's claim for re-transfer of the property had become due, it had prescribed. However they also relied on certain additional defences, namely: that the appellant had consented to the proposed consolidation in terms of a tacit term of the sale; and that the appellant should be estopped from relying on the fact that the property had not been developed within the building period of 18 months. They also contended that the condition registered against the title deed of their property differed from what had been agreed upon in the deed of sale, and regard should therefore be had to the sale terms. However rectification of the title deed was not fully ventilated in the papers nor was it claimed in the proceedings in the court a quo. For present

purposes the matter must therefore be decided having regard to the title deed.

[6] As appears from this, **common to both appeals is the issue whether the appellant's claim for re-transfer of the property prescribed three years after its claim became due when the respondents failed to erect a dwelling on their respective properties within the 18 month building period.** The respondents allege it did. It is their contention that the claim for re-transfer constitutes a 'debt' for the purposes of the Prescription Act 68 of 1969, but not one envisaged in ss 11(a), (b) or (c) of that Act. They therefore submit that, in terms of s 11(d) of the Act, the prescriptive period is three years. On the contrary, the appellant argues the registered condition gives rise to a real right which does not prescribe within three years and not merely a personal right in favour of the appellant.

[7] Before turning to deal with these opposing contentions, it is first necessary to mention the recently reported decision in *Bondev Midrand (Pty) Ltd v Madzhie & others* 2017 (4) SA 166 (GP) which the parties' legal representatives most correctly drew to our attention. In that case the court concluded that a similar repurchase clause was grossly unfair to a purchaser intending to build a residential home, that it infringed the constitutional right to adequate housing and that enforcing it would be against public policy. Relying upon this, the respondents in the present case suggested that the appellant's claims against them were similarly not enforceable.

[8] As appears from the judgment in *Madzhie*, the application to re-transfer the property was unopposed and the matter came before court for judgment by default. When the matter was initially called on 12 August 2016, the learned acting judge informed counsel for the applicant that he was inclined to dismiss the application as he had reservations relating to the question 'whether this type of retransfer clause is consistent with public policy and with the provisions of s 26(1) of the Constitution'. The matter was then postponed until 19 August 2016 for counsel to prepare heads of argument relating to the issue. However, on that date counsel for the applicant indicated in chambers that the applicant had filed a notice of withdrawal, tendering costs. Uniform rule 41(1)(a) provides that once a matter had been set down a party may withdraw proceedings with the leave of the court,

and such leave was granted. That should have been the end of the matter as it is not ordinarily the function of a court to force a party to proceed with an action against its will or to investigate why the party wishes to abandon such action – see *Levy v Levy* 1991 (3) SA 614 (A) at 620B. But four months later the learned acting judge gave reasons for consenting to the withdrawal. He dealt with various constitutional issues, stating that the clause was grossly unreasonable towards a purchaser 'that wishes to pursue the suburban dream incrementally'[1] and that a repurchase clause is 'not central to the business of a developer or the operations of a homeowners association,'[2] before concluding that the present type of repurchase clause is an instance where enforcement should be refused[3].

[9] With due respect, the least said about this judgment is probably the better. It obviously reflects the learned acting judge's personal viewpoint but it was inappropriate, to say the least, to have pronounced upon the issue in the circumstances. As I have said, the applicant wished to abandon an application for default judgment and all that was required was the court's consent. This was not an instance that required a formal judgment, let alone one in respect of constitutional issues that had not been raised or canvassed in the papers and in respect of which interested parties had neither been forewarned nor heard. A court should refrain from dealing with legal issues unnecessary to determine in order to properly deal with a matter before it. This is all the more so in Constitutional matters. As the Constitutional Court said in *Albutt*[4] a passage to which it subsequently referred with approval in *Aurecon*[5]:

'Sound judicial policy requires us to decide only that which is

[1] Para 35.

[2] Para 47.

[3] Paras 53 and 54.

[4] Albutt v Centre for the Study of Violence and Reconciliation & others 2010 (3) SA 293 (CC); [2010] 5 BCLR 391; [2010] ZACC 4 para 82.

[5] City of Cape Town v Aurecon South Africa (Pty) Ltd 2017 (4) SA 223 (CC) para 35.

demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so.'

[10] In the light of the paucity of the information before it, and not having heard the various parties who may well be interested in a matter such as this, it was inappropriate for the court in *Madzhie* to reach the conclusion that it did in regard to the constitutionality and lack of enforceability of the repurchase clause that was registered against the title deeds of the property.

[11] We were informed from the bar that the Registrar of Deeds now views the judgment in *Madzhie* as binding and, consequently, now refuses to register deeds containing such clauses. This is extremely unfortunate, bearing in mind that clauses of this nature are relatively common and are regularly registered at the instance of developers and local authorities. In the light of what I have said above, those employed in the Deeds Office should not regard the judgment in *Madzhie* as an authoritative judgment, binding upon them.

[12] I return to the issue at hand, namely, whether the claim for re-transfer constitutes a debt capable of prescribing or a real right. The condition in question consists of two clauses. The first obliges the transferee or its successors in title to erect a dwelling on the property within a period of 18 months. The second provides that in the event of a dwelling not being erected within that period, the appellant is entitled but not obliged to have the property retransferred to it against return of the purchase price.

[13] The first clause reflects an intention to bind not only the transferee but its successors in title. Moreover, the requirement that a dwelling be erected on the property results in an encumbrance upon the exercise of the owner's rights of ownership of its land. Accordingly, in the light of

authority such as Willow Waters[6], this first clause gives rise to a real right. Indeed, I did not understand the respondents to contend otherwise.

[14] On the other hand, the right of the appellant to claim re-transfer of the property against repayment of the original purchase price as set out in the second clause does not amount to such an encumbrance. It is a right which can only be enforced by a particular person, the appellant, against a determined individual, and does not bind third parties. Not only is this the hallmark of a personal right[7], but it is a right which the appellant can exercise at its sole discretion. In these circumstances I understood that both sides were agreed that if that clause had been standing alone, it would not have carved out a portion of the respondents' dominium and would therefore be regarded as creating a personal right[8].

[15] Section 63(1) of the Deeds Registries Act 47 of 1937 prescribes that no condition in a deed 'purporting to create or embodying any personal right . . . shall be capable of registration'. But although only real rights and not personal rights should be registered against a title deed, the fact that a personal right becomes registered does not, in itself, convert that right into a real right. Almost 100 years ago, Innes CJ observed that '(a) jus in personam does not become a jus in rem because it is erroneously placed upon the register'[9] and this remains the position to this day[10]. The appellant argued, however, that although the

[6] Willow Waters Homeowners Association (Pty) Ltd v Koka NO & others 2015 (5) SA 304 (SCA) para 16 and 22 and the authorities there cited.

[7] See eg Absa Bank Ltd v Keet 2015 (4) SA 474 (SCA) para 20. H Mostert and A Pope The Principles of the Law of Property in South Africa (2010) at 45.

[8] Compare: National Stadium South Africa (Pty) Ltd & others v Firstrand Bank Ltd 2011 (2) SA 157 (SCA) para 33.

[9] British South Africa Company v Bulawayo Municipality 1919 AD 84 at 93.

[10] See eg Fine Wool Products of South Africa, Ltd, & another v Director of Valuations 1950 (4) SA 490 (E) at 499B-C, Nel, NO v Commissioner for Inland Revenue 1960 (1) SA 227 (A) at 34H-35A, Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & others 1974 (4) SA 362 (T) at 367H and Lorentz v Melle & others 1978

second clause appeared to create a personal right, it is so inextricably wound up with the first clause, which clearly created a real right, that the two clauses were to be read together as creating a real right which is capable of registration.

[16] The appellant relied upon the decision of this court in *Cape Explosive Works Ltd & another v Denel (Pty) Ltd & others* 2001 (3) SA 569 (SCA) to support this argument. In that matter the first appellant, Capex, had sold and transferred two pieces of land to Armscor. The deed of transfer contained two restrictions imposed upon Armscor and its successors in title in favour of Capex: first, that the land was to be used only for the manufacture of armaments and, second, that if the land was no longer required for that purpose, Armscor was to advise Capex of that fact and Capex would have the 'first right to repurchase' the land. If it did not avail itself of that right, the restriction on ownership would fall away. In due course Armscor transferred the properties to Denel but in circumstances unnecessary to detail, the second condition was not registered against their title deeds while the first condition was registered only in respect of a small portion of one property. Denel sought an order declaring its ownership of both portions to be unencumbered by condition 2. Capex, in turn, brought a counter-application seeking rectification of the title deeds of both properties to reflect both conditions.

[17] It was argued on behalf of Denel, that the second condition constituted a personal right in the nature of an option to repurchase which could not constitute a valid real right as it imposed an obligation on the part of the transferee, Denel, to notify Capex when the property was no longer required for the use to which it had been restricted. Denel therefore submitted that the second condition could not validly be registered against the title deed, so that it was entitled to the relief it sought and that the title deed could not be rectified in this regard. In rejecting this, Streicher JA, writing for a unanimous court, stated:

> 'In my view, the stipulation referred to was not intended to burden the transferee with an obligation. Condition 1 contained a use restriction and condition 2 provided that in the event of the property no longer being required for the use to which it was

(3) SA 1044 (T) at 1049.

restricted Armscor or its successors in title would advise Capex accordingly, whereupon Capex would become entitled to repurchase the property, failing which the property would no longer be subject to the use restriction. Upon the property no longer being required for the restricted use it would be useless to the owner thereof unless Capex repurchased it or the use restriction could be terminated. Condition 2 was intended to provide Armscor and its successors in title with a mechanism for such termination. Hence, although framed as an obligation, the giving of notice was as much a right as an obligation. . . .

The use restriction according to condition 1 was materially different from the use restriction according to condition 1 read with condition 2. The two conditions were not independent of one another and they could not be separated. They formed a composite whole. They were specifically stated to be binding on the transferee, being Armscor, and its successors in title. Furthermore, they constituted a burden upon the land or a subtraction from the dominium of the land in that the use of the property by the owner thereof was restricted. The right embodied in conditions 1 and 2, read together, therefore constituted a real right which could be registered in terms of the Deeds Registries Act.'[11]

[18] As appears from this, Denel's right as transferee under condition 2 to give notice to the transferor, Capex, that the property was no longer being used for the specified purpose, provided a mechanism to terminate the restriction upon the rights of ownership. Either Capex would repurchase the property or, if it was not inclined to do so, Denel would retain its ownership, free of the restriction. The encumbrance of the land created by condition 1 could only continue until such time as Denel gave Capex a notice under condition 2. Thus the restriction on ownership in condition 1 was inseparably bound up with condition 2.

[19] But that is a far cry from the circumstances in the present cases. **The burden created by the first clause, namely the obligation to build a dwelling on the property, is binding on the transferees (the respondents) and their successors in title. The latter have no right under the second clause to bring that restriction to an end. All clause two**

[11] Paras 14-15.

provides is that in the event of a failure to build a dwelling in the requisite time the appellant, as the transferor, can recover the land against the payment of the purchase price if it so chooses. This is akin to providing the appellant with an option to purchase which is essentially a personal right[12]. But the appellant is not obliged to demand or claim re-transfer of the land and the obligation to build will remain extant as long as the respondents retain their ownership. Thus the restriction upon ownership created by clause 1 remains binding and will not be terminated should the appellant elect not to seek retransfer. The two clauses read together therefore do not constitute what Streicher JA referred to as 'a composite whole' restricting the respondents' use of the property[13].

[20] **In the circumstances, the first clause of this condition must be regarded as providing a real right and a restriction upon the ownership of the property of the respondents and their successors in title. On the other hand, the second clause under which the appellant has the election to claim re-transfer of the property, creates no more than a personal right akin to an option to purchase which is not inseparably bound up with the first clause. As the appellants sought to enforce this second clause, the issue then becomes whether the debt which is the subject of such a claim has prescribed.**

[21] Until fairly recently, it was accepted that the term 'debt' used in the Prescription Act 68 of 1969, but not defined in that Act, should be interpreted as having a wide meaning – see eg *Desai NO v Desai & others* 1996 (1) SA 141 (A) at 146I-J. However, in a series of judgments of the Constitutional Court it has now been held that in the modern constitutional era the term must be interpreted more narrowly than what was previously the case – see *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) paras 87-93 and *Off-Beat Holiday Club & another v Sanbonani Holiday Spa Shareblock Ltd & others* CCT 106/16 (23 May 2017) para 44. However although these decisions have been somewhat

[12] Barnhoorn NO v Duvenhage & others 1964 (2) SA 486 (A) at 494F-H

[13] Cape Explosive Works para 14.

controversial[14], and it may well be that the 'precise boundaries of the husk left by the Makate axe'[15] may not yet have been determined, it appears to be settled that even on a narrow meaning a 'debt' includes the right to claim the return of property. Indeed, in the present case I understood the appellant to accept that if its right to claim re-transfer of the immovable property is to be regarded as a personal right, not only would prescription have begun to run on the date by when the title deed reflected a dwelling had to be erected, but that the appellant's claim in each case had prescribed before proceedings were commenced.

[22] In the light of our conclusion that the second clause of the condition does indeed create no more than a personal right, the appellant's claim in each case was therefore correctly dismissed by the court a quo on the basis of prescription. This renders it unnecessary to deal with the other issues raised by the respondents, Mr and Mrs Puling, in case 802/2016.

[23] Accordingly, in each of these cases, the appeal must be dismissed. There is no reason for costs not to follow the event.

[24] In each case the following order will issue:

The appeal is dismissed with costs.

[14] See eg F Snyckers 'Prescription Under Siege' (2017) 29 Advocate Vol 30 No 2 at 30.

[15] The phrase is plagiarised from Snyckers op cit.

INVESTEC BANK LIMITED v ERF 436 ELANDSPOORT (PTY) LIMITED

Section 11(a)(i) of the Prescription Act(no 68 of 1969) cannot be interpreted so as to apply to a debt which was at one time secured by a mortgage bond but which is no longer so secured at the time the debt arises

Judgment given in the Supreme Court of Appeal on 29 September 2017 by Petse JA (Cachalia JA, Majiedt JA, Mokgohloa AJA and Gorven AJA concurring)

Investec Bank Limited lent money to Erf 436 Elandspoort (Pty) Limited. As security for the loan, the Elandspoort registered a notarial covering mortgage bond in favour of the bank over a notarial agreement of lease that it had earlier concluded with South African Railway Commuter Corporation Limited (SARCC). During January 2002, SARCC cancelled the lease agreement.

On 10 September 2002, pursuant to the cancellation of the lease, the bank addressed a letter to Elandspoort. It advised Elandspoort that it had committed a breach of the loan agreement, and demanded payment of the outstanding balance of R5 633 177.42 within seven days. The letter also contained an intimation that failure to pay this amount within seven days would result in action being instituted against it.

On 18 January 2011 the bank brought an action against Elandspoort claiming payment of R3 979 184.50, the amount then owing. Elandspoort defended the action inter alia on the grounds that the thirty year prescription period provided for in section 11(a)(i) of the Prescription Act (no 68 of 1969) in respect of any debt secured by mortgage bond was not applicable to the debt, and that Investec's claim had prescribed after a period of three years.

Held—

The weight of academic authority supports the view that once the security associated with a debt ceases to exist, the debt is no longer secured and the prescription period then becomes three years as it is with any other debt as provided for in section 11(d).

In the present case, the bank accepted that its action was based, not on the mortgage bond but on the loan agreement, and that prescription commenced to run from 18 September 2002, this being the due date of the debt. It contended that the phrase 'any debt secured by mortgage bond' in section 11(a)(i) could be interpreted to mean 'any debt that was *at any time*' secured by mortgage bond, and that if this were done the period of prescription would be thirty years, meaning that the claim had not prescribed.

However, this argument was untenable. The language of section 11(a)(i) of

the Prescription Act was clear. It was not the sort of language which would have been used if the intention was that the loss of the security or the cancellation of the mortgage bond would have no effect on the period of prescription.

The section was not applicable to the bank's claim. The action failed.

Advocate F J Erasmus instructed by V D T Inc, Pretoria, appeared for the appellant
Advocate H F Oosthuizen SC instructed by Nöthling Attorneys, Pretoria, appeared for the respondent

Petse JA:

[1] This is an appeal against a judgment of the Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J) which upheld the special plea of prescription raised by the respondents against the appellant's claim. I shall, for convenience, hereinafter refer to the court a quo as the High Court.

[2] The essential facts, which are common cause may be summarised as follows: the appellant, Investec Bank Limited, which is a commercial bank and company with limited liability, instituted an action against six defendants for payment of the sum of R3 979 184.50, together with interest and costs. These were Erf 436 Elandspoort (Pty) Ltd as first defendant; Cecilia Joubert NO; Erf 1081 Arcadia (Pty) Ltd; V & J Properties (Pty) Ltd; Remaining Ext 764 Brooklyn (Pty) Ltd and Erf 22 Hillcrest (Pty) Ltd as second, third, fourth, fifth and sixth defendants respectively.

[3] The first respondent, to which the appellant had lent money, was sued as principal debtor whilst the remaining defendants were sued in their capacities as sureties. The action was subsequently withdrawn against the fourth defendant before the commencement of the trial.

[4] As security for the loan, the first respondent registered a notarial covering mortgage bond in favour of the appellant over a notarial agreement of lease that it had earlier concluded with a third party, South African Railway Commuter Corporation Limited (SARCC). During January 2002, SARCC cancelled the lease agreement. The cancellation was confirmed by court order in August 2002.

[5] On 10 September 2002, pursuant to the cancellation of the lease, the appellant addressed a letter to the first respondent, through its attorneys, in terms of which it advised the latter that it had committed a breach of the loan agreement. Consequently, the letter demanded payment of the outstanding balance of R5 633 177.42. In particular, the letter also contained an intimation that failure to pay the aforesaid amount within seven days would result in action being instituted against the first defendant. As already indicated, on 18 January 2011 – after a period of some eight years – the appellant instituted action against the respondents claiming payment of R3 979 184.50, the amount then owing.

[6] The respondents defended the action, advancing various defences to the claim. They also raised a special plea of prescription against the claim asserting that the claim had prescribed by 18 September 2002 at the latest as a result of the amount stipulated in the appellant's demand not having been paid. The appellant, in turn, delivered a replication in terms of which it alleged that the claim had not prescribed as it was secured by a mortgage bond as contemplated in s 11(a) of the Prescription Act 68 of 1969 (the Prescription Act). In the alternative, it pleaded that the running of prescription was interrupted between the period 7 May 2003 and 21 May 2007.

[7] At the trial, and despite resistance by the appellant, the High Court directed that the trial be limited to the respondents' special plea of prescription only. And more particularly, to the question whether the period of prescription of the debt in issue was 30 years or three years as provided in s 11(a) or s 11(d) of the Prescription Act respectively. Accordingly, it ordered a separation of the issues in terms of Uniform Rule 33(4)[1]. After hearing argument, the High Court upheld the special

[1] In terms of rule 33(1) of the Uniform Rules of Court, parties to a dispute may agree upon a written statement of facts in the form of a special case for the adjudication of points of law. This statement sets out the facts agreed upon and the questions of law in dispute between the parties, as well as their contentions. Rule 33(3) gives the court the discretion to draw any inference of fact or law from the facts and documents as if proved at trial. See in this regard: Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd & another [2015] ZACC 34; 2016 (1) SA 621 (CC) para 61, and Bane & others v D'Ambrosi [2009] ZASCA 98; 2010 (2) SA 539 (SCA) para 7 where this court said that rule 33(1) and (2) made it clear that the resolution of a stated case

plea with costs. It subsequently granted the appellant leave to appeal to this Court.

[8] **The crisp issue is whether, in these circumstances, the 30 year prescription period provided for in s 11(a)(i) of the Prescription Act in respect of any debt secured by mortgage bond is applicable to the debt.** If not, the debt would have become prescribed 3 years after the due date for payment (unless the running of prescription was interrupted in terms of s 14(1)) in terms of s 11(d).

[9] Thus the only issue debated at the hearing of this appeal was prescription. Consequently, an analysis of the relevant statutory framework is now apposite. Section 10(1) of the Prescription Act reads:

> '10(1) . . . a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of prescription of such debt.'

Section 11, in turn provides for periods of prescription of debts which, in material terms, reads:

> '11 The period of prescription of debts shall be the following:
>
> (a) thirty years in respect of –
>
> (i) any debt secured by mortgage bond;
>
> (b) . . .
>
> (c) . . .
>
> (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[10] Section 12(1) provides:

> '. . . prescription shall commence to run as soon as the debt is due.'

As already mentioned, it is common cause that the debt in issue in this appeal fell due on 18 September 2002[2]. What is contested is whether the relevant period is 30 years (s 11(a)(i) of the Prescription Act) or three years (s 11(a)(d) of the Prescription Act). If the period is 30 years,

proceeds on the basis of a statement of agreed facts, and is, after all, seen as a means of disposing of a case without the necessity of leading evidence.

[2] See List v Jungers 1979 (3) SA 106 (A) at 121C-D where this Court held that there is a difference between when a debt comes into existence on the one hand and when it becomes recoverable on the other hand, although these dates may coincide.

prescription will not avail the respondents, but it will if the period is three years. One of the philosophical justifications for prescription is that 'society is intolerant of stale claims. The consequence is that a creditor is required to be vigilant in enforcing his rights. If he fails to enforce them timeously, he may not enforce them at all.'[3] This consideration assumes significance in this case where the appellant waited for over eight years before it enforced its right against the respondents.

[11] **The resolution of the dispute between the protagonists in this appeal lies in the proper interpretation of the relevant provisions of the Act set out above (paras 9-10) in accordance with the well-established canons of construction of documents.** This exercise entails that the following must be considered, namely: the language used; the context in which the relevant provisions appear; the apparent purpose to which it is directed; and the material known to those responsible for the production of the document under consideration.[4]

[12] Whilst accepting that the debt in issue became due on 18 September 2002, counsel for the appellant nevertheless contended that the debt had not become prescribed by the time the appellant's summons was served on the respondents on 21 January 2011 (some eight years after due date). This was so, so went the argument, because the debt was secured by a mortgage bond in which event the period of prescription was 30 years in terms of s 11(a)(i) of the Prescription Act. It was further argued that the fact that the notarial lease which served as the appellant's real right under the mortgage bond was cancelled did not matter. Counsel placed heavy reliance on *Oliff v Minnie* 1953 (1) SA 1 (A) in support of his contentions. I shall return to *Oliff* later. Suffice to state at this stage that the facts in *Oliff* are distinguishable from the facts of this case. *Oliff* was concerned with the provisions of a statute that were materially different from those under consideration in this appeal.

[3] Cape Town Municipality v Allie NO 1981 (2) SA 1 (CPD) at 5G-H; Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality 1984 (1) SA 571 (A) at 578F-H.

[4] See: Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18.

[13] In support of the special plea of prescription, counsel for the respondents argued that the question whether the debt in issue was secured by mortgage bond must be determined in relation to the time of the service of the summons enforcing the claim. Consequently, as the cancellation of the lease agreement had the effect of extinguishing the first respondent's rights under the lease and terminating the appellant's real right under the mortgage bond, the object of the mortgage bond, ie the first respondent's rights deriving from the lease agreement, ceased to exist with effect from 21 August 2002 at the latest. Thus, when prescription commenced to run from the due date (ie 18 September 2002) the appellant's debt was not secured by mortgage bond and s 11(d) of the Prescription Act meant that the debt became prescribed after a period of three years reckoned from 18 September 2002.

[14] I return to *Oliff* whose facts are conveniently set out in the headnote of the judgment as follows. In 1930 the respondent had passed a second mortgage bond in favour of the appellant as security of a debt payable on 1 September 1931. During December 1933 the holder of the first mortgage bond caused the mortgaged property to be sold in execution. The sale did not realise enough to reduce the indebtedness on the second bond. The property was transferred to the purchaser and without the encumbrances of the bonds. On 12 February 1931, the appellant gave the respondent notice to pay the amount due under the bond within three months and upon liability being repudiated issued provisional sentence summons on 20 September 1951 based on the bond. The court of first instance refused provisional sentence holding that when the mortgaged property was transferred free of the bonds the appellant's mortgage bond lost its security so that the shorter period of prescription of eight years applied and not 30 years as would have been the case if its security was still in place. On appeal this Court, accepting that the running of prescribed commenced only from the date when the appellant's right of action accrued, ie 1 September 1931, held that the mortgage bond did not cease to be such simply because it had become valueless as security. Provisional sentence was consequently granted. It must be emphasised that in Oliff the plaintiff sued for provisional sentence, solely relying on the mortgage bond passed by the mortgagor, ie the defendant in that case. In addition, the statutory provision under

consideration in Oliff was materially different from that with which this case is concerned.

[15] The decision in *Oliff* has been commented upon by some academic writers. The learned authors of The Law of Property[5], inter alia, point out that a mortgage bond will be extinguished by the mortgagee releasing the property which is the subject of his or her mortgage bond. And when this happens the security is released but the principal obligation remains. They go on to say that as the debt in *Oliff* was no longer secured by a mortgage bond, prima facie, *Oliff* is no longer authority for the interpretation of the [current] Prescription Act, unless a court is prepared to hold that s 11(a)(i) [of the Prescription Act] 'means any debt which was initially secured by a mortgage bond and justify such construction by reference to the ratio decidendi in *Oliff* '[6].

[16] Professor Loubser[7] supports the views expressed in Silberberg and Schoeman's *The Law of Property* referred to in the preceding paragraph and in turn explains the position as follows:

'Where the bond is cancelled before payment or performance of the debt, the thirty-year prescription period will no longer be applicable and if more than the otherwise applicable shorter prescription period has elapsed since the due date of the debt, the debt will become prescribed upon cancellation of the bond when the operation of the thirty year period falls away.'

[17] Similarly, Saner in *Prescription in South African Law* says the following (at 3-35):

> 'In a situation where a mortgage bond is cancelled before payment or performance of the debt in question and the debt would, but for the registration of the mortgage bond, have prescribed in the meanwhile, the debt will immediately become prescribed upon cancellation of the bond due to the falling away of the 30 year period.'

The weight of academic authority therefore supports the view that once

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[5] Badenhorst Pienaar Mostert Sibberberg and Schoeman's The Law of Property, 5ed (2006) at 378, para 16.4.9(c).

[6] dem at page 379 para 16.4.9(f).

[7] M M Loubser: Extinctive Prescription (1996) at 38.

the security ceases to exist, the debt is no longer secured and the prescription period then becomes 3 years as it is with any other debt (s 11(d)).

[18] In this case counsel for the appellant accepted that the appellant's action was based, not on the mortgage bond as in *Oliff* but squarely on the loan agreement. As already mentioned, he also accepted that prescription commenced to run from 18 September 2002, this being the due date of the debt. In *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* [1990] ZASCA 136; 1991 (1) SA 525 (A) this Court said the following in relation to when prescription commences to run as intended in s 12(1) of the Prescription Act (at 532G-H):

> '. . . This means that there has to be a debt immediately claimable by the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under the obligation to perform immediately.' [Citations omitted]

[19] Apparently emboldened by the rider to what the learned authors of Silberberg and Schoeman's *The Law of Property* say (in para 16.4.9(f) at 379 referred to in para 15 above), **counsel for the appellant contended that the phrase 'any debt secured by mortgage bond' in s 11(a)(i) can be interpreted to mean 'any debt that was at any time' secured by mortgage bond. (My emphasis.) And that if this were done the period of prescription would be 30 years, meaning that the claim had not prescribed. In my view this argument is untenable. The language of s 11(a)(i) of the Prescription Act is clear.** And it is hardly the sort of language that the legislature would have used if the intention was that the loss of the security or the cancellation of the mortgage bond would have no effect on the period of prescription. In my view this interpretation accords with the tenets of purposive and contextualised statutory interpretation and does not result in an absurdity.[8]

[20] It was not the appellant's pleaded case, nor was any evidence

[8] Jaga v Dönges NO & another; Bhana v Dönges NO & another 1950 (4) SA 653 (A) at 664E-H; Dadoo Ltd & others v Krugersdorp Municipal Council 1920 AD 530 at 543; Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others (CCT 39/2013) [2013] ZACC 48; 2014 (5) SA 138 (CC).

adduced to establish such a case – given the approach adopted in the High Court – that there is a lacuna in s 11(a)(i) of the Prescription Act rendering it necessary to read in the words 'that was at any time' to cure such lacuna.[9] Consequently, if this Court were disposed to uphold the appellant's counsel's argument it would thereby 'cross the divide between interpretation and legislation'.[10] Counsel for the appellant was understandably constrained to concede as much.

[21] As already alluded to in para 8 above, the only issue adjudicated upon by the High Court was whether the period of prescription of the debt sought to be enforced by the appellant was 30 years or three years. The High Court held that the relevant period of prescription was three years. Since this was the only issue argued in this Court, and has been determined against the appellant, it follows that the appeal must fail.

[22] In the result the following order is made:

The appeal is dismissed with costs.

[9] Phillips & others v National Director of Public Prosecutions [2005] ZACC 15; 2006 (1) SA 505 (CC) paras 36-38

[10] Endumeni footnote 4 above, para 18.

AFGRI OPERATIONS LIMITED v HAMBA FLEET (PTY) LIMITED

A party answering a claim for its liquidation by raising a counterclaim must show that its counterclaim is genuine

Judgment given in the Supreme Court of Appeal on 24 March 2017 by Willis JA (Leach JA, Theron JA, Petse JA and Dambuza JA concurring)

Afgri Operations Limited obtained a judgment for costs against Hamba Fleet (Pty) Limited. These costs were taxed in an amount of R156 796.64. Hamba failed to discharge this debt. Afgri then brought an application to wind up Hamba on the basis that it was unable to pay its debts within the meaning of section 345(1)(a), read with section 344(f) of the Companies Act (no 61 of 1973).

Hamba raised a counterclaim based on alleged unlawful transfers in an amount in excess of R22m that Afgri had made from its bank account during the period 12 November 2003 to 22 March 2006. These transfers were alleged to have taken place while the appellant had been managing the affairs of the respondent in terms of a 'Management Agreement'. The summons had been issued five years earlier but had not been pursued by Hamba.

The application was dismissed. Afgri appealed.

Held—

The first question was whether the counterclaim was genuine.

Hamba's claim was illiquid. Its summons was not attached to its answering affidavit. Its pursuit of the claim appeared to be desultory. These were indications that its claim was not genuine.

In deciding whether or not to order the liquidation of a company, a court must exercise its discretion judicially, and keep in view the specific principle that, generally speaking, an unpaid creditor has a right to a winding-up order against a company that has not discharged a debt.

Mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up. The discretion to refuse a winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one. The onus to answer the applicant's claim is not discharged by the respondent merely by claiming the existence of a counterclaim.

Hamba's inertia in pursuing its right of action alleged in its counterclaim, the illiquidity of its claim, the failure even to attach the summons, the failure to respond to the section 345 demand, the lack of any indication that it might be solvent, and the fact that the respondent does not appear to be trading, were all factors which generated a considerable sense of unease about the genuineness of its counterclaim. It had therefore failed to discharge the onus of demonstrating that its indebtedness to Afgri had indeed been disputed on bona fide and reasonable grounds.

The court was therefore entitled to interfere with the discretion exercised by the court a quo. The correct order would have been to have placed the respondent in liquidation.

Advocate S Stein SC and Advocate L Sisilana instructed by Fluxmans Inc, Johannesburg, appeared for the appellant

Advocate Z Omar instructed by Zehir Omar Attorneys, Springs, appeared for the respondent

Willis JA:

[1] The appellant, the applicant in the court a quo, applied for a final order of liquidation of the respondent. That court (Mabuse J) dismissed the application with costs but granted leave to appeal to this court.

[2] The appellant had obtained a judgment for costs against the respondent on 4 February 2014. These costs were, by agreement between consultants employed by the parties, taxed in an amount of R156 796.64. The respondent failed to discharge this debt owed to the appellant. The appellant then brought an application to wind up the respondent on the basis that the respondent was unable to pay its debts within the meaning of s 345(1)(a), read with s 344(f) of the Companies Act 61 of 1973 (the old Companies Act). Other than to present a bald denial that it is insolvent, the respondent did not dispute the underlying debt and that it had failed to pay it. In addition, the issues of whether demand had been given by the appellant to the respondent in terms of s 345 of the old Companies Act and the failure of the respondent to satisfy that demand, were not in dispute.

[3] The court a quo dismissed the application for the winding-up of the respondent solely on the basis that it had a counterclaim against the appellant. The counterclaim arises from allegedly unlawful transfers in an amount in excess of R22 million that the appellant had made from the respondent's bank account during the period 12 November 2003 to 22 March 2006. These transfers were alleged to have taken place while

the appellant had been managing the affairs of the respondent in terms of a 'Management Agreement'. The summons in respect of this claim had been issued on 10 March 2009 but had not been pursued by the respondent. Not only is the claim illiquid but also the summons was not even attached to the respondent's answering affidavit.

[4] The respondent made no allegation that it was either factually or commercially solvent. It is common cause that the respondent was not trading or conducting any business at the time of the application for its winding-up. The respondent also admits that it has no assets but places the blame for this on the appellant. Most significantly, as previously mentioned, the underlying debt, giving rise to the application for the winding-up of the respondent, was not in dispute. Indeed, it was admitted by the respondent.

[5] In dismissing the application for the winding-up of the respondent, the court a quo relied upon the exercise of its discretion. In its judgment it said:

> 'To conclude on this point I accept that in South African law, as in English law, the power of the Court to grant a winding-up order is discretionary, irrespective of the grounds on which such order is sought.'
>
> A little later on, it said:
>
> 'Quite clearly the applicant has a number of concerns against the respondent's action. I have noted those concerns but under the circumstances *this Court is not at liberty to deal with them or the respondent's claims at this stage* and in this proceedings.' (Emphasis added.)

The questions that therefore arise in this appeal are: (a) may this court interfere with the exercise of its discretion and, if so (b) should it do so?

[6] It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable

grounds[1]. This is known as the so-called '*Badenhorst* rule'[2]. Where, however, the respondent's indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds[3].

[7] The existence of a counterclaim which, if established, would result in a discharge by set-off of an applicant's claim for a liquidation order is not, in itself, a reason for refusing to grant an order for the winding-up of the respondent but it may, however, be a factor to be taken into account in exercising the court's discretion as to whether to grant the order or not[4].

[8] The court a quo was much influenced by a series of English cases in which it has been held that a 'genuine' cross-claim, the equivalent of our counterclaim, is a matter which may justify the exercise of a discretion against making a winding-up order. It relied, in particular, on *Re: Portman Provincial Cinemas Ltd*[5] *and Re: Bay Oil Seawind*

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[1] See Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347-348 and Kalil v Decotex (Pty) Ltd & another 1988 (1) SA 943 (A) at 980D.

[2] Ibid. See also 'Winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds; the procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt.' P M Meskin et al; Henochsberg on the Companies Act 5 ed Vol 1 at 693-694.

[3] See for example Kalil v Decotex (supra) at 980C; Meyer NO v Bree Holdings (Pty) Ltd 1972 (3) SA 353 (T) at 354-355; Badenhorst v Northern Construction Enterprises (Pty) Ltd (supra) at 348B; Machanick Steel & Fencing v Wesrhodan (Pty) Ltd; Machanick Steel & Fencing v Transvaal Cold Rolling (Pty) Ltd 1979 (1) SA 265 (W) at 269B; Kyle v Maritz & Pieterse Inc [2002] 3 All SA 223 (T) at 226; Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV & another v Honig 2012 (1) SA 247 (SCA) at para 11 and Ricoh South Africa (Pty) Ltd v Bula Document Solutions (Pty) Ltd (31095/2012) [2014] ZAGPPHC 187 (2 April 2014) para 22.

[4] See Re: LHF Woods Ltd [1970] Ch 27 (CA); [1969] 3 All ER 882 (CA); Ter Beek v United Resources CC & another 1997 (3) SA 315 (C) at 333H and Ricoh v Bula Document Solutions (supra) para 25.

[5] Re: Portman Provincial Cinemas Ltd (1964) 108 SJ 581, CA.

Tankers Corp v Bay Oil SA[6] and the authorities therein cited. The difficulty is, of course, encapsulated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[7], with which every lawyer must be familiar: **how does one decide whether a disputed counterclaim is 'genuine', when applications for winding-up are, in the ordinary course, brought by way of motion proceedings**?[8]

[9] Indeed, it is precisely by reason of the fact that a court may first make a provisional order of liquidation that in *Kalil v Decotex (Pty) Ltd*[9], a different test was applied from that in *Plascon-Evans* when setting out the circumstances that would be sufficient to justify the making of such an order of liquidation[10]. It is that the affidavits must demonstrate a prima facie case in favour of the applicant[11]. It may bear repeating that *Plascon-Evans* is the locus classicus as to the test in the factual enquiry before a final order can be made in motion proceedings[12].

[10] Ms Stein, who appeared for the appellant, submitted that *Portman Provincial Cinemas* had been wrongly decided (in the sense that it did not correctly reflect the position in English law) and that, in any event, it would be incorrect for a South African court to apply the English law in the matter, as our law is already clear in this regard. It is

[6] Re: Bay Oil Seawind Tankers Corp v Bay Oil SA (1969) 3 All ER 882

[7] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635. See also Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) para 55; Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director Public Prosecutions & others 2009 (1) SA (CC) paras 8 to 10; Zuma National Director of Public Prosecutions 2009 (2) SA 277 (SCA) para 26.

[8] See also Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 All SA 185 (SCA) para 4.

[9] Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A).

[10] At 979.

[11] Ibid.

[12] At 634H-I.

unnecessary, in the present case, to decide either point because **the respondent does not even get past the post: its desultory pursuit of its counterclaim has the consequence that is has failed to discharge the onus of satisfying the court of the 'genuineness' thereof.**

[11] As to the general principles concerning the exercise of a discretion by a court, the Constitutional Court's judgment in *National Coalition for Gay and Lesbian Equality & others v the Minister of Home Affairs & others* has made it clear that an appeal court will not interfere with a lower court's discretion unless that court was influenced by wrong principles or a misdirection of the facts or if that court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles[13]. The court a quo was mindful of the fact that its discretion must be 'exercised on judicial grounds'.

[12] **Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt[14].** Different considerations may apply where business rescue proceedings are being considered in terms of Part A of chapter six of the new Companies Act 71 of 2008[15]. Those considerations are not relevant to these proceedings. The court a quo

[13] National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others 2000 (2) SA 1 (CC) para 11.

[14] See De Waard v Andrew & Thienhaus Ltd 1907 TS 727 at 733; Service Trade Supplies ltd v Dasco & Sons Ltd 1962 (3) SA 424 (T) at 428B-D, to which reference was made, with approval, by this court in Sammel & others v President Brand Gold Mining Company Ltd 1969 (3) SA 629 (A) at 662F. Ex debito justitiae means 'as a right arising out of the justice of the matter'. As Rogers J said in Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd & another 2015 (4) SA 449 (WCC) para 18, a court 'does not sit under a palm tree' - per Warner J in Re Cade & Son Ltd [1992] BCLC 213 at 227.

[15] See for example Absa Bank Ltd v New City Group (Pty) Ltd (45670/2011); Cohen v New City Group (Pty) Ltd and Another (28615/2012) [2013] 3 All SA 146 (GSJ) . See also Richter v Absa Bank Ltd 2015 (5) SA 57 (SCA). Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd 2016 (3) SA 209 (GP) at para 16; Standard Bank of South Africa v A-Team Trading CC 2016 (1) SA 503 (KZP) para 14.

also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a 'very narrow one' that is rarely exercised and in special or unusual circumstances only[16].

[13] **As mentioned above, mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up. Moreover, as set out above, the discretion to refuse a winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one. In these respects the court a quo applied 'the wrong principle[s]'. There must be no room for any misunderstanding: the onus is not discharged by the respondent merely by claiming the existence of a counterclaim.** The principles of which the court a quo lost sight are: (a) as set out in *Badenhorst* and *Kalil*, once the respondent's indebtedness has prima facie been established, the onus is on it to show that this indebtedness is disputed on bona fide and reasonable grounds and (b) the discretion of a court not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide.

[14] Mr Omar, who appeared for the respondent, accepted that this was a correct statement of the law. In other words, he accepted that once the appellant had demonstrated that the respondent was prima facie indebted to it, it was for the respondent to establish that it disputed that indebtedness on bona fide and reasonable grounds. He also accepted that, once the respondent's indebtedness to the appellant had been shown, the discretion to refuse a winding-up order was a narrow one. He submitted, however, that by reason of the Bill of Rights in the Constitution and, in particular s 22 (the right to trade) and s 34 (the right to a fair hearing before a court) contained therein, it would be 'unconstitutional' for a court to apply a narrow discretion, rather than a broad one, when it comes to deciding whether or not to grant a final

[16] ee for example Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd 1962 (3) SA 424 (T) at 428B; First Rand Bank Ltd v Evans 2011 (4) SA 597 (KZD) para 28; Orestisolve (supra) para 18 and Victory Parade Trading 74 (Pty) Ltd t/a Agri-Best Sa v Tropical Paradise 93 (Pty) Ltd t/a Vari Foods (13641/2006) [2007] ZAWCHC 32; [2007] JOL 200096 (C) para 28.

order of liquidation. For the reasons that follow it is unnecessary to reach a decision on the issue.

[15] There may indeed be cogent reasons for the doors of the courts to be wide open when it comes to any matter affecting human rights. One searches the respondent's affidavit in vain, however, for any human right that may be adversely affected by the grant of a final order for its liquidation. It does not appear to be trading. There is not even an allegation that jobs will be lost as a result of its liquidation. Indeed, in its answering affidavit, the respondent did not assert any of the rights contained in the Bill of Rights.

[16] In coming to its conclusion, the court a quo was influenced by *Ter Beek v United Resources CC & another*[17]. In that case, the court affirmed that the applicant bore the onus of showing that the respondent was indebted to it and that the respondent bears the onus of demonstrating that the indebtedness was disputed on bona fide and reasonable grounds[18]. It then went on to find that it was not satisfied that the applicant had discharged the onus of showing that the respondent should be wound up on the basis that it was just and equitable but nevertheless granted a final order of liquidation[19]. To the extent that *Ter Beek* is inconsistent with the reasoning in this judgment, it should not be followed.

[17] The question of onus is indeed critically relevant in a case such as this. It bears repeating that once the respondent's indebtedness to the applicant for a winding-up order has, prima facie, been established, the onus is on it, the respondent, to show that this indebtedness is indeed disputed on bona fide and reasonable grounds[20]. If one accepts the test set out in the English cases upon which the respondent has relied, the respondent would have to show that its counterclaim was 'genuine'.

[17] Ter Beek v United Resources CC & another 1997 (3) SA 315 (C).

[18] At 337I-J.

[19] At 341C-D.

[20] See, for example, Badenhorst v Northern Construction Enterprises (Pty) Ltd (supra) at 347-348 Kalil v Decotex (supra) at 980B-C.

[18] **As mentioned earlier, in this particular case the inertia of the respondent in pursuing its right of action alleged in the counterclaim generates a considerable sense of unease about the genuineness of its contestation. There are other relevant factors too: the illiquidity of the claim, the failure even to attach the summons, the failure to respond to the s 345 demand, the lack of any indication that the respondent may be solvent and the fact that the respondent does not appear to be trading. It has therefore failed to discharge the onus of demonstrating that its indebtedness to the appellant has indeed been disputed on bona fide and reasonable grounds. This court is therefore entitled to interfere with the discretion exercised by the court a quo. The correct order would have been to have placed the respondent in liquidation.**

[19] There was a short debate before us as to whether it would have been the better exercise of its discretion for the high court to have preceded the making of a final order of liquidation with a provisional one. Incontestably, the appellant had established a prima facie case for the liquidation of the respondent and therefore a right to a provisional order. As to the extent to which the courts will incline to taking the precaution of first granting a provisional order of liquidation, rather than a final one, it would seem that there is some degree of regional variance and that the matter is perhaps even affected by the individual preferences among judges[21]. The passage of time since the original hearing of this matter and the full ventilation of the issues that has since taken place render it inappropriate for this court now to substitute the order of the high court with a provisional order. Above all, the appellant has satisfied the requirements for the grant of a final order of liquidation, which was the relief that it had sought in the first instance. Following *Johnson v Hirotec (Pty) Ltd*[22], it will be appropriate for this court to direct the issue of a final order.

[20] Ms Stein asked that the costs of two counsel be allowed, in the event that the appeal was successful. The matter is not complex. The record is short. The amount in question is not particularly large. A fair

[21] See Johnson v Hirotec (Pty) Ltd 2000 (4) SA 930 (SCA) para 9.

[22] Johnson v Hirotec (Pty) Ltd 2000 (4) SA 930 (SCA) para 9. See also Kalil v Decotex (supra) at 976A-B.

exercise of the discretion in regard to costs would not be to allow the costs of two counsel.

[21] The following order is made:

(a) The appeal is upheld.

(b) The order of the High Court is set aside and replaced with the following:

'The respondent is placed under a final winding-up order in the hands of the Master.'

(c) The appellant's costs in the appeal and in the application before the High Court are to be costs in the liquidation of the respondent.

KRANSFONTEIN BELEGGINGS (PTY) LTD v CORLINK TWENTY FIVE (PTY) LTD

Conditions under which a court cannot partially set aside and amend an adopted business rescue plan

Judgment given in the Supreme Court of Appeal on 29 September 2017 by Mokgohloa AJA (Lewis JA, Bosielo JA, Saldulker JA and Rogers AJA concurring)

Kransfontein Beleggings (Pty) Ltd was the registered bondholder of a notarial bond over certain movable property owned by Corlink Twenty Five (Pty) Ltd. As a result of the dire financial position in which Corlink found itself, three farms registered in its name and some of its movables were sold by public auction. Its farming operations were sold as going concerns, the sales including some of the movable items that had been pledged to Kransfontein. Absa Bank and Griekwaland Wes Korporatief Bpk (GWK) held first and second mortgage bonds respectively over the farms. They consented to the sales.

Corlink's sole director passed a resolution placing it in business rescue proceedings in terms of section 129(1)(b) of the Companies Act (no 71 of 2008), on the basis that it was financially distressed.

In terms of the business rescue plan as adopted, most of the proceeds of Corlink's assets was to go to Absa and GWK as secured creditors – R46 265 000 and R24 236 100 respectively. Their concurrent shortfall was calculated at R3 637 360 and R4 281 365 respectively. The claims of concurrent creditors, including Absa and GWK, totalled R35 401 876. The plan stated that if there were a liquidation, the concurrent creditors would receive nothing. In terms of the plan they were offered a 'sweetener' of 1.58 cents in the rand. The total amount available for division among concurrent creditors was R560 000.

On 9 June 2015, Kransfontein Beleggings (Pty) Ltd brought an urgent application to interdict the transfer of Corlink's immovable properties and the implementation of the business rescue plan. It later sought an order (i) that the plan be set aside only to the extent that it failed to reflect itself as a secured creditor of Corlink (ii) that the plan be amended by reflecting itself as a creditor in an amount not exceeding R7 217 500 in respect of specified movable property including certain water rights, and (iii) that a ring-fenced amount remain in trust pending the final determination of the amount payable to it under the notarial bond.

Held—

The question was whether a court could partially set aside and amend an adopted plan so as to alter its operation in relation to one or more of the creditors. It cannot.

A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of section 152 of the Companies Act. The court has no power to foist on creditors a plan which they have not discussed and voted on at such a meeting. This is what Kransfontein was asking the court a quo to do. The plan which the creditors discussed and voted on was one in terms of which Kransfontein was not reflected as a creditor and a specified amount from the proceeds of the farms was to be paid to GWK in settlement of its secured claims. If Kransfontein was granted the relief it sought, the plan would become one in which it received its full secured claim up to a maximum of the ring-fenced amount while GWK would receive proportionately less. Concurrent creditors would also receive slightly less than the plan promised them. The creditors had not discussed or voted on such a plan. GWK might have voted against it. Creditors may have taken the view that the plan could not be finalized and put to a vote until the value of the applicant's secured claim was established.

The court did not have enough information to determine whether GWK on its own could have defeated the plan or whether other creditors might have voted differently. However, this did not matter because a court cannot be asked to delve into suchmatters. The simple point was that the only plan which practitioners could implement was one adopted by creditors in accordance with section 152 of the Companies Act.

Advocate J H Roux SC and Advocate P S Van Zyl instructed by Bill Tolken Hendrikse Inc, Belville, appeared for the appellant
Advocate M H Wessels SC and Advocate S Tsangarakis instructed by Phatshoane Henney Attorney, Bloemfontein, appeared for the respondent

Mokgohloa AJA:

[1] The application for leave to appeal in this matter was referred by the direction of this court for oral argument in terms of s 17(2)(d) of the Superior Courts Act[1]. The parties were forewarned that they should be prepared, if called upon, to address this court on the merits. As a result,

[1] 10 of 2013

arguments were heard on both the application for leave to appeal and the merits of the matter.

[2] The applicant is the registered bondholder of a general and special notarial bond (the notarial bond) in terms of the Security by Means of Movable Property Act[2] registered over certain movable property owned by the first respondent (Corlink). Rights under the bond were ceded to the applicant and the cession registered at the Deeds Office on 19 November 2014. The movable property specially pledged in terms of the notarial bond comprised assets listed in annexures to the bond, including irrigation and other farming equipment, livestock and, purportedly, water rights pertaining to three farms. The water rights were rights in terms of s 21(a) of the National Water Act[3]. I say these rights were 'purportedly' pledged because it was accepted at the hearing of the application before us that the water rights were incorporeal property and thus not capable of being pledged by way of the notarial

[3] As a result of the dire financial position in which Corlink found itself, three farms registered in its name and some of its movables were sold by public auction to the seventh respondent (the Gert Trust) on 28 August 2014. Deeds of sale between Corlink and the Gert Trust were subsequently executed on 1 October 2014. The farming operations were sold as going concerns, the sales including, so it appears, some of the movable items that had been pledged to the applicant. The water rights supposedly pledged to the applicant pertained to these three farms. The fifth respondent (Absa) and sixth respondent (GWK) held first and second mortgage bonds respectively over the farms. They consented to the sales.

[4] On 30 October 2014, Corlink's sole director passed a resolution placing it in business rescue proceedings in terms of s 129(1)(b) of the Companies Act[4], on the basis that it was financially distressed. Pursuant to this, the second and third respondents were appointed as business

[2] 57 of 1993

[3] 36 of 1998

[4] 71 of 2008

rescue practitioners (the practitioners). The applicant's attorney informed the practitioners on 20 January 2015 that the applicant was a secured creditor of Corlink by virtue of the notarial bond. They were requested to include the applicant as such in the business rescue plan.

[5] In the meanwhile, the practitioners had prepared a business rescue plan which was considered at a creditors' meeting on 30 January 2015. We may infer that the applicant's claim was not reflected in this plan. The creditors resolved to adjourn the meeting. They also resolved that the practitioners should implement the sale of the farms to the Gert Trust. On 13 March 2015 the practitioners published a revised plan (the plan). This plan did not reflect the applicant as a creditor, secured or otherwise. The plan was approved and adopted on 22 April 2015 at the creditors' meeting. The applicant attended the meeting and its representative voted against the acceptance of the plan.

[6] In terms of the plan as adopted, the lion's share of the proceeds of Corlink's assets was to go to Absa and GWK as secured creditors – R46 265 000 and R24 236 100 respectively. Their concurrent shortfall was calculated at R3 637 360 and R4 281 365 respectively. The claims of concurrent creditors, including Absa and GWK, totaled R35 401 876. The plan stated that if there were a liquidation, the concurrent creditors would receive nothing. In terms of the plan they were offered a 'sweetener' of 1.58 cents in the rand. The total amount available for division among concurrent creditors was R560 000.

[7] On 9 June 2015, the applicant launched an urgent application in the Free State Division of the High Court, Bloemfontein to interdict the transfer of Corlink's immovable properties and the implementation of the business rescue plan pending determination of a rule nisi to have the plan declared invalid. The only creditors cited as respondents were Absa and GWK, both of whom opposed the application. GWK delivered a notice of opposition in terms of Uniform Rule 6(5)(d)(iii) and raised, among other points, the non-joinder of Corlink's other creditors.

[8] At the hearing on 10 June 2015, the parties reached an agreement which was recorded in a court order as follows (the formatting is not reproduced here):

'By agreement between the applicant, the fifth and sixth respondents:

1. The applicant's application for and insofar as it pertains to final

relief ('the main application') is postponed sine die.

2. Further affidavits in the main application shall be delivered by the above parties in terms of the Rules of Court, as if notice(s) of opposition had been delivered on 10 June 2015.

3. The applicant shall pay the fifth and sixth respondents' taxed party and party costs of the proceedings on 10 June 2015.

4. It is recorded that:

4.1 The sixth respondent and its attorneys have given an undertaking to, pending the final adjudication of the main application, hold in trust the sum of R7 217 500.00 being the portion of the proceeds of the sales of the three immovable properties referred to in the founding affidavit and to which the applicant lays claim on the strength of the Notarial Bond upon which it relies.

4.2 This undertaking does not constitute or imply an admission or a concession that such amount or any part thereof is due or owing to the applicant and that the applicant has any rights thereto (which aspect shall be determined in the adjudication of the main application).

5. The second and third respondents, not having entered appearance to oppose the relief sought, are ordered to provide details to the applicant as to the whereabouts of the proceeds of the movable assets sold by public auction on 28 August 2014 and 24 September 2014 respectively, insofar as those assets are included in the Special Notarial Bond BN 8134/2011 dated 1 December 2011, within ten (10) days of the date of service of this order.'

[9] The amount of R7 217 500 (the ring-fenced amount) was the maximum amount at which the applicant valued its security under the notarial bond. As a result of the agreement incorporated in the court order, transfer of the three farms to the Gert Trust was registered and Absa received the full amount to which it was entitled in terms of the plan (this was less than its full legal entitlement).

[10] The postponed application was heard on 22 October 2015. On the day of the hearing, the applicant's counsel handed up a draft order which modified the relief sought in the notice of motion by asking (i) that the plan be set aside only to the extent that it failed to reflect the applicant as a secured creditor of Corlink; (ii) that the plan be amended by reflecting the applicant as a creditor in an amount not exceeding

R7 217 500 in respect of specified movable property including the water rights; and (iii) that the ringfenced amount remain in trust pending the final determination of the amount payable to the applicant under the notarial bond.

[11] The court a quo dismissed the application with costs on the basis that the applicant had failed to join the other creditors of Corlink.

[12] The test whether there has been a non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined[5].

[13] The applicant submitted that the issue of joinder was considered prior to the hearing on 22 October 2015, and that its legal team concluded that it was not necessary to join any other creditors because the amended relief which the applicant sought did not affect any creditor except GWK.

[14] If the applicant had persisted in the relief set out in the notice of motion, that is, interdicting the implementation of the plan and having it set aside as invalid, there is no doubt that it would have been necessary to join all the creditors[6]. However by 22 October 2015, the applicant had abandoned that relief and confined itself to the amended relief reflected in the draft order. By design the amended relief was intended to affect only GWK.

[15] However, the amendment to the plan which the applicant sought would inevitably have affected concurrent creditors. If GWK's secured entitlement under the plan were reduced by R7 217 500, its concurrent claim would increase by the same amount. Since the applicant did not allege any basis on which GWK could be required to forfeit this concurrent claim, the dividend payable to concurrent creditors out of the surplus of R560 000 would have reduced from 1.58 cents to 1.31 cents. While one may speculate that this modest reduction would not have affected how creditors voted, the fact remains that the amendment did affect their rights under the plan.

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[5] Absa Bank Limited v Naude NO & others [2015] ZASCA 97; 2016 (6) SA 540 (SCA) para 10; Golden Dividend 399 (Pty) Ltd & another v Absa Bank Ltd (569/2015) ZASCA 78 (30 May 2016)

[6] Above

[16] As stated in *Absa v Naude*, if the creditors who voted for the business rescue plan are not joined, their position would be prejudicially affected in that a business rescue plan would be set aside, money that they had anticipated they would receive would not be paid and the money that they had received would have to be repaid. It thus follow that the non-joinder of Corlink's other creditors was fatal to the amended relief sought by the applicant for non-joinder. Since the question of joinder had been raised at the previous hearing and since the applicant had taken a deliberate decision not to join other creditors, I do not think that the court a quo was required to afford the applicant a further opportunity to join the other creditors.

[17] However, and even if non-joinder was not a sufficient basis for dismissing the application, the application was in any event doomed to fail for the reasons elaborated below. Because the applicant did not persist in the relief originally claimed, it is unnecessary to investigate on what grounds a court may set aside an adopted business rescue plan and whether such relief ceases to be competent once the plan has been implemented. The question is whether a court can partially set aside and amend an adopted plan so as to alter its operation in relation to one or more of the creditors. In my view the answer is no.

[18] **A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of s 152 of the Companies Act. The court has no power to foist on creditors a plan which they have not discussed and voted on at such a meeting. This is what the applicant was asking the court a quo to do. The plan which the creditors discussed and voted on was one in terms of which the applicant was not reflected as a creditor and a specified amount from the proceeds of the farms was to be paid to GWK in settlement of its secured claims. If the applicant was granted the relief it seeks, the plan would become one in which the applicant receives its full secured claim up to a maximum of the ring-fenced amount while GWK receives proportionately less. And as I have explained, concurrent creditors would also receive slightly less than the plan promised them. The creditors have not discussed or voted on such a plan. Quite conceivably GWK would have voted against it. Creditors may have taken the view that the plan could not be finalized and put to a vote until the value of the applicant's secured claim was established.**

[19] We do not have enough information to determine whether GWK on its own could have defeated the plan or whether other creditors might have voted differently and in any event I do not think it matters. A court cannot be asked to delve into these matters. The simple point is that the only plan which practitioners can implement is one adopted by creditors in accordance with s 152 of the Companies Act.

[20] The applicant's counsel submitted that, by consenting to the order of 10 June 2015, GWK had agreed that the applicant, if it proved the existence and value of its security, would be entitled to receive such value from the ringfenced amount, in which event GWK would receive proportionately less. No such case was made out on the papers. As at 10 June 2015, the applicant was seeking to have the entire plan set aside. This is the case which Absa and GWK proceeded to answer. It was only on 22 October 2015 that the applicant changed course. Even then, the applicant did not claim that GWK had agreed to a two-way fight in which the ringfenced amount would either go to the applicant or to GWK depending on an adjudication of the applicant's legal rights. The applicant's modified case was that it was entitled to a partial setting aside and amendment of the plan.

[21] I therefore find that the court a quo was correct in dismissing the application. The applicant has failed to show that there are prospects of success in the appeal.

[22] In the circumstances, the following order is made:

The application for leave to appeal is dismissed with costs.