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**IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 1985/2014

ETHEKWINI MUNICIPALITY

APPLICANT

And

MOUNTHAVEN (PTY) LTD

RESPONDENT

JUDGEMENT

Delivered: 30 September 2015

MBATHA J

[1] The Applicant is eThekwini Municipality, a category A Municipality, duly constituted as such and which has its principal place of business at [C..... H....., Dr P..... K..... Street], Durban, KwaZulu-Natal.

[2] The Respondent is Mounthaven (PTY) Ltd, a company duly registered in terms of the Company Laws of the Republic of South Africa and whose registered address is [... E..... S....., 1..... S..... Road, L.....], KwaZulu-Natal.

[3] The Applicant seeks an order that it be declared that in terms of Clause C.2 to the conditions of title, the property described as Erf [2.....] of [V.....] Extension [2.....], situated at 6 [M.....] Place, [V.....], KwaZulu-Natal “the property” is to be transferred, forthwith, to the Applicant and seeks further relief as stated in the Notice of Motion.

[4] The relief sought is sought on the basis that the Respondent did not comply with its obligation to develop the property by June 1988, nor did it deny its failure to honour that obligation and the Applicant was therefore entitled to invoke Clause C.2 at any time thereafter.

[5] Clause 5 of the sale makes the sale subject to specified additional conditions in favour of the Applicant and these were in due course incorporated in the Deed of transfer as clauses C (1) and C (2), when the property was transferred to the Respondent on the 4th of August 1986.

The conditions of title which the Applicant invokes are as follows:

“C. ...

- 1) *The Purchaser shall erect, or cause to be erected on the property, buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100 000,00) and failing the erection of buildings to that value within two (2) years from the date of sale, then, for the purpose of levying the general rate and sewer rate payable to the Verulam Town Council by the Purchaser or his successors in title, there shall be deemed to be buildings to such required value on the property and all valuation and rating provisions of Section 157 of*

Ordinance 25 of 1974 or any amendment thereof shall apply to the property and be binding upon the Purchaser or his successors in title.

2) If at the expiry of a period of three (3) years from the date of sale the Purchaser has failed to complete buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100 000,00) on the property, ownership of the property shall revert to the Seller which shall be entitled to demand re-transfer thereof to it from the Purchaser who shall be obliged to effect 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 transfer, transfer duty, stamp duty and the like.”

The effect of conditions as submitted by the Applicant may be summarised as follows:

- a) If the Respondent did not, within two (2) years of the sale date, erect buildings with a value of not less than R100 000.00 on the property then the Respondent would be liable to the Applicant for increased rates on the property as if such buildings had in fact been built on it; and
- b) If the Respondent did not, within three (3) years of the sale date, erect such buildings on the property then the Applicant was entitled to compel re-transfer of the property to it at the Respondent’s expense against re-payment of the price (“the reversion clause”).

[6] The Respondent admit that it did not, and still has not, erected any such buildings on the property and it remains vacant land, the present directors of the Respondent citing the continued existence of a 750mm diameter storm water pipe that runs under the property, and is not the subject of any servitude, as preventing the effective development of the property, which is zoned for commercial purposes. The Applicant declined to remove the pipe or relocate it to the existing servitude on the property.

[7] On 23 May 2012, the Applicant wrote a letter to the Respondent in which letter the Applicant invoked the reversion clause and demanded re-transfer of the property. Such re-transfer was not effected by the Respondent and on 19 February 2014, the Applicant launched the present application for re-transfer of the property.

[8] The Respondent has raised prescription as one of its defences and proceeded with the defence of prescription only in terms of the Prescription Act¹, when this matter was argued before me. In that regard, it raised the following issues:-

- a) That the right of the Applicant to claim re-transfer of the property in terms of the reversion clause is a “debt” as contemplated in chapter III of the Prescription Act;
- b) That such debt became due on 25 May 1988 when, because of the Respondent’s failure to build the required buildings on the property within the stipulated time, the right to claim re-transfer in terms of the reversion clause accrued to the Applicant;

¹ Act 68 of 1969.

- c) That the debt was immediately claimable and the Applicant could not delay the onset of prescription by not demanding re-transfer of the property until 2012;
- d) That as prescription of the Applicant's right to enforce the reversion clause began to run in May 1988, the debt either prescribed after three (3) years in May 1991 or after 15 years in May 2003; and
- e) That the Respondent also submitted that the Applicant was not an organ of State as understood in Section 11 of the Prescription Act. Even if it had been an organ of State, the claim would have prescribed in 2003. The enforcement proceedings were only instituted in 2014 by the Applicant.

[9] The Respondent also contends that when it raised the issue of prescription in its answering affidavit, the Applicant only raised a bare denial. It was only on its heads of argument, that it contended that ownership automatically reverted to the Applicant after May 1989, whereafter it was entitled to claim possession and re-transfer of the property. It submits that its claim is based on a *rei vindicatio* as owner, and therefore a claim under the *rei vindicatio* is not for a "debt" subject to extinctive prescription.

I accept the Respondent's contention that this defence is not pleaded, though the Applicant gave a lengthy replication. In support of this, the Respondent referred me to the judgment of Theron JA in ***Quartermark Investments (PTY) Ltd v Mkhwanazi and Anther***². Though this was an irregular step on the part of the Applicant, I find that it just and equitable to deal with the merits of the defence raised by the Applicant.

² 2014 (3) SA 96 (SCA) 100 at 13.

[10] It is trite that the extinctive prescription of debts is regulated by Chapter III of the Prescription Act³. The periods of prescription are stated in Section 11 of Chapter III and I will not repeat them here. Prescription sets in as soon as the debt is due.

[11] The question for determination before me is whether the claim for the retransfer of property to the Applicant is a “debt” or not. The Respondent relies on *Desai NO. v Desai and Others*⁴, where the Court held that the term “debt” in the context of section 10 (1) of the Prescription Act⁵ had a wide and general meaning, and included an obligation to do something or refrain from doing something in clause 13 (d) (of that case) to procure registration of transfer was a “debt” as envisaged in section 10 of the Prescription Act.

In the Desai case, the Applicants had launched an application, whereby they sought an order directing the Appellant to take all steps and sign all documents necessary to effect transfer to them of certain immovable properties. Amongst other findings made by Hugo J, he dismissed the application to pass transfer on the basis that it was a “debt” which had been extinguished by prescription.

The Appellate Division, as it was then, confirmed Hugo J’s finding. It went on further to state that the undertaking in clause (d) to procure registration of

³ Act 68 of 1969.

⁴ 1996 (1) SA 141 (A).

⁵ Act 68 of 1969

transfer was a “debt” as envisaged in Section 10(1) of the Act. In terms of the Act⁶, the debt is extinguished.

[12] The Respondent in further support of its defence of extinctive prescription also relied on ***The Master v I.L. Back and Co. LTD and Others***⁷ by Galgut AJA, where the Court held that a creditor’s right of action is not “*postponed until such time as he may, either in his wisdom or when he thinks he ought to, bestir himself.*” Basically, this means that you must strike while the iron is still hot.

[13] Besides considering whether the Applicant’s claim is a “debt” for purposes of extinctive prescription within the meaning of the Prescription Act, I must also consider if there is an exception when the claim is vindicatory in nature, as ownership is a real right and avails the owner thereof of the *rei vindication* i.e. the right to recover the property from anyone who is in possession thereof.

[14] The term “debt” is not defined in the Prescription Act. In terms of Section 12(1) of the Act, prescription commences as soon as the debt is “due”. The term due has been interpreted to mean, that for prescription to run there has to be a debt in respect of which the debtor is under an obligation to perform immediately. The Courts have held that a debt includes also any liability arising under a contract. A debt refers to an obligation to do something e.g. delivery of something. It refers mostly to a claim.

⁶ Act 68 of 1969.

⁷ 1983 (1) SA 986 (A) 1005H.

Prescription begins to run when the debt is due provided that the debtor does not wilfully prevent the creditor from knowing of the existence of the debt, the creditor must have knowledge of the debtor and of the facts from which the debt arises. The time for a contractual debt is determined by the terms of the contract. See ***LTA Construction LTD v Minister of Public Works and Land Affairs***⁸.

Where a contractual debt is dependent upon the happening of a certain event or the lapse of a specified period of time, the debt becomes due upon the fulfilment of that condition or lapse of that period.

[15] Wille's Principles of South African Law, 8th Edition 1991 states that ownership does not pass on account of a mere agreement between the parties but only on delivery and registration. The Respondent relies on Desai that it is a debt, the debt has prescribed and the creditor cannot delay prescription, see ***Mostert v Mostert***⁹, where the Court held that the period of prescription began to run from the date of the dissolution of the partnership and not from the date for demand for this account. It is the Respondent's case that the prescription period is three (3) years, as it was also not an organ of state. There are no averments by the Applicant that prescription has been interrupted, therefore, the property did not automatically revert to Applicant, because it's an owner without transfer and registration of transfer.

⁸ 1992 (1) SA 837 (C).

⁹ 1913 TPD 255.

[16] The Applicant's defence to prescription which has not been stated in replication is that the Respondent acquired only a limited real right in and to the property and relied on **Cumming v Cumming**¹⁰:-

"If the condition creating the reversionary right is a valid one, then something less than full and unrestricted ownership vested in the appellant by virtue of registration, namely, the right of the Respondent to re-acquire ownership an possession on an order of divorce being granted for whatever reason."

It further submits that the property was purchased in 1986 and by June 1989, the Respondent had failed to develop it, therefore, ownership automatically reverted to the Applicant after May 1989. It was therefore entitled to claim possession and transfer of the property.

It further stated that the *rei vindicatio* is not a "debt" as envisaged in the Prescription Act of 1969 and relies on the judgments in **Staegemann v Langenhoven and Others**¹¹; **Fedgroup Participation Band Managers (PTY) LTD v Trustee of the Capital Property Trust**¹².

[17] It is common cause that prescription extinguishes a "debt" being anything that is owed or due. The word "debt" refers to the claim and not the cause of action. In general, prescription begins to run as soon as the debt is due, unless the debt is the result of a continuing wrong. It must be immediately claimable by the creditor in legal proceedings.

¹⁰ 1984 (4) SA 585 (T) at 589 D-E.

¹¹ 2011 (5) SA 648 (WCC) at para 18-12.

¹² 2015 (ZASCA) 103 (30 June 2015).

[18] This takes me to the submissions made by the Applicant that their claim is based on a *rei vindicatio* and it does not prescribe after three (3) years in terms of the Prescription Act. I have considered Staegemann judgment, where Blignaut J says that such a claim is not a debt and it cannot be defeated by prescription. The facts in the Staegemann's case are different as the claim in that matter related to a credit agreement, a credit agreement which stated that if the Respondent failed to make payment to the Appellant, the Respondent would be entitled to the return of the motor vehicle and the Appellant would be entitled to demand payment of arrear instalments.

In my view, each case should be decided on its facts. In this case, nothing is owing to the Applicant. It was aware of the time frame of the reversionary rights to the property and also aware of the debtor. It did not exercise its rights when the three (3) year period expired, but it tried to assist the Respondent without reserving its rights to the property.

[19] I therefore find that this claim is a "debt" as envisaged in the Desai case, where the Court held that a debt was said to have "*a wide and general meaning and includes an obligation to do something and refrain from doing something.*"

20.1 The judgement in ***Evins v Shield Insurance Co. LTD***¹³ held that the word "debt" must be given a wider meaning denoting not debts sounding in money, which is due, but must be extended to debt for a vindication of property. A contrary view is held in ***Absa Bank v Keet***¹⁴, where the Court held that a

¹³ 1980 (2) SA 814 (A).

¹⁴ (817/2015) [2015] ZASCA 81 (28 May 2015).

vindicatory claim based on ownership of a thing cannot be described as a debt. There must be a distinction between real and personal rights.

20.2 In finding whether the decision in Absa Bank v Keet is applicable to this case, I have revisited the conditions of title. Clause C1 binds the purchaser or his successors in title to the erection of buildings to the value of not less than R100 000,00. The intention here being that no building of less than the value of R100 000.00 shall be built on the property.

Clause C 2 specifically state that:

“If at the expiry of a period of three (3) years from the date of sale, the purchaser has failed to complete buildings to the value of not less than 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....”

20.3 The wording of this provision (C2) is peremptory and stipulates that the period should be three (3) years if no buildings are erected. It further states that the seller *“shall be entitled to demand re-transfer”*. The wording of the provision, does not say that the property *“shall automatically”* revert to the seller. It is trite that property can only be transferred by registration thereof and does not occur automatically.

No demand was made at the expiration of three (3) years by the Applicant, therefore its claim lapsed. It has also not made any submission that prescription was interrupted, as at all times it was aware of its cause of action and the debtor was known to it.

21.1 It is my view that it's right to claim re-transfer could not have occurred automatically. The successors in title are only bound to the value of the building of the property. A right that was vested to the Applicant was extinguished by the effluxion of time. The Applicant has not established that it had an absolute real right to the property. They lost their right of action when it prescribed after three (3) years.

21.2 In ***Legater McKenna Inc. and Another v Shea and Others***¹⁵ the Court held that the requirements for passing of ownership are:

- 1) Delivery (registration of transfer);
- 2) Real agreement, essential elements of which being;
 - i. intention of transferor to transfer ownership; and
 - ii. Intention of transferee to acquire ownership.

21.3 Similarly, in ***Middleton v Middleton and Another***¹⁶, the Court held that there was no merit in Applicant's contention. It was trite, both in terms of the common law and in terms of Section 16 of the Deeds Registries Act¹⁷, that ownership of land could be conveyed by one person to another only by means of a deed of transfer executed or attested by the registrar, save as otherwise provided in the Act or in any other law. It held further that the settlement agreement between the Applicant and First Respondent in that matter merely had the effect of creating a contractual right in favour of the Applicant for acquisition of the First Respondent's one half undivided share in the property. The derivative acquisition of ownership of property, or of any rights therein, required an act of *traditio* (ie. delivery or transfer). In all instances where

¹⁵ 2010 (1) SA 35 (SCA)

¹⁶ 2010 (1) SA 179 (D).

¹⁷ Act 47 of 1937.

rights of ownership of immovable property could only be vested in a person by means of an act of *traditio*, the only legal recognised and effective method of accomplishing that was by registration of a deed of transfer in the Registry of Deeds

It went on further to say that the settlement agreement conferred no more than a contractual right in *personam* in favour of the Applicant against the First Respondent for transfer of ownership of the latter's rights in and to the property by registration or endorsement in terms of the Act.

It held that there was no act of *traditio* perfecting the Applicant's '*acquisition*' in the present matter, the Applicant had not become vested with the First Respondent's rights in rem in and to the property. The First Respondent remained vested with ownership of a one half undivided share in the property as at the date on which such was placed under judicial attachment at the instance of the Second Respondent.

[22] I am also of the view that the Applicants claim is a debt that prescribed by effluxion of time after three (3) years and that the property did not automatically revert to it after the expiration of the three (3) year period.

[23] I therefore make the following order:

- a) The plea for Prescription is upheld with costs.

MBATHA J

Date of hearing : 27 July 2015

Date delivered : 30 September 2015

Appearances:

For the Applicant : Adv. S. Mahabeer

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For the Respondents : Adv. R. Suhr

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