

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No.: 05/2018

SCA Case No.: 1068/2016

KZND Case No.: 1985/2014

In the matter between:

eTHEKWINI MUNICIPALITY

Applicant

and

MOUNTHAVEN (PTY) LTD

Respondent

APPLICANT'S WRITTEN SUBMISSIONS

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A. INTRODUCTION

1. The applicant launched an application in the Durban High Court to compel the re-transfer from the respondent of Erf 2678, Verulam Extension 25, situate at 6 Magpie Place, Verulam, KwaZulu-Natal (*“the property”*). The sole issue in the High Court and the Supreme Court of Appeal was whether the respondent could avoid a condition, which is contained in the registered deed of transfer and which anticipates the re-transfer of the property upon a failure to develop within a specified period (three years following the sale), on the basis that the applicant’s entitlement to invoke its rights under the condition is a *debt* that has prescribed. The High Court and the SCA determined that the registered right constitutes a *“debt”* within the meaning of section 11(d) of the Prescription Act, 1969 (*“the Act”*) and rejected the applicant’s claim.

2. The property was sold by the applicant's predecessor-in-title to the respondent in 1985. The issue is whether the municipality's registered right to reclaim the property is a *debt* that has prescribed.
3. The applicant contends that:-
 - 3.1 the interpretation of *debt* which the High Court and the SCA adopted is inconsistent with this court's reasoning and is outdated;
 - 3.2 the condition constitutes a real right which does not constitute a *debt* or obligation as contemplated in the Act;
 - 3.3 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;
 - 3.4 conflicting judgments by the SCA and the public interest are compelling factors that require this court to make a final pronouncement on the matter.
4. The framework of these submissions is as follows:-
 - 4.1 in section **B** we set out the context to the dispute.

4.2 in section **C** we advance submissions on the judicial shift in the interpretation of *debt* under the Act, pursuant to this court's reasoning in *Makate v Vodacom (Pty) Ltd*¹ ("*Makate*", also known as the "*Please Call Me*" case);

4.3 an analysis of what rights were entrenched in the Deed of Transfer follows in section **D**. Here it will be argued that in *ABSA Bank Ltd v Keet*² the SCA reasoned but did not expressly state that real rights do not prescribe, that the obligation to re-transfer the property is a real right which is not subject to prescription and that, in any event, it would not amount to a *debt* under the Act. We further analyse the reasoning that the SCA has traversed in three decisions – its judgment in this matter,³ in *Bondev (Midrand) (Pty) Ltd v Puling Puling and Others*⁴ and, by parity of reasoning, the SCA's conclusion on real rights in *Willow Waters Homeowners' Association (Pty) Ltd v Koka and Others*.⁵ These lead to the inevitable conclusion in this matter that the right contained in the Deed of Transfer upon which the municipality relies is a real right which is incapable of prescribing;

¹ 2016 (4) SA 121

² 2015 (4) SA 474

³ Delivered on the 29th September 2017

⁴ Judgment delivered on 2nd October 2017

⁵ 2015 (5) SA 304 (SCA)

- 4.4 the alternative argument – that Clause C(2) constitutes a mortgage bond as defined in the Deeds Registries Act, 1937 – is addressed in section **E**;
- 4.5 we set out the basis of the municipality’s claim to a constitutional issue and address the increasing public importance of the case, generally and specifically within the boundaries of the municipality, in section **F**;
- 4.6 section **G** is the application for condonation;
- 4.7 the conclusion is set out in section **H** and we advance submissions explaining why the application for leave to appeal to this court should be granted, and set out the order sought.

B. THE FACTS

- 5. The applicant, eThekweni Municipality, is a Category A municipality. It is the successor-in-law to the Verulam Town Council.
- 6. The respondent, Mounthaven (Pty) Ltd (“*Mounthaven*”), has been the lawful owner of the property since 1985. The directors of Mounthaven have changed over time.
- 7. On 24 May 1985, the Verulam Town Council (as mentioned, the municipality’s predecessor-in-title) sold the property by public auction to Mounthaven for a sum

of R60,000.00. Special conditions were attached to the sale and these were subsequently endorsed in the Deed of Transfer.

8. The material conditions were:-

8.1 the Town Council of Verulam sold Lot 2678 Verulam (Extension 25) to Mounthaven, its successors-in-title or assigns [preamble];⁶

8.2 Mounthaven would 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 these would be deemed to be buildings to that value and general rates and sewer rates would be levied accordingly [Clause C(1)]⁷;

8.3 if at the expiry of a period of three (3) years from the date of sale Mounthaven 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 would revert to the town council which would be entitled to demand re-transfer thereof to it from Mounthaven which would be obliged to effect transfer thereof to the town council against payment by the town council of all payments made on account of the purchase price less any

⁶ Record: Volume 1, pages 23 and 26

⁷ Record: Volume 1, page 26

costs it would incur in obtaining re-transfer of the property into its name [Clause C(2)];⁸

8.4 Mounthaven relies on further obligations set out in Clause C(3) of the Deed of Transfer, which states:-

*“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”.*⁹

9. Self-evidently and in accordance with common commercial practice at the time of the sale and presently, the development conditions dictated the low sale price of R60,000.00 for the property. As alluded to, this expressly bound not only Mounthaven but also its successors-in-title and assigns.

10. It is common cause that Mounthaven failed to develop the property as required by Clauses C(1) and C(2) of the Deed of Transfer and that the municipality had engaged with Mounthaven on development plans it proposed at various times

⁸ Record: Volume 1, page 26

⁹ Record: Volume 1, page 26

over the years.¹⁰ (The failure to develop, Mounthaven claims, was consequent upon the existence of a stormwater pipe on the property – an allegation which the municipality denies. For present purposes, nothing turns on this aspect of the dispute.)

11. In any event, efforts by the parties to have the land developed continued intermittently until the impasse was reached early in 2012. On 23 May 2012, the municipality wrote a letter to Mounthaven in which it invoked the reversionary right and demanded re-transfer of the property under Clause C(2).¹¹ Mounthaven refused to give effect to its obligation to retransfer the property as had been agreed in 1985.¹²

The High Court

12.

- 12.1 In 2014, the municipality instituted an application in the Durban High Court invoking Clause C(2) of the conditions of title to claim re-transfer. The municipality's notice of motion stated in relevant part¹³:

¹⁰ Record: Volume 1, pages 28 – 37

¹¹ Record: Volume 1, pages 38 – 39

¹² Record: Volume 1, pages 40 – 43

¹³ Record: Volume 1, pages 1 – 2

“1.

THAT it is declared that in terms of clause C.2 to the conditions of title the property described as Erf 2678 of Verulam Ext 25, situate at 6 Magpie Place, Verulam, KwaZulu-Natal (“the property”) is to be transferred forthwith to the [municipality].

2.

THAT [Mounthaven’s] duly authorised representative/s is/are directed to immediately do all things necessary and to sign all documentation necessary to effect transfer of the property to the [municipality].

3.

THAT in the event of [Mounthaven’s] duly authorised representatives failing to comply with paragraph 2 hereto within fourteen (14) days of being called upon to do so, the sheriff of this court or his deputy is authorised and directed to do all things necessary and to sign all documents necessary to effect transfer of the property to the [municipality].”

12.2 An amended order with minor variations and which more aptly sets out the appropriate relief is set out in section **H**.

13.

13.1 Mounthaven opposed the application. In its answering affidavit, it raised factual disputes and other defences, including that the municipality’s right to invoke clause C(2) had prescribed in terms of the Act.

- 13.2 Mounthaven subsequently abandoned all but the prescription defence. In its heads of argument, Mounthaven relied on *Desai v Desai and Others* 1996 (1) SA 141 (A) ("*Desai*") to argue that an obligation to do or refrain from doing something constituted a *debt* which prescribed after three (3) years. Hence, so Mounthaven contended, the municipality's claim for re-transfer had prescribed.
14. The High Court agreed with Mounthaven. It concluded that the right of the municipality to claim re-transfer of the property in terms of the reversion clause was a *debt* as contemplated in Chapter III of the Prescription Act and was subject to extinctive prescriptive. The judgment was primarily based on the authority of *Desai*:-

*"The question for determination before me is whether the claim for the retransfer of property to the [municipality] is a "debt" or not. [Mounthaven] relied on Desai N.O. v Desai and Others, where the court held that the term "debt" in the context of section 10(1) of the Prescription Act 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."*¹⁴

15. The prescription plea was upheld with costs.¹⁵ The High Court later granted leave to appeal to the SCA.¹⁶

The case in the SCA

16. The municipality raised four grounds of appeal in the SCA¹⁷:

16.1 that the claim for re-transfer of the property is not an obligation to “*pay money, deliver goods, or render services*” and thus does not constitute a *debt* as contemplated in Chapter III of the Act;

16.2 that the claim is based on a real right and not a *debt*;

16.3 if the claim is a *debt*, it is secured by a mortgage bond and is not extinguished by prescription for a period of thirty (30) years; and

16.4 finally, that if the claim is a debt, then Mounthaven’s failure to re-transfer the property to the municipality constitutes an “*ongoing wrong*” which does not prescribe.

¹⁵ Record: Volume 2, page 135, paragraph [23]

¹⁶ Record: Volume 2, page 142

¹⁷ Record: Volume 2, pages 143 – 146

17. The municipality does not persist with the fourth ground of appeal in this matter.
18. The first ground on which the municipality relied in the SCA was that a claim for re-transfer of the property is not a *debt* under the Act. In this regard, reliance was placed on *Makate*, which had considered extinctive prescription under the Act. The municipality argued that:-

18.1 *Makate* overturned *Desai* to the extent that *Desai* went further than *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*¹⁸ (“*Escom*”), where the Appeal Court had held that only “*an obligation to pay money, deliver goods, or render services*” (our emphasis) would constitute a *debt*;

18.2 the ordinary meaning of ‘delivery of goods’ does not include a claim for the re-transfer of immovable property. The only way through which ‘delivery of goods’ could be construed to include the re-transfer of immovable property would be if the expression were given a wide interpretation;

18.3 on the strength of *Makate* and section 39(2) of the Constitution, the interpretation of the word *debt* which should be favoured is the interpretation least intrusive on the right of access to courts. Prescription

¹⁸ 1981 (3) SA 340 (A)

should therefore be interpreted narrowly to exclude a claim for re-transfer of immovable property as ‘delivery of goods’ and therefore to disqualify the claim as a *debt* under the Act;

18.4 in addition, as discussed in paragraph 27.4 below, a wide interpretation of ‘delivery of goods’ is not purposive.

19. The SCA, in dismissing the appeal ground that the claim to recover the property is not a debt, held:-

“[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 Mdeyide¹⁹ expressed doubt on whether an obligation is indeed a debt in terms of the Act. In Njongi v MEC, Department of Welfare, Eastern Cape²⁰ it raised, but left open, the question whether a constitutional obligation could be considered a debt. An interpretation that restricts the meaning of

¹⁹ 2011 (2) SA 26 at paragraph [11]

²⁰ [2008] ZACC 4; 2008 (4) SA 237 (CC)

'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" (emphasis added).

20. The SCA therefore rejected the municipality's reliance on *Makate* by giving *debt* a wide meaning. The SCA raised the spectre of doubt about what meaning to attach to this court's determination in *Makate* in relation to *Desai* and exposed tensions between the notion of a *debt* under the Prescription Act and the enforcement of an obligation.
21. The municipality's second ground of appeal in the SCA was that the reversionary right constituted a real right in the property which is not subject to prescription. The argument was that:
 - 21.1 the persons who created the right intended successors-in-title to be bound. On this, there can be no doubt, as the Deed of Transfer contains a succession clause providing that the conditions bind successors-in-title and assigns; and

21.2 the right results in a 'subtraction from *dominium*' in the land against which it is registered. The municipality retained a limited real right to reclaim transfer against Mounthaven's right to sell or use property without encumbrance.

22. The SCA rejected the municipality's characterisation of the condition as a real right, reasoning:-

"[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, i.e. 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" (emphasis added).

23. We respectfully submit that the SCA misinterpreted Clause C(2) and arrived at an incorrect conclusion in so doing.

24. On the mortgage bond argument, the municipality argued that by agreeing to register the condition Mounthaven granted the municipality real security against the property for performance of its obligation to develop the property within a defined time.
25. The SCA rejected this argument, holding that “*the reversionary clause is not a security clause and is thus not a mortgage bond*”.²¹
26. It is respectfully submitted that on this ground too the SCA erred.

C. THE INTERPRETATION OF *DEBT*

27. The SCA’s decision reveals that:-

- 27.1 the ambit and effect of *Makate* and the status of *Desai* and *Escom* as far as the law of prescription is concerned is far from settled;

- 27.2 that the SCA and Constitutional Court have adopted approaches to the interpretation of *debt* which are diametrically opposed;

- 27.3 the meaning of ‘delivery of goods’ has not been properly interrogated in the context of the Prescription Act. Indeed, only since *Makate* has there been

²¹ Record: Volume 3, page 205, line 11

a need to do so because it is only since *Makate* that the pre-*Desai* ratio in *Escom* has once again been the focus; and

27.4 finally, that the SCA did not consider that the purpose of the Prescription Act, according to this court, “*is to prompt creditors to institute legal proceedings without inordinate delays which may adversely affect the quality of adjudication of witnesses are no longer available or their memories have faded. Unquestionably the focus here is on having a claim settled without undue delay.*”²² This is a consideration which has no bearing on the matter at hand, where the rights in issue are registered and their proof does not rely on witnesses or similar evidence.

28. Whether or not *Desai* was overturned on its facts is entirely dependent on the legal question of whether an obligation to effect transfer of individual shares in immovable property, on the facts of *Desai*, is “*an obligation to pay money, deliver goods, or render services*” (i.e. a debt as per *Escom*). It bears mentioning that *Desai* dealt with a settlement agreement and not a registered condition of title, and accordingly, the enquiry in the present matter extends beyond the interpretation of a contractual right.

²² *Myathaza v Johannesburg Metropolitan Bus Services (Soc) Ltd t/a Metrobus and Others* 2018 (1) SA 38 (CC) at paragraph [28]

29. This court has given a strong indication that it did intend to overturn *Desai* on its facts, going as far as stating in the subsequent judgment of *Myathaza*²³ that *Desai* was “*overruled by this court in Makate*”.²⁴
30. Thus, abstracted from the debate around *Makate* is the question for present purposes: whether a claim for re-transfer is a claim for ‘delivery of goods’. The SCA held that it is.²⁵
31. The SCA’s treatment of ‘delivery of goods’ to include the registration of transfer of property is, with respect, flawed:-
- 31.1 it is contrary to the common sense usage of the terms ‘*delivery*’ (which typically does not include registration) and ‘*goods*’ (which typically do not include immovable property);
- 31.2 the SCA’s reasoning that the Act already distinguishes between movable and immovable property where it makes reference to a mortgage bond is, with respect, incorrect. A mortgage bond is a form of security for a right, not a right or *debt* itself. The Act provides that, notwithstanding that the right, for example, to repayment of a home loan is secured by way of a

²³ *Myathaza supra*

²⁴ At paragraph [59]

²⁵ Paragraph [12] – see paragraph 19 of these submissions

mortgage bond, it may still prescribe after thirty (30) years. The Act is not distinguishing between rights in movable and immovable property; rather, the Act distinguishes between debts that are secured by a bond and those that are not. In any event, while a mortgage bond is typically over immovable property, it can be registered over movable property (such as an aircraft) so the SCA's analogy does not go far enough.

31.3 We submit on the basis of *ABSA v Keet* that there is good reason to distinguish between delivery of movables and immovable property, not only because the common sense meaning of the phrase '*delivery of goods*' favours the distinction but also because failure to do so creates a plethora of legal questions which deepen, rather than minimise, uncertainty.

32. We submit that there is no *debt* within the meaning of the Act at all. The municipality has the right to have ownership of the property returned to it if the registered owner does not develop within a stipulated time. The registered owner's obligation to re-transfer the property on demand is the mechanism for registration of re-transfer, which could be effected through an alternative mechanism (for example by the Sheriff signing the necessary documentation). This does not convert the reversionary right to be merely or solely a claim for delivery from Mounthaven. From this perspective, there is no *debt* for the purposes of the Prescription Act.

D. IDENTIFYING THE RIGHT

33. As mentioned, the municipality relies on a right to require full ownership of the property to be returned to it in the event of its non-development within three years.

We submit that this reversionary right constitutes a real right in the property which is not subject to prescription.

34. Real rights are primarily concerned with the relationship between a person and property, whereas personal rights are concerned with a relationship between two persons.²⁶ The distinction between real rights and personal rights was explained by this court in *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd*:²⁷

“Real rights have as their object a thing (Latin: res; Afrikaans: saak). Personal rights have as their object performance by another, and the duty to perform may (for present purposes) arise from a contract. Personal rights may give rise to real rights; for instance, a personal obligation to

²⁶ Wille's Principles of South African Law (9th edition), page 429

²⁷ *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 SCA at [31]

grant someone a servitude matures into a real right on registration. Real rights give rise to competencies: ownership of land entitles the owner to use the land or to give others rights in respect thereof. Others may say that ownership consists of a bundle of rights, including the right to use the land, but it does not really matter who is right on this point".²⁸

35. Various tests have been proposed to determine whether a right is real or personal.²⁹ This court has endorsed a test which contemplates two requirements: (a) that the person who created the right must have intended successors-in-title to be bound; and (b) the right must result in a subtraction from the *dominium* of the land against which it is registered.³⁰
36. It is submitted that both requirements are met in the present instance. As we highlight below, the deed of transfer has an express succession clause, and the obligation to improve or re-transfer was thus intended by Mounthaven to bind its successors-in-title and assigns, in other words the world-at-large. The obligation to improve the property or re-transfer subtracts from the ordinary *dominium* of an owner, which may otherwise do as it pleases with its property.

²⁸ Paragraph [31]

²⁹ Wille's Principles of South African Law, 9th edition, pages 427 to 429

³⁰ *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) A 569 SCA at [12]
Willow Waters Homeowners' Association (Pty) Ltd v Koko N.O. and Others 2015 (5) SA 304 SCA at [16]

37. The right provides the municipality with the ‘competence’ to claim re-transfer. This subtracts from *dominium* and it binds successors-in-title. It was intended, when the property was sold, that the municipality would retain this limited right in the property – one of the bundle of rights usually enjoyed by a registered owner.
38. Real rights such as that asserted by the municipality in this matter do not prescribe. *ABSA Bank v Keet* supports this proposition because the SCA reasoned there that a vindicatory claim is not a *debt* for purposes of the Prescription Act.
39. The SCA in *Keet* relied on *Staegemann v Langenhoven and Others*³¹ that the solution to the question of prescription was to be found in the basic distinction in our law between a real right (*jus in re*) and a personal right (*jus in personam*).
40. In concluding in *Keet* that exercising a vindicatory right is not a *debt*, the Supreme Court of Appeal departed from the view expressed in three earlier judgments of the same court in which a claim for vindication was equated with a *debt*.³² The court confirmed that these earlier decisions were incorrect and stated that “[t]he

³¹ 2011 (5) SA 648 (WCC)

³² These were: *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) (2007 (11) BCLR 1214; [2007] ZASCA 95) paragraph 19; *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) ([2009] 3 All SA 508; [2009] ZASCA 51) paragraph 18; *Leketi v Tladi NO. and Others* [2010] 3 All SA 519 SCA ([2010] ZASCA 38) paragraphs 8 and 21

perpetuation of that view gives rise to absurdity in the construction of an important statute and would cause uncertainty in a multitude of relationships”.

41. The correct position, it is submitted, is that the distinction drawn in *Keet* between a real right and a personal right³³ is correctly made, and it confirms that a real right is not a *debt* for the purposes of the Act.

The Reversionary Right Is Not A Debt Under the Prescription Act

42. The SCA erred by concluding that Clause C(2) (the reversion clause) does not constitute a real right and is a *debt*.
43. The general legal principle, that real rights do not prescribe, prevails in the judgment. This would be consistent with *ABSA v Keet*, where the SCA had reasoned that real rights do not prescribe. Wallis JA did so on the basis that a real right can be exercised against property, whereas a personal right is exercised against a thing. In this case, the reversionary right is exercised against the property and re-transfer is merely the mechanism for delivery of title.
44. However, the SCA concluded that the municipality’s right in this case is not a real right but a personal or relative one. We submit that the SCA erred in its approach

³³ Especially at [20] to [25]

to and assessment of whether the right is real or personal or both but less of one and more of the other, a point to which we return shortly.

A Variety of Tests To Determine The True Nature of the Right Concerned

45. In *Willow Waters* the SCA considered the test to determine whether the right or condition in respect of land is real to have two requirements:-

45.1 whether the intention of the municipality, as the party which created the right, was to bind not just the respondent but its successors-in-title as well; and

45.2 the nature of the right or condition is such that its registration results in a 'subtraction from dominium' in the land against which it is registered.³⁴

45.3 The foregoing is a matter of interpretation – the intention of the parties must be clear from the terms of the sale agreement, construed in the light of the relevant and admissible context, including the circumstances in which the instruments in this case – the sale agreement and the

³⁴ *Willow Waters* at [16]

subsequent registration of the condition in the title deed – came into being.³⁵

45.4 As mentioned, the municipality's predecessor-in-law had sold at a low value (R60,000.00) a large tract of vacant land (771 m²), and it attached development conditions to the sale. The parties' rights in and to the property thereafter were entirely dependent on whether Mounthaven developed the land – if it did not, Mounthaven accepted the risk that the municipality could escalate the rates and sewer charges on the property and it could reclaim title at any time.

45.5 Contextually, it is significant that Mounthaven at various times attempted to develop the property, particularly when threatened with re-transfer, that the municipality supported its efforts to develop the property, and that it was only in 2012, after Mounthaven insisted that the location of the stormwater pipe presented an insurmountable problem, that the municipality elected to exercise the right to claim the property back. The conduct of the parties demonstrates that they were acutely aware that the municipality's right to reclaim the property was not one that would or could expire.

46.

³⁵

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA at paragraph [18]

46.1 The municipality passed the threshold of establishing a real right which the SCA had itself set in *Willow Waters*, and it should have resulted in a determination in favour of the municipality.

46.2 However, the SCA interpreted Clause C(2) by characterising the municipality's right as a relative or personal right. The SCA concluded that the right which the municipality relied on was not absolute but relative because it could be enforced against a determined individual or a class of individuals only – Mounthaven or its successors-in-title, not against the whole world.

46.3 The court did not enter into the interpretive exercise which it had formulated in *Willow Waters*. It determined instead that the municipality had failed to establish a real right because the clause relied upon did not operate against the world-at-large.

47.

47.1 Furthermore, Clause C(2), the reversionary right, comprises a subtraction from *dominium*.

47.2 On the test – whether the right amounts to a 'subtraction from *dominium*' and whether it was intended to bind successors-in-title – we submit that a

real right is enforceable against not only the present owner of the land but the world-at-large. The municipality maintains that the clause in the Deed of Transfer relied on a subtraction from the ordinary rights of ownership and is enforceable against the world-at-large.

47.3 In *Agri South Africa v Minister for Minerals and Energy*³⁶ this court recognised the “*entitlement not to mine, or the ability not to exploit minerals, as one of the essential components of mineral ownership*”. The present case follows a similar line of reasoning as one of the normal incidents of immovable property ownership – the right to develop or not – was taken away from the owner. The right not to lose the property to the entity from which it was purchased in the event of non-development is further intrusion into ownership.

47.4 The subtraction from Mounthaven’s and subsequent owners’ *dominium* amounts, in simple terms, to the following: taken away from the owner was not just the choice to develop (or not), freedom from the municipality reclaiming the property was also lost.

47.5 The Deed of Transfer expressly states that it binds successors-in-title or assigns; evidently, the parties intended to enforce the right against the

³⁶ (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013)

world-at-large. The SCA erred in restrictively applying the distinction between real rights and personal rights which was set out in *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*,³⁷ which established that “*real rights are absolute in the sense that they are enforceable against the whole world whereas a personal right is relative in that it can be enforced against a particular person.*”

47.6 That the condition was registered in the Deed of Transfer satisfies the notification rationale behind the registration of real rights. Recently, in *Jordaan and Others v Tshwane Metropolitan Municipality and Others*³⁸ this court recognised that it is a long standing doctrine in our law that a real right of security over immovable property can arise only by giving notice of its creation to the world in general:

*“The law insists that mortgages shall be effected in so open and public a manner that no one can afterwards complain that he had no notice of them.”*³⁹

47.7 According to the Constitutional Court therefore, real security in property is a limited real right for the purpose of ensuring satisfaction of a debt or

³⁷ 2017 (1) SA 613 (CC) at paragraph 89

³⁸ 2017 (6) SA 287 (CC)

³⁹ Paragraph [36]

obligation to another, usually ahead of other, unsecured creditors.⁴⁰ This leads to the alternative argument we make in the next section, that the right constitutes a mortgage bond which would extinguish thirty years following the registration of the condition.

48.

48.1 The reversionary right in Clause C(2), on all of these tests, is thus a real right. The SCA's approach not only misapplies the law, it also conflicts with the test that was established in *Willow Waters*.

48.2 *Willow Waters* concerned an embargo provision in a condition which had been registered against a title deed of immovable property in a community scheme. The registered condition restricted transfer in the event of non-payment of Homeowners' Association levies. In order to bind successive owners, including trustees of insolvent estates, the condition had to constitute a real right as opposed to merely a personal right.

48.3 The SCA in *Willow Waters* held:⁴¹

⁴⁰ *Jordaan and Others v Tshwane Metropolitan Municipality* at paragraph [38]

⁴¹ At paragraph [22]

“[22] It is established that ownership comprises a bundle of rights or competencies which include the right to use or exclude others from using the property or to give others rights in respect thereof. One of these rights or competencies is the right to freely dispose of the property, the ius disponendi. If that ‘right is limited in the sense that the owner is precluded from obtaining the full fruits of the disposition ... [then] one of his rights of ownership is restricted’. In this matter the embargo registered against the property’s title deed ‘carves out, or takes away’ from the owner’s dominium by restricting its ius disponendi. Thus, it subtracts from the dominium of the land against which it is registered. It satisfies the second aspect and is, therefore, a real right” (footnotes omitted and emphasis added).

48.4 The SCA accordingly regarded a similar right to that asserted by the municipality – in this case, pertaining to the transfer of immovable property which is registered against the Deed of Transfer – as a limited real right and not a personal right.

49.

49.1 In *Puling*, the SCA held that the condition in a registered title deed entitling the transferor to claim re-transfer if neither the transferee nor their successors-in-title developed the property within a stipulated period gave rise to both a real right (to have the dwelling erected) and a personal right (to claim re-transfer). The personal right, so the SCA found, was not so

inextricably linked to the real right that together they formed a “*composite whole*” restricting the respondent’s use of the property.⁴²

49.2 On the basis of what we have advanced, the SCA’s finding in *Puling*, that the real right is both real and personal but are “*not so inextricably wound up ... that together they formed a ‘composite whole’ restricting the [registered owner’s] use of the property*” is, with respect, incorrect.

50.

50.1 For present purposes therefore, the distinction drawn by the SCA in this matter between the world-at-large and successors-in-title misses the fundamental point that the only persons in the world-at-large against whom the clause in fact can ever be exercised are owners – that is, Mounthaven, its successors-in-title and its assigns. This is because only an owner would be legally capable of effecting re-transfer and, in this case, it would be Mounthaven, its successors-in-title and its assigns. It would simply make no sense to apply Clause C(2) against any other third party or to express it in the Deed of Transfer more broadly as the “*world-at-large*” or as anything else. This does not make the right personal or relative. The party against whom the right is enforceable remains impersonal and the

⁴²

Paragraphs [19] and [20]

clause is applicable to any person in his, her or its' capacity as owner of the property.

50.2 Nor is the right a combined real and personal right – it is a real right in a thing which belongs to another person in the sense that “*it is a real right 'less than ownership' in a thing owned by a person other than the holder of such a right.*”⁴³

51. Academic authorities have weighed in on this issue, and favour the municipality's submissions. In The Law of South Africa (LAWSA),⁴⁴ Van De Merwe explains that personal rights can become real by registration. Van De Merwe identifies a group of personal rights which are sometimes deemed to be registerable, called the *onera realia* which can also become real by registration. The author, relying on *Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd*,⁴⁵ opines that:

“Although uncertainty surrounds the precise nature of onera realia, they are sometimes described as real burdens of Germanic origin which impose personal obligations on the owner of land qua land owner. An example is where the state grants land to a person subject to the condition that if the land is not developed in a certain manner the land will revert to the state. The registration of such a burden against the land undoubtedly restricts the

⁴³ The Law of Property: Silberberg & Schoeman (5th edition) at page 47, paragraph 4.2

⁴⁴ Vol. 27 at paragraph 241(d)

⁴⁵ 1930 AD 169

owner in the unfettered exercise of his ownership and constitutes for that reason alone a real right".

E. THE REVERSIONARY CLAUSE IS A MORTGAGE BOND

52. 'Mortgage bond' is defined in the Deeds Registries Act to mean a bond attested by the registrar specially hypothecating immovable property. Simply stated, if Mounthaven's obligation to build was enforceable only as a personal right, then performance of the obligation has been secured in the registered deed of transfer by hypothecating the property.
53. By agreeing to register the clause, Mounthaven granted real security against the property for performance of its principal obligation, which in this case was to erect certain buildings within a defined time.
54. This contention is supported by a decision of the Gauteng Division, Pretoria in *Land and Agricultural Development Bank of South Africa v Phato Farms (Pty) Ltd and Others*.⁴⁶ Here, the High Court was required to consider whether the words 'mortgage bond' in section 11(a)(i) of the Prescription Act also includes reference to a general notarial bond.

⁴⁶

2015 (3) SA 100 (GP)

55. The High Court held that a 'mortgage' refers to a real right of security in the asset of another which is created by registration in the Deeds Registry pursuant to an agreement between the parties.⁴⁷ It further held that an agreement will constitute a 'mortgage agreement' resulting in a real right of security upon registration only if it reveals, upon analysis, an intention to grant real security for the performance of a principal obligation by the creation of a real right in an immovable asset of the mortgagor.
56. On this interpretation of the word 'mortgage bond', the right of reversion, which in this case is registered against the title deed for the disputed property, constitutes a real right in the form of a 'mortgage bond' for the purposes of the Prescription Act.
57. A debt secured by a mortgage bond is subject to a prescription period of thirty (30) years⁴⁸ and, as such, the claim for re-transfer has not prescribed.
- 58.
- 58.1 We point out that Mounthaven cites the right of first option, contained in Clause C (3), to purchase the property if it decided to sell it within five years of purchase as a ground of opposition to the application for leave to

⁴⁷ Paragraphs [29] to [41]

⁴⁸ Section 11(a)(i) of the Prescription Act

appeal in this matter. There is a short answer to this: the rights contained in Clause C(3) are distinct from those contemplated in Clause C(2). Clause C(3) addresses a sale to the municipality if the property is developed within three years with buildings of a value over R100,000.00 at a predetermined purchase price, that is the price that Mounthaven had originally paid for it.

58.2 The conditions created in Clause C(3) are unequivocal:-

58.2.1 the property must have been developed within three years;

58.2.2 Mounthaven must have elected to sell within the first five years;

58.2.3 the purchase price would essentially refund to Mounthaven the purchase price it had paid for the vacant property.

58.3 Clause C(3) is therefore a pre-emptive option to purchase which operates in favour of the municipality. It provides for a different scenario from the reversionary right set out in Clause C(2) and has no bearing on the question before this court.

F. A CONSTITUTIONAL ISSUE

The Need for Certainty

59. Section 167(3)(b) of the Constitution confers on this Court the power to decide constitutional matters as well as matters that raise an arguable point of law of general public importance which ought to be considered by this Court. The issues in this matter are both.
60. The challenge which this case highlights is that the Prescription Act does not define what a *debt* is, and so one must analyse its provisions within the context of section 39(2) of the Constitution, which enjoins the court to “*promote the values that underlie an open and democratic society based on human dignity, equality and freedom*”. Recent judgments of this court have sought to clarify the concept of *debt* but none have pronounced upon whether a registered right of reversion of ownership of land is a *debt*.
61. The correct interpretation of the word *debt* in the Prescription Act gives rise to a constitutional issue. The concern in *Makate*, that prescription presents a possible bar to access to the courts under section 34 of the Constitution, finds expression in the particular circumstances of this matter.
62. The SCA’s retreat from *Makate* and *Willow Waters* creates uncertainty. Clarification is necessary. The point is important, not settled and of public interest.

63. The outcome in this matter has implications for section 25 of the Constitution as, if the decision of the SCA is upheld, the municipality will have lost its rights to reclaim hundreds of properties that were sold subject to such clauses in its favour.
64. Just as the decision in *Makate* involved the interpretation of the Prescription Act to promote the spirit, purport and objects of the Bill of Rights in accordance with section 39(2) of the Constitution, so too does the present case.
65. It is in the public interest that the leave to appeal is granted and the municipality enjoys good prospects of success on the merits.

The Public Importance

66. Prescription affects a variety of legal relationships and is designed to achieve legal certainty. The present uncertainty, which the SCA judgment contributes to, undermines that objective. In addition to the general public importance activated by the rights in issue, the question of whether the municipality, as an owner and controller of state property, may invoke similar reversionary clauses more than three (3) years after its rights are triggered has serious and potentially unknown ramifications for all organs of state. This is, in the circumstances, not a matter solely of academic interest which the court should be loathe to entertain. The

dispute involves “*a matter of law that will affect many litigants beyond the confines of this case.*”⁴⁹

67.

67.1 The municipality inherited these rights when innumerable properties were sold by old local government structures under sale agreements containing reversionary endorsements. There are hundreds, if not thousands, of properties in the municipal area that are subject to reversionary clauses and are affected by the SCA judgment.

67.2 Mounthaven does not challenge the municipality’s submission that historically, residential townships developed in various areas around eThekweni, typically in lower to middle income suburbs, were sold at a reduced rate, and that registered against the deeds of transfer were terms that the properties would be developed within a stipulated period of time or would be used for certain purposes and failing that, ownership would return to the municipality. All that remained were the mechanics relating to transfer.

68.

⁴⁹ *ABSA Bank v Keet* supra at paragraph [8]

- 68.1 The reversion clause in the present Deed of Transfer expresses the obligation as follows: if Mounthaven failed to complete the buildings within the agreed time frame (three (3) years from date of purchase) *“ownership of the property shall revert to the Seller [the municipality] which shall be entitled to demand re-transfer to it from [Mounthaven] 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 into its name ...”*. If the development rights remain unfulfilled, which must occur if the SCA’s judgement prevails, the municipality will be left with a pocket of vacant land in Verulam which could be put to better public use. This would defeat the municipality’s constitutional obligation to promote development.
- 68.2 The SCA appears to have constructed the meaning of the obligations on the municipality on the one hand, and on Mounthaven, on the other, as set out in Clause C(2) and to have adopted a broad and not a narrow interpretation to avoid the impact of *Makate*. The SCA did so without appreciating that registering these conditions assist the municipality to stimulate development, to stop the harmful practice of ‘land banking’ and to ensure the development of townships. It is an effective town planning and development tool and always has been.

69.

69.1 The municipality has illustrated that one residential township register alone shows that in the 1980s, its predecessor-in-law wished to reserve the land for residential development and, to incentivise development, properties were sold subject to the reversionary condition.

69.2 Of 233 properties in the same township, to date seventeen (17) have not been developed. This is a 'default rate' of 7%. Assuming this is the average 'default rate' and taking all of the municipality's township developments into account, in eThekweni alone the number of properties that are affected by this clause is in the tens of thousands.

69.3 The consequences of failing to adhere to the building or use condition registered in the deed of transfer would only work for the purpose intended – that is, to encourage development – if the right to reclaim could be exercised against all successors-in-title once it reaches the municipality's attention that land was being used other than for the purpose for which it had been sold. Only then would the municipality be capable of exercising the right to reclaim the affected property.

69.4 Historically and because of this indefinite operation of the reversionary right, there has been no system in place or implemented to check that land

previously owned by local authorities was being used for the purpose registered in the deed of transfer or if development had taken place. Nor was it considered necessary to keep a register as it was not intended that the right would be exercised within three years to avoid the municipality forfeiting its rights in and to properties. It has at all times been regarded as a registered real right which remains operative indefinitely.

- 69.5 Reversionary clauses such as that which is the subject of the present dispute equally protected purchasers' rights where they were not in a financial position to develop the properties after paying the purchase price for the property but would be able to build eventually.
- 69.6 The municipality, as in the case of most state organs, always regarded that such properties, if it became necessary, could be reclaimed (against tender of refunding the purchase price) so that ownership in 'problem plots' would revert to the state before being sold to or used by another person who may develop, or the state itself could develop or utilise it. Either way, development and sustainable use would be encouraged.
- 69.7 As far as residential plots are concerned it is undisputed, with recent developments in jurisprudence around the constitutional right of access to

land and housing, that if the clause were to be exercised against a home owner it could not be exercised in a manner that results in homelessness.

69.8 The municipality avoids having to resort to legal action in the course of exercising rights of reversion. Nor is it feasible financially for the municipality to sue each land owner within three (3) years of the relevant non-development or non-use arising. And as in the present dispute, reversion conditions were frequently registered long before the consolidation of the eThekweni Municipality from a number of different town councils into a Category A municipality. Furthermore, from the point of view of practicality and management, it is difficult to identify exactly how many properties have been sold subject to similar registered real rights but they are innumerable. A litigious course would undermine the municipality's negotiations and its good faith attempts to secure compliance with the conditions (where necessary) through extra-legal means. For example, the municipality could provide support to the land owner to secure development, instead of suing it. This is what it attempted to in the case of Mounthaven - to its peril, if the SCA judgement is upheld.

69.9 Generally therefore, to institute proceedings pursuant to non-development within three (3) years of the sale of the property is impractical, unduly expensive and prejudicial to ratepayers within the municipality, particularly

the poor. It is simply not a policy that a municipality could adopt on a wide scale and does not appear to be compliant with the statutes regulating the municipality's finances. Many of the purchasers of the residential properties subject to these conditions are not themselves wealthy.

70. In addition, clauses of this nature are frequently included by the municipality and other state organs in commercial developments. In that context, the state would be reluctant, given its already strained resources, to sue its development partners. Negotiations, delays and changes in planning approvals can at times take in excess of three or even five or ten years to finalise and the negotiations are often sensitive. Being compelled to sue a development partner so as to interrupt prescription would be unsustainable and impractical.
71. Furthermore, although it remains unclear how these properties have been provided for in the municipality's accounting system, if the properties have been valued with the right of reversion and included in the municipality's books, the effect of the judgment has been to erase millions of rands off the municipality's books and value.
72. It is to avoid all of the foregoing concerns that the municipality created and inherited, and registered in each case not a personal right but a real right. That, however, is not how the SCA viewed it in this particular matter and so the

municipality's carefully constructed scheme has had its building blocks pulled from under it, at significant cost to the municipality and its development potential.

73. The problem is not an eThekweni-specific concern from a governance point of view. Conceivably, all of the municipalities around South Africa have sought to stimulate land development by including conditions in title deeds or deeds of transfer, and would have lost thousands of plots (if not millions cumulatively) because of the SCA's judgment in this matter. Provincial Human Settlement units and other municipalities frequently roll out similar development projects with such conditions. It is not clear what the effect of the SCA judgment would have on those projects but, as mentioned, for eThekweni the consequence of the SCA judgment is that if the municipality ever wants to build a housing township again, it will be entirely impractical because it would be only the municipality that would attract risk.
74. A definitive Constitutional Court judgment will determine the municipality's rights, the real rights of other organs of state and rights of private parties over properties where they have limited (reversionary) rights.
75. The municipality enjoys good prospects of success in the appeal both as a land owner and because it is in the public interest that a final determination is made in its favour.

76.

76.1 *Willow Waters* and *Puling* demonstrate that private developers have also utilised reversionary clauses to protect their interests and promote development in immovable properties across the country.

76.2 *Puling* deals specifically with private land developers with a similar provision to Clause C(2) in their sale agreements. In those cases, the developers are in an even less favourable position to the municipality as they cannot make and enforce planning bylaws. All that they can rely on is the registered real right which, it now transpires, would have expired after three years or less, depending on the terms of the contract of sale and title deed.

76.3 The impact of the SCA judgment is, in the circumstances, widespread.

G. CONDONATION

77. We submit that it is in the interests of justice that condonation be granted.

78. A full explanation has been provided for the lateness of the application for leave to appeal to this court ⁵⁰
79. As seen above, this matter is imperative for not just the municipality's asset management processes and valuation but also that of other organs of state and private developers.
80. Mounthaven suffers no prejudice and ought also to welcome a definitive judgment on its rights in the property.
81. The application for condonation ought to be granted in these circumstances.

H. CONCLUSION

82. Given the *ratio* in *Makate* criticising *Desai*, subsequent decisions of the Constitutional Court suggesting that *Desai* has been overturned and the interpretative stance in relation to the definition of *debt* in the SCA, a definitive decision on the nature of the right pursuant to reversionary clauses and whether these constitute a real right capable of prescribing, would be valuable and bring certainty to various organs of state and the promotion of development.

⁵⁰ Record: Vol 3, pages 194 -196, paragraphs 75 - 81

83. *Makate* has provoked a fresh examination of the law on prescription and this matter is perfectly suited to achieve just that aim in regard to the particular right relied on. It is in the interests of justice that leave to appeal be granted.
84. This provides the Constitutional Court with the necessary jurisdiction to consider this matter in terms of section 167(3)(b) of the Constitution.
85. The municipality requires a definitive judgment on its rights to invoke reversionary clauses such as the one sought in the present instance in order to guide its management of similar properties. Title to properties held subject to similar reversionary clauses, ranging from properties which were meant to be part of middle or lower income residential developments to large commercial developments, is at stake.
86. In summary, this case is a 'test case' for the municipality, certainty is imperative to guide both the municipality and property owners in similar matters, and a decision in this matter would avoid further litigation on the point.
87. Leave to appeal should be granted and the appeal ought to be upheld. An order should be granted in the following terms:-
- (a) that the appeal is upheld with the costs of two counsel, excluding the costs of the application for leave to appeal to the SCA;

(b) that the order of the court below is set aside and substituted with the following order:-

- (i) that in terms of Clause C.2 to the conditions of title, the property described as Erf 2678 of Verulam Extension 25, situate at 6 Magpie Place, Verulam, KwaZulu-Natal (*“the property”*) is declared to be the lawful property of the applicant;
- (ii) that the applicant is directed to pay forthwith to the respondent the sum of R60,000.00 less all costs incurred by the applicant in obtaining retransfer of the property into its name, including costs as between attorney and client, all costs of transfer, transfer duty and the like;
- (iii) that the respondent's duly authorised representative/s is/are directed to immediately do all things necessary and to sign all documents necessary to effect transfer of the property to the applicant;
- (iv) that in the event of the respondent's duly authorised representative/s failing to comply with paragraph (iii) hereto within fourteen (14) days of being called upon to do so, the Sheriff of this

court or his/her deputy is authorised and directed to do all things necessary and to sign all documents necessary to effect transfer of the property to the applicant.

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6 Durban Club Place

Durban

12 July 2018

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 5/2018

SCA Case No: 1068/2016

KZND Case No: 1985/2014

In the matter between:

ETHEKWINI MUNICIPALITY

APPLICANT

and

MOUNTHAVEN (PTY) LTD

RESPONDENT

RESPONDENT'S WRITTEN SUBMISSIONS

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1.

PREAMBLE

1.1 The term 'debt' is not defined in the Prescription Act 68 of 1969 (the Act); however, this Honourable Court has conclusively endorsed the more circumscribed meaning of the term 'debt' as held by the Supreme Court of

Appeals (SCA) in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*¹ (Eskom) namely:

1. *“Something owed or due: something (as money, goods or services) which one person is under an obligation to pay or render to another.*
2. *A liability or obligation to pay or render something; the condition being so obligated.”*²

1.2 The distinction between real and personal rights is now settled law and there is no dispute as to what constitutes real and personal rights.³

1.3 The Reversionary Clause contained in the Deed of Transfer (Clause C2) consists of two (2) parts (clauses) namely:⁴

- i. The first part places an obligation on the Respondent or its successor in title to construct a building within a period of three (3) years from the date of sale.
- ii. The second part provides that if the Respondent does not construct a building within the three (3) year period, the Appellant is entitled but not obliged to demand re-transfer of the property against payment of the purchase price.⁵

¹ 1981 (3) SA 34 (A) at 344 E-G

² *Makate v Vodacom* 2016 (4) SA 121 (CC) at para 85

Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others 217 (5) SA 9 (CC) at para 48

Brompton Court v Khumalo 2018 (3) SA 347 (SCA) at para 11

³ *National Stadium SA v First Rand Bank* 2011 (2) SA 157 at 166 paragraph 31

⁴ See Appeal Record Volume 1, Page 26

⁵ *Bondev v Puling* 217 (6) SA 373 (SCA) at para 12

- 1.4 It is settled law that even on the narrow and more circumscribed meaning of the term 'debt', a claim for re-transfer of the property or return of the property is a debt in terms of the Act.⁶
- 1.5 The Applicant seeks to be excused from the distinction between real and personal rights and the prescriptive period of three (3) years that applies to a claim for retransfer or return of the property (without any legal justification).
- 1.6 If the Applicant is to be so excused, this would undoubtedly lead to legal uncertainty and considerable confusion in that the Applicant seeks to be treated differently which would violate the right to equality before the law as set out in the Constitution of the Republic of South Africa Act 108 of 1996.⁷
- 1.7 There is no justification either in law or fact, as to why the Applicant, being an Organ of State, should be treated differently when it comes to the distinction between real and personal rights and the prescriptive period applicable to a claim for re-transfer of the property.
- 1.8 It would be inherently inequitable to other persons to whom the prescriptive period of three (3) years applies in terms of Section 10 (d) of the Act in respect of a claim for re-transfer/return of the property be it moveable or immovable for the Applicant to be exempt from the said prescriptive periods.
- 1.9 There is no justification in an open and democratic society for the Applicant being an Organ of State to be afforded such unfettered powers to enforce Reversionary Clauses at its leisure to the detriment of the owners of such properties.

⁶ *Bondev supra* at para 21

⁷ Chapter II, Bill of Rights, Section 9

- 1.10. This appeal does not raise any real constitutional issues aside from whether the Applicant should be exempt from the three (3) year prescriptive period in which to enforce any claim for return or re-transfer of the property and whether or not the Applicant may rely on Section 39 (2) of the Constitution.

2.

THE PARTIES TO THE LITIGATION

2.1 The Applicant is **ETHEKWINI MUNICIPALITY**, a Category 'A' Municipality which is duly constituted in terms of the Municipal Systems Act of 2000 which has its principal place of business at City Hall, Dr. Pixley Ka Seme Street, Durban, KwaZulu-Natal.

2.2 The Respondent is **MOUNTHAVEN (PTY) LIMITED**, a company duly registered in terms of the Company Laws of the Republic of South Africa with its registered offices alternatively principle place of business situated at 11 Eastern Shores, 120 South Beach Road, La Mercy, KwaZulu-Natal.

3.

HISTORY OF THE LITIGATION

- 3.1 On 19 February 2014 the Applicant instituted proceedings against the Respondent in terms of the reversion clause out of the KwaZulu-Natal High Court, Durban under case number 1985/2014.
- 3.2 The application was opposed by the Respondent and Judgment was delivered on 30 September 2013 in terms of which the Respondent's defence of extinctive prescription was upheld and the Applicant's claim dismissed with costs.
- 3.3 The Judgment of Mbatha J in the KwaZulu-Natal High Court, Durban was handed down on 30 September 2015 and is reflected below.⁸
- 3.4 On 9 September 2016 the Applicant was granted Leave to Appeal to the SCA against the Judgment of Mbatha J after successfully seeking condonation for the late delivery of the Application for Leave to Appeal.
- 3.5 On 29 September 2017 the SCA handed down Judgment in terms of which the Appeal was dismissed with costs and such Judgment is reported as is reflected below.⁹

⁸*Ethekwini Municipality v Mounthaven (Pty) Limited* (1985/2014) [2015] ZAKZDHC 78 (30 September 2015)

4.

INTRODUCTION

4.1 On 24th May 1985 the Respondent purchased the immovable property described as Lot 2678 Verulam (Extension 25) with an area of 771 Square Metres, having the address 6 Magpie Place, Verulam ("the property") from the Appellant at a public auction for a price of R60 000, 00.

4.2 The property was transferred into the name of the Respondent on 4 August 1986 subject to the following additional conditions which were incorporated in the Title Deed namely:

i) Clause C1 which reads as follows:

"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 successor 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 successor in title."

⁹*Ethekwini Municipality v Mounthaven (Pty) Limited* 2018 (1) SA 384 (SCA)

- ii) Clause C2 which reads as follows:

"If at the expiry of a period of three (3) years from the date of sale the Purchaser has failed to complete buildings to the value of not less than ONE HUNDRED THOUSAND RAND (R100 000,00) on the property, ownership of the property shall revert to the Seller which shall be entitled to demand re-transfer thereof to it from the Purchaser who shall be obliged to effect transfer thereof to the Seller against payment by the Seller to the Purchaser of all payments made on account of the purchase price less any costs incurred by the Seller in obtaining re-transfer of the property into its name, including costs as between attorney and client, all costs of transfer, transfer duty, stamp duty and the like."

- iii) Clause C3 which reads as follows:

"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."

4.3 The effect of the aforesaid conditions may be conveniently summarized as follows:

- i) If the Respondent did not, within two 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 Appellant for increased rates on the property as if such buildings had in fact been built on it.
- ii) If the Respondent did not, within three years of the sale date, erect such buildings on the property then the Appellant was entitled to compel re-transfer of the property to it at the Respondent's expense against repayment of the price ("the reversion clause").
- iii) If the Respondent wished to sell the property within five years of the sale date, and had not by then erected such buildings on the property within three years of the sale date, then the Appellant had a pre-emptive right to repurchase the property at the price paid by the Respondent ("the pre-emption clause").

4.4 It is common cause that the Respondent did not erect any such building and the property remains vacant land since according to the Respondent and its present Directors the existence of a 750mm diameter storm water pipe runs beneath the property which is not the subject of any servitude in favour of the Applicant thereby preventing the development of the property which is zoned for commercial purposes.

4.5 The Applicant by letter dated 23 May 2012 invoked the reversion clause and demanded re-transfer of the property and when such re-transfer was not

affected by the Respondent the Applicant on 19 February 2014 launched an application for re-transfer of the property.

- 4.6 The Respondent resisted the application and raised various defences, one such defence was that of extinctive prescription with reference to Section 11 (d) of the Prescription Act 68 of 1969 ("the Act") in that the Applicant was seeking to enforce a 'debt' which had prescribed and became unenforceable as more than three (3) years had passed after the debt had become due.
- 4.7 In the High Court and in the Supreme Court of Appeal (SCA) the Respondent relied only on the defence of extinctive prescription referred to in subparagraph 4.6 *supra*.
- 4.8 The Applicant's right to claim re-transfer of the property became due on 25 May 1988 when the Respondent failed to construct the requisite buildings on the property within the stipulated time. Accordingly the right of the Applicant to demand re-transfer in terms of the reversion clause accrued to the Applicant on 25 May 1988.
- 4.9 If the Applicant's right to enforce the reversion clause is a 'debt' subject to the Act such 'debt' either prescribed after three (3) years¹⁰ at midnight on 24 May 1991 or after fifteen (15) years at midnight on 24 May 2003¹¹.
- 4.10 On 19 February 2014 the Applicant instituted proceedings for re-transfer of the property in terms of the reversion clause, more than twenty-three (23) years later if the debt prescribed at midnight on 24 May 1991 or more than eleven (11) years later if the debt prescribed at midnight on 24 May 2003.

¹⁰ Section 11 (d) of the Act

¹¹ Section 11 (c) of the Act (a debt arising out of the sale of land to the Respondent) see however *Holeni v Land and Agricultural Development Bank* at footnote 54

5.

JURISDICTION AND LEAVE TO APPEAL

- 5.1 This Honourable Court in terms of Section 167(b) (ii) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) may decide matters of a constitutional nature and any other matter that raises an arguable point of law of general public importance which ought to be considered by this Honourable Court.
- 5.2 This Appeal does not raise matters of a constitutional nature nor arguable points of law with regard to real and personal rights and their applicability to the reversionary clauses as it appears in the Title Deed.
- 5.3 In addition thereto the issue as to the proper interpretation of the term 'debt' as it appears in Section 10 (1) read with Section 11 (2) of the Prescription Act with reference to Section 39 (2) of the Constitution, has already been considered and adjudicated upon by this Honourable Court.
- 5.4 This Honourable Court should accordingly not grant Leave to Appeal in respect of this matter and the Respondent contends that it is not in the interests of justice that this Honourable Court considers this matter mindful that the Applicant has for the first time raised constitutional issues before this Honourable Court.
- 5.5 In the event of this Honourable Court granting leave to Appeal, the issues for determination are set out in paragraph 6 *infra*.

6.

ISSUES FOR DETERMINATION BY THIS HONOURABLE COURT

- 6.1 Does the reversionary clause as it appears in the Deed of Transfer (Clause C2) constitute a limited real right or a personal right in favour of the Applicant?
- 6.2 Whether the Applicant's claim for re-transfer of the property pursuant to the Reversionary Clause (Clause C2) is a real or personal right.
- 6.3 Does the claim for re-transfer of the property from the Respondent to the Applicant constitute a 'debt' as contemplated in Chapter III of the Act?
- 6.4 Is the Reversionary Clause a mortgage bond?
- 6.5 Should the Applicant be permitted to raise constitutional issues by invoking Section 39(2) of the Constitution for the first time on appeal before this Honourable Court?

7.

REAL AND PERSONAL RIGHTS

- 7.1 Even though the Reversionary Clause (Clause C2) consists of two (2) parts namely; a real (limited) right and a personal right, it is perhaps useful to deal briefly with the differences between real and personal rights.

JUS IN RE

- 7.2 “A right in a thing; a real right, as distinguished from a *jus ad rem* or in *personam*, a personal right. He who has a *jus in re* has a right to the thing against all other men, and may enforce it against anyone who interferes with his possession or control of the thing. A *jus ad rem*, on the other hand, is a mere right to oblige a particular person to give or do not do something, as, e.g., to give transfer of immovable property to a purchaser. After transfer the purchaser will have a *jus in re* in the property, but until then his right is only a *jus ad rem* or right against the seller to fulfil his obligation to pass transfer.”¹²
- 7.3 The distinction between real and personal right is derived from Roman law where there is a distinction between *actiones in rem* and *actiones in personam*.

8.

THE APPROACH BY THE COURTS IN DISTINGUISHING A REAL AND PERSONAL RIGHT

- 8.1 The courts have on occasions considered the distinction between a real and personal right and it is useful to refer to some of these cases.
- 8.2 In *National Stadium SA v First Rand Bank*¹³ Harms D.P stated as follows:

¹²Claassen’s Dictionary of Legal Words and Phrases

¹³2011 (2) SA 157 at 166 paragraph 31

“The first concerns the distinction between real and personal rights. Real rights have as their object a thing (Latin: res; Afrikaans: saak). Personal rights have as their object performance by another, and the duty to perform may (for present purposes) arise from a contract. Personal rights may give rise to real rights; for instance, a personal obligation to grant someone a servitude matures into a real right on registration. Real rights give rise to competencies: ownership of land entitles the owner to use the land or to give others rights in respect thereof. Others may say that ownership consists of a bundle of rights, including the right to use the land, but it does not really matter who is right on this point.”

- 8.3 In *Staegemann v Langenhoven*¹⁴ Blignault J dealt extensively with the distinction between real rights (*jus in re*) and a personal right (*jus in personam*) and is perhaps useful to quote these paragraphs in full.

“[16] It seems to me that the solution of the prescription question is to be found in the basic distinction in our law between a real right (jus in re) and a personal right (jus in personam). The distinction has its origin in Roman law. See Reinhard Zimmermann The Law of Obligations at 6-7:

‘The essential element of an obligation is developed Roman law, therefore, was the fact that the debtor was directly bound to make performance.

...

[The] remedy, in the case of obligations, was always an actio in personam: the plaintiff was not asserting a relationship between a person and a thing (in the sense that he could bring his remedy against whoever was, by some act,

¹⁴2011 (5) SA 648 (WCC) at 651 paragraph 16 to 652 paragraph 19
Cited with approval by the SCA in *ABSA Bank Limited v Keet* 2015 (4) SA 474 (SCA)

denying the plaintiff's alleged right to the object in question-that was the crucial point in an actio in rem), but rather a relationship between two persons; the plaintiff set out to sue the particular defendant because he, personally, was under a duty towards him, and not because (for instance) he happened to be in possession of some of the plaintiff's property. If one translates this into the language of substantive law, one can say that the law of obligations is concerned with rights in personam, whilst rights in rem are the subject matter of the law of property.'

See also CG van der Merve 'Things' in 27 LAWSA (first reissue) para 232 for a summary of the development of the distinction in Roman Law between actiones in rem and actiones in personam to the modern division between the law of things and the law of obligations.

[17] The distinction between a real right and a personal right has consistently been recognised in our case law. See Smith v Farrelly's Trustee 1904 TS 949 at 958/ Ex parte Geldenhuys 1926 OPD 155 at 164; Lorentz v Meele and Others 1978 (3) SA 1044 (T) at 1049E/E-F; Erlax Property (Pty) Ltd v Registrar of Deeds and Others 1992 (1) SA 879 (A) at 884I-885A; and National Stadium South African (Pty) Ltd and Others v Firststrand Bank Ltd 2011 (2) SA 157 (SCA) para 31:

'[31] The first concerns the distinction between real and personal rights. Real rights have as their object a thing (Latin: res; Afrikaans: saak). Personal rights have as their object performance by another, and the duty to perform may (for present purposes) arise from a contract.'

[18] Ownership is the most comprehensive real right embracing a wide spectrum of competencies. The *rei vindicatio* (vindicatory action) is the remedy that is available to an owner for the recovery of the thing from whomsoever is in possession thereof. See *Chetty v Naidoo* 1973 (3) SA 13 (a) AT 20a-e:

'It may be difficult to define dominium comprehensively (cf. Johannesburg Municipal Council v Rand Townships Registrar and Others, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in Munsamy v Gengemma, 1954 (4) SA 468 (N) at pp. 470H-471E) that one of its incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a rei vindication, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res-the onus being on the defendant to allege and establish any right to continue to hold against the owner (cf. Jeena v Minister of Lands, 1955 (2) SA 380 (AD) at pp. 382E, 383).

[19] An obligation, on the other hand, is equivalent to a right in personam and its correlative duty in personam. See the following remarks by LTC Harms 'Obligations' in 19 LAWSA (2 ed) paras 217, 218 and 221:

'217...The law of obligations (in the sense of vorderingsreg in Afrikaans and Forderungsrecht in German) is concerned with rights and duties in personam.

218...*An obligation is a legal or jural bond (jural tie) between two legal subjects in terms of which the one, the creditor, has a right to a particular performance against the other, the debtor, while the debtor has a corresponding duty to render the performance.*

221...*An obligation is always a relation (bond or tie) between two or more legal subjects. For this reason the creditor's right is called a personal right (ius in personam). A real right (ius in rem), on the other hand, primarily constitutes a relation between a legal subject and a legal object (thing).*

- 8.4 Returning to *ABSA Bank Limited v Keet*, Zondo JA at paragraph 20 explained the difference between real and personal rights and stated as follows:

"Real 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.

It then continued in paras 23-25:

The obligation which the law imposes on a debtor does not create a real right (ius in rem), but gives rise to a personal right (ius 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 favour of the creditor..."

9.

CHARACTERISTICS OF A REAL RIGHT

9.1 The following is the basic characteristics of a real right, namely:

- (1) The object of a real right is a corporeal thing;
- (2) A real right affords a direct power over the thing;
- (3) In principle real rights are absolute and affords a so-called right of pursuit;
- (4) Real rights afford a right of preference in the event of insolvency;
- (5) The maxim *prior in tempore potior in iure* applies to a conflict between two or more real rights;
- (6) Transfer of a real right is accompanied by a measure of publicity; and
- (7) Real rights flow from juristic facts like transfer, prescription, occupation and accession and are not established by mere agreement between two contracting parties.¹⁵

10.

REGISTRATION OF A PERSONAL RIGHT

10.1 In terms of Section 63 (1) of the Deeds Registry Act of 1937 personal rights subject to a few exceptions may not be registered.

¹⁵ Wille's Principles of South African Law, Juta 9th Edition, Page 430

- 10.2 The registration of a personal right (be it mistakenly) does not alter or change its personal character and such a right though registered cannot be transformed into a real right by the intention of the parties alone.¹⁶
- 10.3 A practice has developed nevertheless to register the following personal rights namely:
- (1) Terms and conditions contained in mortgage agreements, (long) leases and similar contracts;
 - (2) Personal rights that are intimately connected with registrable real rights or which in the opinion of the Registrar of Deeds are complementary or otherwise ancillary to a registrable right contained or conferred in such a deed;
 - (3) So-called *iura in personam ad rem acquirendam* or personal rights that become real on registration; and
 - (4) So-called *onera realia* or real burdens of Germanic origin which impose personal obligations on the owner of *lad qua* landowner.¹⁷
- 10.4 A limited real right on the other hand is described as a right with regard to a thing which belongs to another person in that it is a real right "less than ownership" to a thing owned by another person.¹⁸

¹⁶ *British South Africa Company v Bulawayo Municipality* 1919 AD 84 at 83 where Innes CJ held - jus in personam does not become a jus in rem because it is erroneously placed upon the register
Lorentz v Melle 1978 (3) SA 1044 (T)

¹⁷ Wille's Principles of South African Law, Juta 9th Edition, Page 444

¹⁸ Silberberg and Schoeman's The Law of Property, 5th Edition, Lexis Nexis, Page 47 at sub-paragraph 4.2

- 10.5 A limited real right to land which restricts the exercise of ownership by the landowner is capable of registration at the Deeds Office in terms of the Deeds Registry Act.¹⁹

11.

THE SUBTRACTION FROM THE DOMINIUM TEST

- 11.1 In order to determine whether or not a particular right is real, the Courts have formulated and applied what is referred to as the subtraction from the dominium test.
- 11.2 The Courts refer to the right as being real if its correlative obligation constitutes a burden upon the servient thing.²⁰
- 11.3 In *Ex parte Geldenhuys*²¹ De Villiers JP said:

"One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the dominium, the corresponding right is real ad registrable; if it is not such as obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right, or a right in personam, and it cannot as a rule be registered)."

¹⁹ Silberberg and Schoeman's The Law of Property, 5th Edition, Lexis Nexis, Page 65 at sub-paragraph 4.5

²⁰ Silberberg and Schoeman's The Law of Property, 5th Edition, Lexis Nexis, Page 55 at sub-paragraph 4.3.6

²¹ 1926 OPD 155 at 162

11.4 The reasoning behind the subtraction from dominium test is that a limited real right diminishes the owner's ownership (*dominium*) over his/her thing (property) in a sense that it either:

- i) *“Confers on its holder certain entitlements inherent in the universal right of ownership; or*
- ii) *To some extent prevents the owners from exercising his or her right of ownership.”*²²

11.5 A further requirement in relation to the subtraction from dominium test is the intention of the parties in the sense that it was intended that the correlative duty to be binding not only on the present owner of the thing concerned but also for the duration of such right to all successor in title.²³

11.6 In order to determine whether a particular right or condition in respect of land (property) is real the following two (2) requirements must be satisfied:

- i) The intention of the person who creates the right must be to bind not only the present owner of the land, but also successors in title; and
- ii) The nature of the right or condition must be such that its registration results in a 'subtraction from dominium' of the land against which it is registered.²⁴

11.7 In summary real and personal rights may be explained as follows:

²² Silberberg and Schoeman's The Law of Property, 5th Edition, Lexis Nexis , Page 56 at sub-paragraph 4.3.6

²³ *Erlax Properties (Pty) Limited v Registrar of Deeds* 1992 (1) SA 879 (A) at 885 B
Provisional Trustees, Alan Dogget Family Trust v Karakondis 1992 (1) SA 33 (A) at 38 A-B

²⁴ *Cape Explosive Work Limited v Denel (Pty) Limited* 2001 (3) SA 569 (SCA) at 578 D-E
Willow Waters Homeowners v Koka N.O 2015 (5) SA 304 (SCA) at 310 para 16

- i) *Real rights belong to the category of rights known as absolute rights, establishing a direct legal connection between a person and a thing, the holder of the right being entitled to control that thing within the limits of his right without reference to another person. Real rights are divided into ius in re propria, conferring the most comprehensive and absolute control, i.e. dominium or ownership and ius in re aliena, conferring only limited real rights, i.e. less than ownership in a thing owned by a person other than the holder of such rights. Importantly, real rights are enforceable against the whole world.*
- ii) *Personal rights, on the other hand, derive from contractual or delictual relationships between persons. They are by no means absolute rights, as the holder thereof can only enforce these rights against the other party and not against the whole world, as with real rights. Personal rights usually lapse when the holder thereof dies as opposed to real rights where the right is passed on to the holder's successor in title.*

12.

PRESCRIPTION

JUSTIFICATION FOR PRESCRIPTION AS PART OF OUR LAW

- 12.1 As a general rule a creditor ought to be vigilant when it comes to enforcing his or her right as the failure to do so timeously may result in them not being able to enforce such right.

12.2 In *Mohlomi v Minister of Defence*²⁵ Didcott J explained the *rationeli* behind extinctive prescription as follows:

"Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."

12.3 In *Road Accident Fund v Mdeyide*²⁶ Van der Westhuizen J explained as follows:

"In the interests of social certainty and the quality of adjudication, it is important, though, that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible. Claims thus lapse, or prescribe, after a certain period of time. If a claim is not instituted within a fixed time, a litigant may be barred from having a dispute decided by a court. This has been recognised in our legal system - and, others - for centuries."

²⁵ 1997 (1) SA 124 (CC) at para 11

²⁶ 2011 (2) SA 26 (CC) at para 2

- 12.4 Van der Westhuizen J in *Mdeyide*²⁷ emphasized the importance of prescription as follows:

"This Court has repeatedly emphasised the vital role time limits play in bringing certainty and stability to social and legal affairs, and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time, bringing about prolonged uncertainty to the parties of the dispute. The quality of adjudication by courts is likely to suffer as time passes, because evidence may have become lost, witnesses may no longer be available to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes, and must follow from sound reasoning, based on the best available evidence."

- 12.5 In *Uitenhage Municipality v Molly*²⁸ Mohamed CJ said:

"One of the main purposes of the Prescription Act is to protect a debtor from old claims against which it cannot effectively defend itself because of loss of records or witnesses caused by the lapse of time. If creditors are allowed by their deliberate or negligent acts to delay the pursuit of their without incurring the consequences of prescription that purpose would be subverted."

- 12.6 It is against this background one must consider whether the Applicant's claim for re-transfer of the property constitutes a "debt" as contemplated in Chapter III of the Prescription Act 68 of 1969 (the Act).

²⁷ at paragraph 8

²⁸ 1998 (2) SA 735 (SCA) at 742I-743A

THE MEANING OF DEBT

12.7 It has been repeatedly pointed out in numerous cases that the word "debt" is not defined in the Act and accordingly has been subject to interpretation by the Courts.

12.8 In *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* (Eskom)²⁹ the meaning of debt was said to be:

1. *"Something owed or due: something (as money, goods or services) which one person is under obligation to pay or render to another.*
2. *A liability or obligation to pay or render something; the condition of being so obligated."*

12.9 In *Desai N.O v Desai and Others* (Desai)³⁰ the then Appellate Division dealing with the meaning of the term "debt" in the context of Section 10 (1) of the Act held as follows:

"The term "debt" is not defined in the Act, but in the context of Section 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something... "

12.10 The Court in *Desai* extended the meaning of the term 'debt' to give it a wider interpretation beyond what was held in *Eskom*.

12.11 This Honourable Court in *Makate v Vodacom Limited* (Makate)³¹ dealing with the extended meaning of the term 'debt' in the Act stated as follows:

²⁹ 1981 (3) SA 340 (A) at 344 F-G

³⁰ 1996 (1) SA 141 (A) at 146I - 147A

³¹ 2016 (4) SA 121 (CC) at 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...."

12.12 This Honourable Court referring to the meaning of debt in *Eskom* and *Desai* said as follows³²:

"It is unclear whether the court in Desai intended to extend the meaning of the word 'debt' beyond the meaning given to it in Eskom. 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 S 39 (2) of the Constitution.

It then concluded:

³² Makate *supra* paragraph 86

However, in present circumstances it is not necessary to determine the exact meaning of 'debt' as envisaged in s10. This is because the claim we are concerned with falls beyond the scope of the word as determined in cases like Eskom which held that a debt is an obligation to pay money, deliver goods, or render services... ³³

This Honourable Court then held as follows:

*"To the extent that Desai went beyond what was said in Eskom it was decided in error. There is nothing in Eskom that remotely suggests that 'debt' includes every obligation to do something or refrain from doing something, apart from payment or delivery..."*³⁴

12.13 Approximately a year after the decision in *Makate* this Honourable Court had occasion to again consider the definition of the term 'debt' in *Off-Beat Holiday Club and Another v Sanibonani Holiday Spa Shareblock Limited and Another (Off-Beat)*³⁵ the following was stated:

"[47]...In summary, Makate held that the broad interpretation of 'debt' in Desai was inconsistent with earlier decisions that gave the term a narrow definition.

[48] I am satisfied that in interpreting the meaning 'debt', Makate functionally overturned the broad test adopted in Desai to the extent that it went beyond the narrow test in Eskom..."

³³ *Makate supra* at page 151 para 92

³⁴ *Makate supra* at page 151 para 93

³⁵ 2017 (5) SA 9 (CC) at paras 47 and 48

12.14 In light of the decisions of this Honourable Court in *Makate* and *Off-Beat* in a Post Constitutional Era the term 'debt' for the purposes of Section 10(1) and 12(1) of the Act means:

- i. *"Something owed or due; something (as money, goods or services) which one person is under an obligation to pay or render to another.*
- ii. *A liability or obligation to pay or render something: the condition of being so obligated."*

12.15 Insofar as it may be suggested that this Honourable Court gave any indication that it intended to overrule *Desai* on its facts in *Myathaza v Johannesburg Metrobuses (Myathaza)*³⁶ a case dealing with whether an arbitration award and/or a claim for unfair dismissal under the Labour Relations Act 66 of 1995 constitutes a debt for the purposes of Section 10(1) of the Act is with respect misplaced.

12.16 In *Myathaza*³⁷ this Honourable Court stated as follows:

"[59] But even if the Prescription Act were to apply, the main award granted in favour of the Applicant could not prescribe because it is not an obligation to pay money or deliver goods or render services by Metrobus to the Applicant. 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."

³⁶ 2018 (1) SA 38 (CC)

³⁷ at paragraph 59

12.17 It is submitted with respect that this Honourable Court in *Myathaza* did not overrule *Desai* on its facts but merely confirmed that it overruled *Desai* insofar as it extended the meaning of the term “debt” beyond what the SCA held in *Eskom*.

12.18 This Honourable Court therefore with respect did not overrule *Desai* insofar as it held that a claim for re-transfer/return of immovable property is a ‘debt’ within the meaning of Section 10(1) of the Act.

12.19 If this Honourable Court intended to overrule *Desai* on its facts that a claim for re-transfer/return of immovable property is not a ‘debt’ it would have expressly said so in *Makate*, *Off-Beat* and *Myathaza* which this Honourable Court, with respect, did not do.

12.20 It therefore follows that a claim for re-transfer/return of immovable property is a ‘debt’, as was held in *Desai*, which remains the position in our law as correctly pointed out by the court *a quo* (SCA) in *Mounthaven*. To restrict the meaning of debt to delivery of moveable property to the exclusion of immovable property would create a baseless distinction between moveable and immovable property for the purposes of prescription.³⁸

³⁸ Ethekwini Municipality *supra* at para 12

Frieslaar N.O & Others v Ackerman (1242/2016) [2017] ZASCA 03 (02 February 2018) at para 21

Radebe v Government of the Republic of South Africa & Others 1995 (3) SA 787 (N) at 804 A-C insofar as it held that debt includes a claim for redelivery of immovable property

Evans v Shield Insurance Company Limited 1979 (3) SA (W) 1136 at 1141F

Barnett v Minister of Land Affairs & Others 2007 (6) SA 313 (SCA) at para 19 insofar as it held that a vindicatory relief to property is a debt in terms of the Act notwithstanding having relied on *Desai* to reach this conclusion

Leketi v Tladi 2010 [3] ALL SA 591 (SCA) at para 8 referred with approval to *Barnett* and *Evans* cases noting in *Mdeyide supra* this Honourable Court referred with approval to *Barnett* at para 11

Bondev Midrand (Pty) Limited v Puling & Another 2017 (6) SA 373 at 381 para 21

13.

FOREIGN LAW REGARDING THE TERM 'DEBT'

13.1 The Zimbabwe Prescription Act 31 of 1975 is very similar to the Prescription Act 68 of 1969.

13.2 The Zimbabwe Prescription Act is divided into various sections namely:

- i) Part I – Preliminary
- ii) Part II – Acquisition of ownership of things by Prescription
- iii) Part III – Acquisition and Extinction of servitudes by Prescription;
- iv) Part IV – Prescription of Debts;
- v) Part V – General

13.3 In Part I (Preliminary) the term 'debt' is defined as follows:

“debt”, without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.”

13.4 In *Emily Ntombizodwa Luwaca v Efolou (Pvt) Ltd and Others*³⁹ a case dealing with a claim for the setting aside of the transfer of immovable property based on an allegation of fraud; the Zimbabwe High Court as per the Judgment of Mafusire J at page 5 held as follows:

³⁹ HC 1816/10 and HC 3285/10 (High Court of Zimbabwe, 10 April 2013)

“The term ‘debt’ is defined in section 2 to include anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. In this case Mrs Muringani’s claim for a reversal of the transfer that was registered on 14 May 1999 is plainly a debt. It is any other debt. Therefore the applicable period of prescription is three years.”

13.5 The Prescription Act 68 of 1969 is also applicable in the Republic of Namibia and in interpreting and applying the Act the Courts draw extensively from the case law and jurisprudence of the South African Courts.

13.6 In *Ongopolo Mining Limited v Iuris Safari Lodge (Pty) Ltd and Others*⁴⁰ Damaseb JP held as follows:

“Namibia gained its independence on 21 March 1990. The judgments of a superior foreign court, including South Africa’s, are not binding on the courts of Namibia but may have persuasive force. In a number of cases prior to Namibia’s independence, the High Court of South Africa and the counterpart to the Namibian Supreme Court had pronounced that a claim for the recovery of property constitutes a ‘debt’ as contemplated in the Prescription Act.”

13.7 The Namibia High Court in *Ongopolo Mining Limited* having considered various South African and other authorities (albeit not *Makate* which was not decided by then) held that the meaning and scope of the word ‘debt’ is as follows⁴¹:

“(a) The word ‘debt’ has a wide and general meaning and includes an obligation to do something or to refrain from doing something;

⁴⁰ (I 3544/2010) [2014] NAHCMD 55 (19 February 2014) at para 29

⁴¹ *Ongopolo Mining Limited supra* at para 39

- (b) *At the core of a 'debt' is a right and a corresponding obligation;*
- (c) *The concept of 'debt' has a proprietary meaning;*
- (d) *A debt does not only exist when the debtor is required to do something, as such a construction is too limiting;*
- (e) *The exercise of a right may call for no action on the part of the 'debtor' but merely to submit himself or herself to the exercise of the right;*
- (f) *A debt assumes both a passive and active meaning."*

13.8 The criteria set out in paragraph 13.7 *supra* regarding what constitutes a debt must be evaluated with regard to the narrow confines of the term as set out in *Eskom, Makate* and *Offbeat Holiday Club*; however, of importance is (c) *supra* which confirms that the concept of debt has proprietary meaning.

13.9 In *Magrietha Jonanna Louw v Anna Hendrina Strauss*⁴² the High Court of Namibia endorsed the Judgment of this Honourable Court in *Makate* and *Offbeat Holiday Club* regarding the meaning of the term 'debt' and held as follows⁴³:

"I pause to mention that when one has regard to the judgment in Desai, it would appear that the extended meaning ascribing to the word 'debt' by the court in that case to some extent adopts or is consistent with the statutory meaning given by the Legislature in Zimbabwe as recorded above. In the latter jurisdiction, it is clear that the word includes anything that may be sued for or claimed, arising by reason of an obligation arising from statute, contract,

⁴² HC-MC-CIV-ACT-CON-2016/03949 [2017] NAHCMD 217 (9 August 2017)

⁴³ *Louw supra* at para 29

delict or otherwise. I should, however mention that even in Zimbabwe, there is no mention in the definition of refraining from doing something in relation to an obligation, which is unfortunately part of the extension given in Desai. In South Africa and this jurisdiction, it is not so. As stated earlier, I respectfully associate myself with the conclusion of the Constitutional Court in Makate that the definition of debt, placing reliance on Desai is incorrect...”

13.10 It is therefore submitted that a claim for re-transfer/return of the property is a debt within the meaning of Chapter III of the Act, not only in our jurisprudence but also that of Zimbabwe and Namibia.

14.

WHEN DOES PRESCRIPTION COMMENCE TO RUN

14.1 In terms of Section 12 (3) of the Act:

“A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

14.2 As in the case of the word ‘debt’ the phrase ‘debt is due’ as it appears in Section 12 (3) of the Act is also not defined.

14.3 The phrase ‘debt is due’ however, has been the subject of judicial interpretation.

14.4 In *Truter & Another v Dyse*⁴⁴ the following was said:

“...A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim.”

14.5 As pointed out in *Minister of Finance and Another v Gore N.O*⁴⁵

“This court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case “comfortably”.

14.6 In terms of Subsection 3 of the Act the following must be established before the debt is deemed to be due:

- i) The identity of the debtor;
- ii) Knowledge of the facts from which the debt arose;
- iii) Insofar as (ii) is concerned there is an additional proviso that the creditor is deemed to have such knowledge if it could have acquired same by exercising reasonable care.⁴⁶

⁴⁴ 2006 (4) SA 168 (SCA) at paragraph 16

⁴⁵ 2007 (1) SA 111 (SCA) at 119 para 17

⁴⁶ *Mtokonya v Minister of Police* 2017 (11) BCLR 1443 (CC) at para 34

14.7 In this matter the Applicant was aware of the identity of the Respondent and the facts from which the debt arose as far back as 18 March 1997 and 23 May 2012.⁴⁷

14.8 The date of sale in respect of this matter was 24 May 1985 and in terms of Clause C2 as it appears on the Deed of Transfer, the building needed to be constructed within a period of three (3) years which lapsed on midnight on 24 May 1988.⁴⁸

14.9 It therefore follows that the debt became due on 25 May 1988 and the 3-year period would have lapsed in May 1991 or if a period of fifteen (15) years applied same would have expired in May 2003.⁴⁹

14.10 It must be emphasised that what prescribes in terms of the Act is a debt and not a cause of action, but rather a claim due to the effluxion of time.⁵⁰

15.

REI VINDICATIO

15.1 The Applicant must prove the following basic elements in order to rely on the *actio rei vindicatio* namely:

- i. That ownership of the *res* (in this case the property) vests in the Applicant.⁵¹

⁴⁷ See Appeal Record Volume 1, Pages 38-39

See Appeal Record Volume 1, Pages 29 and 30

⁴⁸ See Appeal Record Volume 1, Page 7 and 26

⁴⁹ See Appeal Record Volume 2, Pages 126-127

⁵⁰ *Unilever Bestfoods Robertsons (Pty) Ltd v Soomai & Another* 2007 (2) SA 347 (SCA) at 359, para 18

⁵¹ *Goundini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (AD) at 82

- ii. That the *res* (thing/property) still exists and is clearly identifiable.⁵²
- iii. That the Respondent was in possession of the thing/property at the time of the initiation of the proceedings.⁵³

15.2 Accepting in favour of the Applicant that the Reversionary Clause as agreed between the parties created a limited real right in favour of the Applicant (in particular the first part which places an obligation on the Respondent to erect a building within a stipulated period), the question remains as to whether the registration of that right resulted in the right not being subject to prescription since the Applicant could exercise the *actio rei vindicatio* at any time.

15.3 There are no Third Parties involved and the parties remain the Appellant and the Respondent as it was at the time the agreement was concluded on 24th May 1985.

15.4 The Applicant's reliance on *Absa Bank Ltd v Keet*⁵⁴ is with respect misplaced in that the Applicant in *Keet* based its claim on ownership of the tractor and such a claim cannot be described as a debt as envisaged by the Act⁵⁵ and accordingly to reclaim the tractor is not defeated by extinctive prescription.

15.5 The Applicant's claim in the present appeal is not a claim of an owner based on the *rei vindicatio*.⁵⁶

15.6 The Reversionary Clause (in particular the first part) can be best described as an option created in favour of the Applicant who may or may not elect to exercise the option and claim re-transfer/return of the property.

⁵² *Sorvaag v Pettersen and Others* 1954 (3) SA 636 (CPD) at 639

⁵³ *Chetty v Naidoo* 1974 (3) SA 13 (AD) at Page 20 A-D

⁵⁴ 2015 (4) SA 474 (SCA)

⁵⁵ at page 481 para 20

⁵⁶ 27 LAWSA §233

- 15.7 The creation of such a circumscribed right against the Respondent is not a right based on ownership giving rise to the *rei vindicatio* and remains a right in favour of the Applicant based on contract.
- 15.8 When a right as in the present appeal is a right less than one of ownership there is absolutely no reason why it should not be a debt subject to prescription.
- 15.9 It therefore follows that the Appellant has not established the necessary requirements to rely on the *actio rei vindicatio* to claim re-transfer/return of the property.
- 15.10 In the circumstances the *actio rei vindicatio* is not available to the Applicant.

16.

EQUALITY

- 16.1 In terms of Section 9 (1) of the Constitution of the Republic of South Africa Act 108 of 1996

“(1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*”

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.*

- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”*

16.2 In *Harksen v Lane and Others*⁵⁷

“At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

- (a) *Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
- (b) *Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:*

⁵⁷ 1998 (1) SA 300 at 324 para 54

1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 24-6, interpreting section 8(1) of the interim Constitution. This interpretation was adopted and applied to section 9(1) in *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC) at para 43; 1997 (11) BCLR 1489 (CC) at para 42.

- (i) *Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*
- (ii) *If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).*
- (c) *If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).⁵⁸*

16.3 In terms of Section 9 (1) “everyone is equal before the law and has the right to equal protection and benefit of the law”.

⁵⁸ *Jooste v Score Supermarkets Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) at para 17; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC) at para 24; *Prinsloo v Van der Linder and Another* 1997 (3) SA 1012 (CC) at paras 24 to 26 and 36

- 16.4 The Respondent is unaware and has no knowledge as to how many properties that have been sold and transferred in respect of which the Reversionary Clauses applies as same is within the exclusive knowledge of the Applicant.
- 16.5 According to the Applicant there are “tens of thousands” of properties apparently affected by the Reversionary Clauses and therefore the Clause should be treated as a real right which is incapable of prescribing and accordingly they would be exempt from the 3 year prescriptive period in respect for a claim for re-transfer/return of the property.
- 16.6 As alluded to above the Reversionary Clause has two (2) parts and the second part relating to the claim for re-transfer of the property is a personal right and therefore subject to the three (3) year prescriptive period.
- 16.7 The Applicant has failed to explain why it waited almost twenty-six (26) years calculated from the date on which the debt became due to the date on which the application was instituted in the High Court ,being 19 February 2014.⁵⁹
- 16.8 This is more so in light of the fact that on the Applicant’s own version as far back as 1 November 1991 it was aware that the Respondent had not complied with the Reversionary Clause insofar as the construction of the building is concerned.⁶⁰
- 16.9 The Applicant is an Organ of State which has its own internal legal department and has access to external legal services and accordingly there is

⁵⁹ See Appeal Record Volume 1 Pages 1 and 7

⁶⁰ See Appeal Record Volume 1 Pages 8 and 9

absolutely no reason why it could not enforce its rights before the expiry of the three (3) year prescriptive period.

16.10 In *Holeni v Land and Agricultural Development Bank*⁶¹ it was held as follows:

“Furthermore, the modern trend in comparable jurisdiction is towards streamlining prescription periods and not making special provision for public authorities.”

16.11 There is no reason why the Applicant should be treated differently insofar as the prescriptive period of three (3) years is concerned in order to enforce its right to claim re-transfer/return of the property.

16.12 It is speculative to suggest that there are tens of thousands of properties that may be affected by the Reversionary Clause since there is no factual basis set out to support this contention.

16.13 In any event each case must be dealt with in its own merits and facts and there may well be instances where the running of prescription may be interrupted or delayed depending on the facts of each case.

16.14 It does not automatically follow that in all instances the Applicant's claim for re-transfer/return of the property would have prescribed as it did in this matter since the facts of this case may be distinguishable from the facts of other cases.

⁶¹ 2009 (4) SA 437 (SCA) at para 40 – where it was also held that the Land and Agricultural Development Bank is not the “State” and can accordingly benefit from the 15 year prescriptive period in terms of Section 11 (b) of the Act (paras 37 to 39)

16.15 In the circumstances there is no basis in an open and democratic society for the Applicant to be treated differently when it comes to the enforcement of the Reversionary Clause as contained in the Title Deed.

17.

IS THE REVERSIONARY CLAUSE A MORTGAGE BOND

17.1 In terms of Section 11 (a) of the Act the Prescription period in respect of any 'debt' secured by a mortgage bond is thirty (30) years.

17.2 The Reversionary Clause (Clause C2) as contained in the Deed of Transfer is manifestly not a mortgage bond nor is that right secured by a mortgage bond.

17.3 It would be indeed remarkable and have far reaching consequences to find that a mortgage bond can be created in a Deed of Transfer without the need for such mortgage bond to be registered against the property.

17.4 There is no suggestion in the decision of *Land and Agricultural Development Bank v Phato Farms (Pty) Ltd & Ors*⁶² which held that a general notarial bond is not a mortgage bond as envisaged in Section 11 (1) of the Act that can possibly support the extension of the meaning of mortgage bond from its ordinary and usual meaning.

17.5 In the same vein there is no suggestion in the decision of *Land and Agricultural Development Bank of South Africa t/a The Land Bank v Factaprops 1052 CC & Ano.*⁶³ which found that a special notarial bond

⁶² 2015 (3) SA 100 (GP) at para 74

⁶³ 2016 (2) SA 477 (GP) at para 49

constitutes a mortgage bond can also be used to support an extended meaning to the usual meaning of a mortgage bond.

- 17.6 In *Standard Bank of South Africa v Saunderson*⁶⁴ Cameron JA (as he then was) stated as follows:

“A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt...”

- 17.7 The Deed of Transfer does not fall within the definition of a mortgage bond as set out in Section 102 of the Deeds Registry Act 47 of 1937 and is simply not a bond attested by the Registrar of Deeds hypothecating immovable property and simply remains a Deed of Transfer and no more.
- 17.8 This issue as to whether the Reversionary Clause is a mortgage bond was raised only on appeal and any finding that it constitutes a mortgage bond could conceivably have serious implications in that the registration of mortgage bonds as we know in that it can be incorporated in the Deed of Transfer and thereby enjoy a prescriptive period of thirty (30) years.
- 17.9 If such an approach is to be considered or adopted then surely interested parties like the Registrar of Deeds and the appropriate government minister ought to be parties to these proceedings so that their views can be considered.

⁶⁴ 2006 (2) SA 264 (SCA)269 at para 2

17.10 In any event the Reversionary Clause (Clause C2) can never be construed as a mortgage bond and thereby enjoy a prescriptive period of thirty (30) years.

18.

PUBLIC IMPORTANCE

18.1 In terms of Section 167 (3)(b)(ii) of the Constitution of South Africa Act 108 of 1996 in order to entertain this appeal:

- i. The matter should raise an arguable point of law;
- ii. That point is one of general public importance; and
- iii. The point ought to be considered by this Court.

18.2 In addition thereto the fact that the matter raises arguable point of law does not automatically mean that the appeal will be entertained. It will also depend on the interest of Justice on whether the appeal should be entertained.⁶⁵

18.3 There is no dispute regarding the distinction between real and personal rights as explained by this Honourable Court in *Masstores v Pick n Pay*⁶⁶ where the following was said:

“...the distinction between real and personal rights derived from the Roman procedural distinction between actions in rem and actions in personam. The central pillar of the distinction is that the real rights are absolute in the sense that they are enforceable against the whole world whereas a personal right is relative in that it can be enforced against a particular person...”

⁶⁵ Paulsen and Another v Slip Knot Investments 777 (Pty) Limited 2015 (3) SA 479 (CC) at paras 16 and 18

⁶⁶ 2017 (1) SA 613 at para 89

- 18.4 The Judgments of the SCA in *Mounthaven* and *Bondev Midrand* cases both dealing with virtually identical reversionary clauses came to the same conclusion that the right to claim re-transfer/return of the property is a personal right and capable of prescribing.
- 18.5 The reasoning of the SCA in *Bondev Midrand* differs slightly from that of *Mounthaven* in that in *Bondev Midrand* the SCA held the reversion clause consists of 2 parts:
- i. the first being an obligation to erect a dwelling on the property within a specified period thus being a limited real right not capable of prescribing;
 - ii. the second in the event that the dwelling is not erected within the specified period then the developer (the seller) is entitled to re-transfer/return of the property is a right enforceable against a particular person and no-one else and accordingly is a personal right which is capable of prescribing.
- 18.6 The SCA in *Bondev Midrand* and *Mounthaven* therefore came to the same conclusion that the second part of the reversionary clause which is relevant to this matter is a personal right and thus capable of prescribing.
- 18.7 In both *Bondev Midrand* and *Mounthaven* the SCA came to the same conclusion that a claim for re-transfer/return of the property is a debt as contemplated in Chapter III of the Prescription Act.

- 18.8 There is therefore no confusion regarding the distinction between real and personal rights and whether the claim for re-transfer/return of the property is a debt as contemplated in Chapter III of the Prescription Act.
- 18.9 The issue as to whether or not it is practical or financially feasible for the Applicant to enforce its claim for re-transfer/return of the property in terms of the reversionary clause within the three (3) year prescriptive period is not a relevant consideration in this matter.
- 18.10 The crisp issue is whether a claim for re-transfer/return of the property is a debt as contemplated in Chapter III of the Prescription Act is settled law and requires no further consideration.

19.

APPLICANT'S SUBMISSIONS REGARDING CONSTITUTIONAL ISSUES

- 19.1 The Applicant in Section F of its written submissions has raised constitutional issues *inter alia* the need for clarity and public importance in respect of this matter.
- 19.2 These constitutional issues were not advanced by the Applicant in the High Court and in the SCA and have been raised for the first time on appeal before this Honourable Court.
- 19.3 The Applicant had ample opportunity to deal fully in its replying affidavit with the Respondent's defence of prescription; however, it elected to simply deny

same without advancing any legal or constitutional argument in opposition to the defence of prescription.⁶⁷

19.4 It is true that Makate's case was not decided when the matter came before the High Court and after the Judgment in Makate's case was handed down; the Applicant sought and obtained leave to appeal to the SCA.

19.5 The Applicant did not raise any constitutional issues before the SCA and neither was the SCA called upon to consider whether to develop common law in terms of Section 39 (2) of the Constitution of the Republic of South Africa when it comes to the interpretation of the word 'debt' in Chapter III of the Prescription Act.

19.6 The Applicant for the first time raises constitutional issues before this Honourable Court which is inherently prejudicial to the Respondent.

19.7 In *Everfresh Market Virginia v Shoprite Checkers*⁶⁸ Moseneke DCJ said as follows with reference to *Prince v President, Cape Law Society and Others*⁶⁹:

"[51] Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise that all this information must be

⁶⁷ See Appeal Record Volume 1 Page 54

See Appeal Record Volume 2 Page 95

⁶⁸ 2012 (1) SA 256 (CC) at 271 paras 51 and 52

⁶⁹ 2001 (2) SA 388 (CC) at para 22

placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and relief that is sought. Nor can parties hope to supplement and make their case on appeal.”

“[52] It is so that the test on proper pleadings in Prince related to a challenge to the constitutional validity of a provision in a statute. That test, however, is of equal force where, as in the present case, a party seeks to invoke the Constitution in order to adapt or change the existing precedent or a rule of the common law or of customary law in order to promote the spirit, purport and objects of the Bill of Rights. Litigants who seek to invoke provisions of s 39(2) must ordinarily plead their case in the court of first instance in order to warn the other party of the case it will have to meet and the relief sought against it. The other obvious benefit is that the High Court and the Supreme Court of Appeal will be afforded the opportunity to help shape the common law and customary law in line with the normative grid of the Constitution.”

- 19.8 The Applicant’s reliance on Section 39 (2) of the Constitution is with respect misplaced as the Respondent’s right to property are also entrenched in Section 25 of the Constitution and this Honourable Court in promoting the spirit and objective of the constitution should endeavour to protect individual proprietary rights.

- 19.9 It is clear that the Applicant has adjusted its case as the matter proceeded through the courts including the High Court and the SCA.
- 19.10 By way of illustration the issue as to whether the reversionary clause tantamounts to a mortgage bond with a prescriptive period of thirty (30) years and whether the Respondent's failure to retransfer the property constituted and 'ongoing wrong' which did not prescribe were issues raised for the first time on appeal before the SCA.
- 19.11 The Applicant in the SCA abandoned the 'ongoing wrong' argument; however, it failed to raise any constitutional issues and has advanced no explanation for its failure to do so.
- 19.12 As pointed out in *Everfresh Market Virginia* where the development of common law is an issue, the views of the High Court and in particular the SCA would be extremely helpful to this Honourable Court and no exceptional circumstances exist as to why this Honourable Court should entertain such constitutional issues at such a late stage in its litigation.⁷⁰
- 19.13 It is prejudicial and unfair to the Respondent at this very late stage to have to deal with constitutional issues without having had an opportunity of tendering evidence and probably considering such issues which it could have done had these issues been raised at least before the SCA.
- 19.14 The Applicant is an organ of State with an abundance of resources including financial and legal services and can hardly contend a greater right to the acquisition of the property to the deprivation of the Respondent whose only asset is the property considering that the Applicant adopted a supine attitude

⁷⁰ *Everfresh Market Virginia* at paras 63 and 73

and waited for approximately twenty-three (23) years before instituting these proceedings in the High Court.

19.15 On the facts of this matter there is no reason why the term 'debt' should be given a strict and narrow interpretation to exclude the re-transfer of immovable property as this could amount to the arbitrary deprivation of property.

20.

CONCLUSION

- i. The Respondent has no objection to any condonation being granted.
- ii. That Leave to Appeal be refused.
- iii. That the Appeal falls to be dismissed with costs.

D.D NAIDOO

CHAMBERS

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23rd July 2018

LIST OF AUTHORITIES

1. *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 34 (A)
2. *Makate v Vodacom* 2016 (4) SA 121 (CC)
3. *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others* 217 (5) SA 9 (CC)
4. *Brompton Court v Khumalo* 2018 (3) SA 347 (SCA) at para 11
5. *National Stadium SA v First Rand Bank* 2011 (2) SA 157
6. Chapter II, Bill of Rights, Section 9
7. The Prescription Act 68 of 1969
8. *Ethekwini Municipality v Mounthaven (Pty) Limited* (1985/2014) [2015] ZAKZDHC 78 (30 September 2015).
9. *Ethekwini Municipality v Mounthaven (Pty) Limited* 2018 (1) SA 384 (SCA)
10. Claassen's Dictionary of Legal Words and Phrases
11. *Staegemann v Langenhoven* 2011 (5) SA 648 (WCC) at 651
12. *ABSA Bank Limited v Keet* 2015 (4) SA 474 (SCA)
13. Wille's Principles of South African Law, Juta 9th Edition
14. *British South Africa Company v Bulawayo Municipality* 1919 AD 84 at 83
15. *Lorentz v Melle* 1978 (3) SA 1044 (T)
16. Silberberg and Schoeman's The Law of Property, 5th Edition, Lexis Nexis
17. *Ex parte Geldenhuys* 1926 OPD 155
18. *Erlax Properties (Pty) Limited v Registrar of Deeds* 1992 (1) SA 879 (A)
19. *Provisional Trustees, Alan Dogget Family Trust v Karakondis* 1992 (1) SA 33 (A)
20. *Cape Explosive Work Limited v Denel (Pty) Limited* 2001 (3) SA 569 (SCA)

21. *Willow Waters Homeowners v Koka* N.O 2015 (5) SA 304 (SCA)
22. *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC)
23. *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC)
24. *Uitenhage Municipality v Molly* 1998 (2) SA 735 (SCA) at 742I-743A
25. *Desai N.O v Desai and Others* 1996 (1) SA 141 (A)
26. *Myathaza v Johannesburg Metrobuses* 2018 (1) SA 38 (CC)
27. *Frieslaar N.O & Others v Ackerman* (1242/2016) [2017] ZASCA 03 (02 February 2018)
28. *Radebe v Government of the Republic of South Africa & Others* 1995 (3) SA 787 (N)
29. *Evans v Shield Insurance Company Limited* 1979 (3) SA (W) 1136
30. *Barnett v Minister of Land Affairs & Others* 2007 (6) SA 313 (SCA)
31. *Leketi v Tladi* 2010 [3] ALL SA 591 (SCA) at para 8 referred with approval to Barnett and Evans cases noting in *Mdeyide supra* this Honourable Court referred with approval to Barnett at para 11
32. *Bondev Midrand (Pty) Limited v Puling & Another* 2017 (6) SA 373
33. *Emily Ntombizodwa Luwaca v Efolou (Pvt) Ltd and Others* HC 1816/10 and HC 3285/10 (High Court of Zimbabwe, 10 April 2013)
34. *Ongopolo Mining Limited v Iuris Safari Lodge (Pty) Ltd and Others* (I 3544/2010) [2014] NAHCMD 55 (19 February 2014)
35. *Magrietha Jonanna Louw v Anna Hendrina Strauss* HC-MC-CIV-ACT-CON-2016/03949 [2017] NAHCMD 217 (9 August 2017)
36. *Truter & Another v Dysel* 2006 (4) SA 168 (SCA)
37. *Minister of Finance and Another v Gore* N.O 2007 (1) SA 111 (SCA)
38. *Mtokonya v Minister of Police* 2017 (11) BCLR 1443 (CC)

39. *Unilever Bestfoods Robertsons (Pty) Ltd v Soomai & Another* 2007 (2) SA 347 (SCA)
40. *Goundini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (AD)
41. *Sorvaag v Pettersen and Others* 1954 (3) SA 636 (CPD) at 639
42. *Chetty v Naidoo* 1974 (3) SA 13 (AD) at Page 20 A-D
43. 27 LAWSA §233
44. *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC)
45. *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC)
46. *Jooste v Score Supermarkets Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] 1999 (2) SA 1 (CC)
47. *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* [1997] 1998 (2) SA 61 (CC)
48. *Holeni v Land and Agricultural Development Bank* 2009 (4) SA 437 (SCA)
49. *Land and Agricultural Development Bank v Phato Farms (Pty) Ltd & Ors* 2015 (3) SA 100 (GP)
50. *Land and Agricultural Development Bank of South Africa t/a The Land Bank v Factaprops 1052 CC & Ano.* 2016 (2) SA 477 (GP)
51. *Standard Bank of South Africa v Saunderson* 2006 (2) SA 264 (SCA) 269
52. *Everfresh Market Virginia v Shoprite Checkers* 2012 (1) SA 256 (CC)
53. *Prince v President, Cape Law Society and Others* 2001 (2) SA 388 (CC)