

# The power of prescription reinforced: The SCAs recent approach in respect of immovable property



The Supreme Court of Appeal recently delivered two pertinent judgments dealing with the issue of prescription in respect of immovable property claims. Read together, these decisions send a clear message to holders of real

rights ostensibly created via registration of a mortgage bond or title deed conditions: Do not assume the luxury of an extended period within which such rights may be enforced.

## ***Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd (1029/2016) [2017] ZASCA 128 (29 September 2017)***

The Appellant (Investec) instituted action against the Respondent (Erf 436) for the recovery of money owing on a loan. As security for the loan, Erf 436 registered a mortgage bond, in favour of Investec, over a notarial lease that it had earlier concluded with South African Railway Commuter Corporation Limited (SARCC). This lease comprised Investecs real right under the mortgage bond. During January 2002, SARCC cancelled the lease.

Investec construed this cancellation as a breach of the loan agreement and demanded payment of the outstanding balance, which became due and payable on 18 September 2002. Having failed to make payment, on 21 January 2011 some eight years later Investec instituted formal action. Erf 436 raised various defences to the action – in particular that the claim had prescribed. Investec contended the claim was secured by a

mortgage bond as contemplated in s11(a) of the Prescription Act, No 68 of 1969 (Prescription Act) and was therefore subject to a 30 year prescription period.

The crisp issue for decision by the SCA was whether the prescription period of the debt in issue was 30 years or 3 years as provided in s11(a)(i) or 11(d) of the Prescription Act respectively. The SCA rejected Investecs assertion that the phrase any debt secured by mortgage bond in section 11(a)(i) [could] be interpreted to mean any debt that was at any time secured by mortgage bond.

The SCA contented that the language of section 11(a)(i) was clear and affirmed that upon a purposive and contextualised interpretation thereof, the cancellation of a mortgage bond or the loss of security would have an effect on the prescription period. More specifically, once security ceases to exist, the relevant debt is no longer secured and the prescription period subsequently becomes three years as it is with any other debt in terms of s11(d) of the Prescription Act.

It was common cause that the running of prescription commenced on 18 September 2002. SARCCs cancellation of the lease agreement extinguished Investecs real right in terms of the mortgage bond. The fact that the debt was no longer secured by mortgage bond rendered it subject to the three year prescription period in terms of s11(d) of the Prescription Act as opposed to the 30 year prescription period provided for in s11(a)(i) thereof. As such Investecs claim had prescribed.

***Bondev Midrand (Pty) Ltd v Puling (802/2016); Bondev Midrand (Pty) Ltd v Ramokgopa (803/2016) [2017] ZASCA 141 (2 October 2017)***

Similarly, this case centred on the issue of prescription. Herein the Appellant (Bondev), a property developer, sought an order obliging the Respondents (Puling & Ramokgopa) to re-transfer to it certain immovable property in consequence of

Puling & Ramokgopas breach of a condition registered against their respective title deeds. The condition comprised two clauses:

- The first obliged the transferee or its successors in title to erect a dwelling on the property within a period of 18 months.
- The second entitled Bondev to have the property re-transferred to it against return of the purchase price in the event of a dwelling not being erected within that period.

Neither Puling nor Ramokgopa had erected a dwelling and as such Bondev sought re-transfer. The issue at hand was whether Bondevs claim for re-transfer prescribed three years after Puling & Ramokgopa failed to erect a dwelling, being the date on which its claim became due. In deciding this, the SCA had to determine whether Bondevs claim constituted a debt in terms of s11(d) of the Prescription Act, and as such was capable of prescribing, or whether it was a real right not subject to the three year prescriptive period.

The SCA held that the first clause conferred a real right as it intended to bind both the transferee and its successors in title, and constituted an encumbrance upon the exercise of an owners ownership rights in respect of its land. Conversely, the second clause did not amount to such an encumbrance it was a personal right that could not bind third parties. It offered an entitlement rather than an obligation. Comparatively, the restriction upon ownership imposed by the first clause remained binding whether or not Bondev elected to seek re-transfer per clause two. Therefore, the clauses were stand-alone and did not constitute a composite whole that restricted Puling & Ramokgopas use of property.

The SCA then had to determine whether such personal right constituted a debt in terms of the Prescription Act. It found that it appeared to be settled [in law] that even on a narrow

meaning a debt includes the right to claim the return of property. As such, Bondevs claim to re-transfer was a debt, envisaged by s11(d) of the Prescription Act, the prescription period of which was three years.

### **Comment**

To reiterate, these decisions demonstrate how prudent it is for holders of real rights, secured by mortgage bonds, title deed conditions and other instruments, to fully assess and understand the true nature of their interests.