



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 3544/2010

In the matter between:

**ONGOPOLO MINING LIMITED**

**PLAINTIFF**

and

**!URIS SAFARI LODGE (PTY) LTD**

**FIRST DEFENDANT**

**FIRST NATIONAL BANK OF NAMIBIA LTD**

**SECOND DEFENDANT**

**REGISTRAR OF DEEDS**

**THIRD DEFENDANT**

**Neutral citation:** *Ongopolo Mining Limited v !Uris Safari Lodge (Pty) Ltd* ( I 3544/20100 [2014] NAHCMD 55 (19 February 2014)

**Coram:** DAMASEB, JP

**Heard:** 15 July 2013

**Delivered:** 19 February 2014

**Flynote:** Law of property – Plaintiff seeking declarator that immoveable property, a farm, allegedly fraudulently transferred into the name of first defendant – Plaintiff also seeking an order that title deed at Deeds Registry be ‘rectified’ to record plaintiff as owner; and seeking order that first defendant be evicted from farm – First defendant raising special plea of prescription and after exception thereto seeks to amend special plea – Plaintiff still excepting to special plea on ground that it does not disclose a defence in law as claim to enforce return of property fraudulently obtained not a ‘debt’ as contemplated in Prescription Act, 1969; that ‘rectification’ equally not susceptible to prescription; alternatively, if found to be a ‘debt’, unlawful possession of farm constitutes a ‘continuous wrong’ creating a series of debts arising from moment to moment and thus interrupting prescription.

*Held* What is important is not the label claimant assigns to claim but effect it has. Present claim seeks the re-transfer of the farm and declarator without relief seeking re-transfer academic. *Obiter dicta* from pre-independence and other *dicta* from South Africa, post Namibia’s independence, suggesting that claim seeking vindication of property is, regardless of whether or not relating to real right in property, a ‘debt’ in terms of Prescription Act. ‘Rectification’ sought in respect of title deed not the same thing as rectification under common law based on mistake. The cause of action relied on is an alleged act of fraud which led to separation of plaintiff from the farm. That single act not a continuous wrong creating series of debts.

*Held* Special plea, if given most beneficial construction, capable of disclosing a defence of prescription. Plaintiff’s argument that holding that prescription applies to property fraudulently acquired breaches Art 16 of the Constitution demonstrates that both special plea and exception are arguable as both offer differing interpretations of the Prescription Act and Constitution and can only be determined after full argument.

*Held* Exception dismissed and first defendant’s amendment of special plea allowed.

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## ORDER

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- (a) The plaintiff's exception dated 19 October 2011 is dismissed.
  - (b) The first defendant's proposed amendment embodied in its notice to amend dated 29 February 2012 is allowed, with costs, including the costs of instructing and two instructed counsel.
  - (c) The matter is enrolled on the Court's case management roll of **24 February 2014 at 15h30 before Unengu AJ**, for pre-trial and the parties are directed in preparation for that conference to hold a parties' meeting and to submit a proposed pre-trial order to the managing judge in compliance with rule 37(12).
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## JUDGMENT

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Damaseb JP,

[1] This is an opposed exception taken by the plaintiff (Ongopolo Mining (Pty) Ltd) against a notice to amend introduced by the first defendant (!Uris Safari Lodge (Pty) Ltd) raising a special plea of prescription.

[2] It is common cause that the first defendant is, by Title Deed T7534/2002, the registered owner of Farm !Uris ('the Farm'), having taken transfer of the Farm on 28 October 2002 on the strength of an agreement entered into between it and plaintiff on 22 August 2002. Having thus taken transfer of the Farm, first defendant obtained a bond from second defendant (First National Bank of Namibia) with the Farm as security.

[3] The plaintiff filed suit against the first defendant claiming that the agreement which formed the basis for the transfer of the Farm to the first defendant is a nullity and that it (plaintiff) remains the lawful owner of the Farm. The plaintiff therefore seeks to have declared as null and void the transfer of ownership in the Farm to the first defendant that took effect on 28 October 2002; to rectify the documents in the third defendant's office to reflect the plaintiff as the true owner of the Farm, and for the eviction of the first defendant from the Farm.

[4] The plaintiff seeks the following relief in the particulars of claim:

- '1. Declaring the purported transfer of the farm !Uris to the first defendant null and void;
2. That the third defendant be authorised and directed to rectify registration documents in the Deeds Office to reflect the plaintiff as the owner of the Farm !Uris 481;
3. That the first defendant be ordered to redeem the outstanding amount on the bond registered in favour of the second defendant;
4. Evicting the first defendant from the Farm !Uris 481.'

The third defendant is the Registrar of Deeds who effected the registration of the Farm into the name of the first defendant.

#### The cause of action

[5] The basis of the claim as set out in the particulars of claim is that the 'purported' registration of the Farm into the first defendant's name did not deprive the plaintiff of the ownership of the Farm as the 'abstract theory in relation to the transfer of ownership in respect of immoveable property' does not assist the first defendant in that the real agreement was a nullity and defective because:

- (a) the plaintiff did not have the intention to transfer ownership in the Farm to the first defendant as the person 'purporting' to give instructions to the conveyancer to register the Farm into first defendant's name could not and did not represent the intention of the plaintiff as he had no authority to instruct a conveyancer to do so; and or
- (b) no resolution of the board of directors of the plaintiff authorising the transfer or sale of the Farm to the first defendant ever existed and the 'purported' resolution which formed the basis for the transfer into the first defendant's name was a forgery.

#### Plea on the merits

[6] The first defendant denies that the transfer of the Farm into its name was fraudulently procured and states that the written agreement which preceded the transfer was valid and lawfully executed. The first defendant also denies the absence, on the part of the plaintiff, of the intention to transfer ownership in the Farm to the first

defendant. The first defendant puts the plaintiff to the proof of the allegations of the alleged fraud and the absence of an intention to transfer the Farm.

### The special plea

[7] The first defendant delivered two special pleas, only one of which (prescription) is the subject of the present dispute raised by the plaintiff's exception thereto, following a notice by the first defendant to amend the special plea raising prescription. The first defendant pleads specially that the relief sought in the present claim is prescribed in terms of s 10(1)<sup>1</sup> of the Prescription Act<sup>2</sup> in that it was brought three years after the facts giving rise to it became known to the plaintiff.

### *Exception to the special plea on prescription*

[8] The plaintiff initially excepted to the special plea of prescription on the ground that a claim for declaratory relief and of rectification of the title deed is not a 'debt' as contemplated in the Prescription Act as it has the effect of 'merely' declaring 'why the plaintiff is entitled (as a matter of law) to rectification and eviction of the first defendant' and that first defendant's possession of the Farm is a 'continuous wrong' resulting in a series of debts (assuming without conceding that the alleged unlawful possession of somebody else's property can constitute a debt), 'arising from moment to moment', as long as the wrongful conduct endures, and in any event, possession of someone else's property does not constitute a 'debt' as contemplated in the Prescription Act.<sup>3</sup>

### *Notice to amend special plea of prescription*

[9] The first defendant sought an amendment to its special plea which will have the effect of the first special plea being supplemented and the second special plea being removed.

[10] The original special plea stated in relevant part as follows:

#### **'FIRST SPECIAL PLEA**

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<sup>1</sup> Read with s 11(d).

<sup>2</sup> Act 68 of 1969.

<sup>3</sup> Plaintiff adds, for good measure, that the special plea of prescription amounts to a perversion of the law of ownership as possession of property in circumstances as alleged in the plaintiff's particulars of claim, if seen as a debt, would be contrary to Art 16 of the Constitution.

4. The plaintiff claims herein for an order declaring the transfer of the Farm !Uris to the first defendant null and void, and that the third defendant be authorized and directed to rectify registration documents in the Deeds offices to reflect the plaintiff as the owner of Farm !Uris 461.
5. The agreement of sale of the Farm !Uris, by plaintiff to the first defendant – annexed to the plaintiff’s particulars of claim – was already concluded on 22<sup>nd</sup> August 2002 and the property was already registered in first defendant’s name on 28 October 2002. Plaintiff’s claim therefore became due, not later than the 28<sup>th</sup> of October 2002,  
Alternatively,
  - 5.1 the plaintiff, in its particulars of claim, bases its alleged entitlement for the relief sought in the particulars of claim on the grounds set forth in paragraph 10 of same.
  - 5.2 on the plaintiff’s own version, the plaintiff already became aware of the existence of the alleged facts during 2006.
6. The plaintiff’s summons herein was served on first defendant on 18 October 2010, which is more than three years after the date on which the claim arose, alternatively after the plaintiff became aware of the existence of the facts on which its cause of action and its alleged entitlement to the relief sought is founded.
7. In the premises, plaintiff’s claim is prescribed in terms of the relevant provisions of the Prescription Act, Act 68 of 1969.’

[11] The proposed amendment reads thus:

**‘1. By the deletion of the whole of the existing paragraph 4, immediately under the caption of the heading “first special plea” and the substitution thereof with the following:**

- “4. The plaintiff, in its particulars of claim, claims, subject to the second defendant’s rights, the following relief to wit:**
  - 4.1 Declaring the purported transfer of the Farm !Uris to the first defendant null and void.**
  - 4.2 That the third defendant be authorized and directed to rectify registration documents in the deeds office to reflect the plaintiff as the owner of Farm !Uris 481.**
  - 4.3 That the first defendant be ordered to redeem the outstanding amount on the bond registered in favour of the second defendant.**

- 4.4 Evicting the first defendant from the Farm !Uris 481.
- 4.5 Costs of suit against those parties who defend this action.
- 4.6 Further and/or alternative relief.”

2. By the deletion of the existing paragraph 5, and the substitution thereof with the following:

“5. Plaintiff alleges that the real agreement” i.e. the agreement directed to the transfer of ownership of Farm !Uris No 481 to first defendant was a nullity and defective, for some or all of the reason as set out in subparagraphs 10.1 to 10.5 in its particulars of claim. The agreement directed to the transfer of ownership is embodied in annexure “A” to plaintiff’s particulars of claim, whereof certain parts are illegible. Annexure “U1”, attached hereto is legible”.

3. By the insertion of a new paragraph 6, with the following contents.

“On the first page of annexure “A” (“U1”), Barend Hermanus Mouton, the then Financial Director of plaintiff, warranted that he was duly authorized by plaintiff to represent it, in concluding the agreement of sale.”

4. By the insertion of a new paragraph 7, with the following contents.

“7. On the sixth page of annexure “A” (“U1”) under subparagraphs 13.1 and 13.2, the following provisions appear:

This agreement constitutes the whole agreement between the parties hereto relating to the subject matter hereof and save as otherwise provided herein, no amendment, alterations, additions or variations shall be of any force of effect unless reduced to writing and signed by both parties.”

and

“the parties agree that no other conditions, warranties or representation whether oral or written and whether expressed or implied or whether by statute or otherwise shall apply hereto” ’

[12] The bolded parts above indicate the proposed amendments.

*Exception persisted with*

[13] The plaintiff objects to the proposed amendments on the basis that they still do not sustain a defense in law and that, if the amendment be allowed, the special plea of prescription would still be excipiable, alternatively will become excipiable on the grounds stated in the original exception as, it is said, the plaintiff's claim is not a debt within the meaning of the Prescription Act; alternatively, even if the right to seek the return of the Farm is found to be a debt, the possession by the first defendant constitutes a series of debts arising from moment to moment as long as the unlawful possession continues and therefore interrupts prescription.

The test for adjudicating an exception

[14] In adjudicating the exception to the special plea, I must take the facts alleged in the pleadings as correct, reminding myself that the excipient must satisfy the court that on all reasonable constructions of the defendant's special plea as amplified and amended, it does not disclose a defence in law.<sup>4</sup> I must, in so doing, place on the impugned special plea the most beneficial construction that can be given to it; and the fact that the plaintiff puts a particular interpretation on a statutory provision<sup>5</sup> that is different from the interpretation that the defendant puts thereon, does not, in and of itself, render the special plea excipiable. Where an issue raised in an exception is inextricably intertwined with the dispute on the merits which can be canvassed at the trial, it is preferable that the exception be deferred for adjudication at the trial.<sup>6</sup>

[15] If the relief the plaintiff seeks is susceptible of being construed as 'a debt' and is not a continuous wrong which interrupts prescription, the plaintiff's exception must fail and the first defendant be allowed to introduce the proposed amendment which postulates that the plaintiff should have instituted proceedings within three years of

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<sup>4</sup> July v Motor Vehicle Accident Fund 2010 (1) NR 368 (H) at 273.

<sup>5</sup> The Prescription Act and the Constitution of the Republic of Namibia.

<sup>6</sup> Hatson v Hatson 1927 AD 259 at 269; Minerals & Quarries Ltd v Henckert en n' Andre 1967 (4) SA 77 (SWA) at 84C-D; Glendale Sugar v SA Sugar Association 1986 (3) SA 815 (NPD) at 823B-C.



becoming aware of the alleged fraudulent conduct which led to the transfer of the Farm from the plaintiff to the first defendant.

### The differing arguments of the parties

#### *The plaintiff*

[16] The plaintiff's exception to the special plea has four strands: the first is that, what it seeks is not a *rei vindicatio* but a declarator and that a declarator is not susceptible of prescription. Secondly, it maintains that what it seeks, following the declaratory relief, is rectification of the Title Deed at the Deeds office and that rectification equally is not liable to prescription. Thirdly, the plaintiff's stance is that the relief it seeks is not a 'debt' within the meaning of the Prescription Act as, in law, the plaintiff never ceased to be the owner of the immovable property. Fourthly, the plaintiff maintains that even if the relief it seeks is found to be a debt, the alleged unlawful possession of the immovable property by the first defendant constitutes a continuous wrong which arises from moment to moment as long as the unlawful possession continues and that such continuing wrong interrupts the operation of prescription.

[17] I will treat the objections in the order I have listed them.

#### Declaratory relief vs *rei vindicatio*

[18] A declaration by this court that, because there was fraud, the Farm's ownership did not pass to first defendant would be academic without a corresponding order that the Farm be re-transferred to the plaintiff.<sup>7</sup> The significance in this claim lies in no small measure in the relief related to seeking registration of the Farm in the name of the plaintiff and evicting first defendant therefrom. That right, the right to take transfer and to evict first defendant because of an alleged illegality (a fraudulent transfer), as I understand the special plea, constitutes a 'debt' which should have been prosecuted within three years from the date the facts giving rise to it became known to the plaintiff, but was not.

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<sup>7</sup> This court does not make orders that are academic. See *Mushwena and others v Government of the Republic of Namibia and Another* (2) 2004 NR 94.

[19] In my view, what matters is not the label a party assigns to the relief it seeks but the effect it is sought to have. Whatever label the plaintiff gives to the present claim, the cause of action is the alleged absence of a lawful causa for the transfer of the Farm from it to first defendant - fraud. Prescription is a legal fiction which disentitles the claimant of a right, a debt, from enforcing it, not so much because he lost the right or ownership of a *res* through a duly executed legal act, but because he did not enforce that right within a period arbitrarily determined by the legislature. The special plea is not a fight over whether the plaintiff is the true and lawful owner of the Farm but whether it ought to have but failed to enforce its right to the Farm within three years.

*Does the claim concern rectification and thus not subject to prescription?*

[20] In *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd*<sup>8</sup> the Supreme Court of Appeal stated the following:

'A claim for rectification does not have as a correlative a debt within the ordinary meaning of the word. Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification. Rectification therefore does not create a new contract; it merely serves to correct the written memorial of the agreement'

[21] The *ratio* for the rule that prescription does not apply to rectification is that the granting of that remedy does not alter the contractual relationship between the parties as it only restores that which the parties had actually agreed but was incorrectly recorded. As Amlers' states:

'The object of rectification is to have a written contract conform to the common intention of the parties'.<sup>9</sup>

[22] The difference with the present case is that the property is registered in the name of the first defendant as a result of fraud allegedly perpetrated by a director of the first defendant which created a new reality to that which existed between the parties prior to such conduct. On this theory, there is no agreement between the parties in the first

<sup>8</sup> 2009 (3) SA 447 (SCA) at 452, para 13.

<sup>9</sup> LTC Harms, *Amler's Precedents of Pleadings*, (7<sup>th</sup> Ed) at p 336.

place which can be rectified. Rectification in our law of contract, to which the case law refers, is not the same thing the plaintiff seeks in relation to the Title Deed of the Farm. The common law principle that prescription does not apply to rectification is therefore not applicable. The facts before me are clearly distinguishable.

[23] It needs to be understood that the factual and legal reality which created the separation between the plaintiff and the Farm was not the result of a mistake that occurred in the memorialization of an agreement between the parties in seeking to give effect to an underlying consensus aimed at transferring the property from the plaintiff to the first defendant. The plaintiff's case is that no such underlying consensus existed. According to the plaintiff, it never intended to transfer the Farm to first defendant. The claim, thus understood, could on a reasonable interpretation of the factual and legal position be susceptible of being construed as 'a debt' within the meaning of s 10 of the Prescription Act.

The relief sought is not a debt

[24] The plaintiff's argument in this regard is heavily reliant on two judgments: one from this court and the other by this court's South African counterpart. The Namibian decision relied on is *Oshakati Tower (Pty) Ltd v Executive Properties CC and Others*.<sup>10</sup> That case is similar, as far as the facts are concerned, to the case before me but is unhelpful in the resolution of the dispute raised by the special plea and the resultant exception. In that case, just as it is alleged here, a director of the company whose land was transferred to another party fraudulently procured an agreement of sale of immovable property, forging a company resolution when clearly the company had not lawfully resolved to authorise the transaction. The company's immovable property was, on its strength, transferred to another against whom the company successfully claimed a declarator that the company had not intended to transfer the immovable property and that the resultant real agreement was a nullity.

[25] The ratio for the court's judgment is set out as follows in relation to the 'abstract system of land registration' applicable in Namibia:

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<sup>10</sup> 2009 (1) NR 232.

'In this system two separate agreements are recognised, namely the underlying agreement and the real agreement. A defect in the first agreement does not prevent valid transfer. In respect of the real agreement it is a requirement that it should not only be voidable, but it should be void *ab initio* because of a mistake or fraudulent misrepresentation. A forgery would certainly also render the agreement void. For transfer, the owner must have the intention to pass ownership. If there was no such clear intention to transfer ownership, ownership does not pass.'<sup>11</sup>

[26] *Oshakati Tower* really does not break new ground: It simply reiterates the common law that where fraud is shown (all things being equal) ownership in immovable property does not pass and that the defrauded owner is entitled to its re-transfer. Whether the right to do so can become prescribed was not an issue in *Oshakati Tower*. The special plea raises that very issue which was not at issue in *Oshakati Tower*.

#### *The first defendant*

[27] In the first place, the first defendant maintains that the alleged act of fraud is not a continuous wrong as suggested by the plaintiff. Secondly, it maintains that the relief the plaintiff seeks in the form of an order for the declaration of rights does not detract from the fact that the plaintiff's action is vindicatory in nature and thus constitutes a 'debt' within the meaning of the Prescription Act. The first defendant therefore maintains that the plaintiff cannot persuade the court on every interpretation of the special plea that same does not, if interpreted in the most beneficial manner, reasonably bear a proper defence of prescription. The first defendant relies on a number of authorities for these propositions, chief amongst them, *Leketi v Tladi N.O & Others*<sup>12</sup>, *Barnett & Others v Minister of Land Affairs & Others*<sup>13</sup>, *Radebe v Government of the Republic of South Africa & Others*<sup>14</sup> and *Evins v Shield Insurance Co Ltd*.<sup>15</sup>

[28] One of the cases relied on by first defendant in meeting the plaintiff's 'continuous wrong argument' is *Leketi v Tladi N.O.*<sup>16</sup> The brief facts in that case were the following:

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<sup>11</sup> At 245, para 26.

<sup>12</sup> *Supra*.

<sup>13</sup> 2007 (6) SA 313 (SCA).

<sup>14</sup> 1995 (3) SA 787 (N).

<sup>15</sup> 1997 (3) SA 1136 (W).

<sup>16</sup> 2010 (3) ALL SA 519.

The claimant in *Leketi* sought a declarator and vindicatory relief aimed at recovering from an estate an immovable property which was allegedly fraudulently transferred and registered in the name of a beneficiary in the estate of the deceased, who claimed that he was the only male heir of the deceased and thus entitled to the property upon intestate succession according to Black custom. Although the alleged fraud took place on 25 June 1969, the claimant's summons commencing action was only served on the defendants against whom relief was sought between 9 February 2004, 13 May 2004 and 20 July 2005. The High Court upheld a special plea that the claim had prescribed.

#### Principles discernable from case law

[29] 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.<sup>17</sup> In a number of cases prior to Namibia's independence, the High Court of South Africa<sup>18</sup> and the counterpart to the Namibian Supreme Court had pronounced that a claim for the recovery of property<sup>19</sup> constitutes a 'debt' as contemplated in the Prescription Act.<sup>20</sup>

#### *Cases prior to 1990*

[30] The South African courts had before 1990 commented on the issue of 'a debt' under the Prescription Act. The pre-1990 statutory scheme on prescription has not changed in South Africa and was and remains the same in Namibia. The Cape Provincial Division stated in *Leviton & Son v De Klerk's Trustee*<sup>21</sup>:

'I am disposed to take the word debt in a wide and general sense as denoting whatever is due – *debitum* - from any obligation.'

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<sup>17</sup> Attorney-General v Minister of Justice and 14 Others, Case No. P. 12/2009 at para 6 (as yet unreported); Westcoast Fishing Properties v Gendev Fish Processors Ltd and Another (A 228/2012) [2013] NAHCMD 185 (28 June 2013).

<sup>18</sup> Evans (see note 15)

<sup>19</sup> Without making a distinction between real rights or personal rights in property.

<sup>20</sup> See note 12 and 13.

<sup>21</sup> 1914 CPD 685 at 691 in fin.

[31] It was stated in *Electricity Supply Commission v Steward and Lloyds of SA (Pty) Ltd*<sup>22</sup>, relying on *Leviton*, that:

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

#### *Cases after 1990*

[32] In *Radebe v Government of the Republic of South Africa & Others*<sup>23</sup>, Booysen, J stated the following:

'The effect of the expropriation, whether valid or not, is that the applicant has been deprived of ownership of the land. He was thus left with no more than a personal right (if he has any right at all) to claim redelivery of the land by registration of title in his name. Such a claim constitutes a debt within the meaning of ss10 and 11 of the Prescription Act 68 of 1969. While 'debt' is not defined in the Act, it has to be given a wide and general meaning. There is no reason why a claim for vindication of property movable or immovable should not be included.'

[33] In *Desai N.O v Desai and others*<sup>24</sup> it is stated:

's 10 (1) of the Prescription Act. . . lays down that a debt shall be extinguished after the lapse of the relevant prescriptive period. . . The term 'debt' is not defined in the act, but in the context of s 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something.'

[34] Based on that finding, the court found that an undertaking to procure registration of transfer was a debt as envisaged in s 10(1).

[35] In *Barnett and Others v Minister of Land Affairs and Others*<sup>25</sup> the Supreme Court of Appeal stated<sup>26</sup>:

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<sup>22</sup> 1981 (3) SA 340(A) at 344F-G.

<sup>23</sup> At 804B-C.

<sup>24</sup> 1996 (1) SA (A) at 146I-J.

<sup>25</sup> 2007 (6) SA 313 (SCA).

<sup>26</sup> At para 19.

'Though the Act does not define the term 'debt', it has been held that for purposes of the Act, the term has a wide and general meaning and that it includes an obligation to do something or refrain from doing something'.

[36] Significantly, the *Barnet* court uses the term 'property' in the general sense without distinguishing between real rights and personal rights in property.

[37] In *Evins v Shield Insurance Co Ltd*<sup>27</sup>, it was stated that:

'The word debt in the prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due, but also, for example, a debt for the vindication of property'.

[38] By reference to *Evins*, the Supreme Court of Appeal held in *Leketi v Tladi N.O. & Others*<sup>28</sup> that a claimant who wanted to claim the return of immoveable property allegedly fraudulently transferred was, in relation to the transferee, a 'creditor' and that the obligation on the part of the transferee to restore it to the person claiming to be the rightful owner constituted a 'debt' in terms of the Prescription Act. The court stated that in terms of the Prescription Act, the ordinary period of prescription of such a 'debt' is three years from the date upon which the debt became due. *Evins* was referred with approval by the Supreme Court of Appeal in *Leketi*.<sup>29</sup>

### *Principles discernable*

[39] The following principles can be distilled from an examination of the case law prior to 1990 as regards the meaning and proper scope of 'a debt' arising under s 10 of the Prescription Act:

- (a) The word 'debt' has a wide and general meaning and includes an obligation to do something or to refrain from doing something;
- (b) At the core of a 'debt' is a right and a corresponding obligation;
- (c) The concept of 'debt' has a proprietary meaning;

<sup>27</sup> 1997 (3) SA 1136 (W) at 1141F-G.

<sup>28</sup> [2010] 3 ALL SA 519 (SCA).

<sup>29</sup> [2010] (3) ALL SA 519 (SCA).

- (d) A debt does not only exist when the debtor is required to do something<sup>30</sup>, as such a construction is too limiting<sup>31</sup>;
- (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<sup>32</sup>.

[40] The authorities further establish that a debt arises if the plaintiff wants to enforce a right to take legal steps in order to undo a certain factual and legal reality created by the actions of the defendant which created that legal reality to the prejudice of the potential plaintiff.

[41] In opposition to the authorities referred to above, Mr Heathcote has relied on *Staegemann v Langenhoven and others*<sup>33</sup>, a case which was concerned with the recovery of a vehicle fraudulently transferred from the owner to someone else. The perpetrator of the fraud entered a plea-bargain admitting the fraud and the owner sought a *rei vindicatio* in respect of the vehicle three years after the fraud was perpetrated on him. Blignaut J, in rejecting that prescription applied, drew a distinction between real rights and personal rights and held that when, in respect of a real right, an owner seeks *rei vindicatio* prescription did not apply.

[42] *Staegemann* supports the plaintiff's exception, except that I am not bound by it and need not follow it, unless I find it to be persuasive. With the greatest respect, I do not consider *Staegemann* sufficiently persuasive for the following reasons:

- (a) the learned judge did not cite any judgment, reported or unreported, for that proposition;
- (b) Under the guise of it being *obiter*, Blignaut J ignored *ex cathedra* pronouncements by the Supreme Court of Appeal making clear that a debt under the Prescription Act includes not only the doing of something or failing to do something, but also a claim for *rei vindicatio*;

<sup>30</sup> *Electricity Supply Comm v Stewards and Lloyds of South Africa* 1981 (3) SA 340 at 344F-G. *Leviton & Sons v De Klerk's Trustee* 1914 CPD.

<sup>31</sup> *Duet and Magnum Financial services CC (IN LIQUIDATION)* 2010 (4) SA 499 (SCA) at 501, paras [3] and [6].

<sup>32</sup> *Ibid.*

<sup>33</sup> 2011 (5) SA 648(WCC).



- (c) The learned judge in *Staegemann* did not refer to *Leketi* and did not for that reason distinguish it if it was possible to do so, and for that reason, the *dictum* in *Staegemann* was reached *per in curiam*;

[43] Although the pre- 1990 dicta stating that an action seeking the return of immoveable property on account of alleged fraud constitutes a debt within the meaning of the Prescription Act are, strictly, *obiter* in the sense that the cases in which the pronouncements were made were not concerned with that issue, they have been stated with unwavering consistency that they must be departed from only for compelling reasons. Besides, the dicta have been confirmed by the Supreme Court of Appeal in *Leketi*. On the contrary, Blignaut J cites no authority for the conclusion, not even *obiter*, that seeking a *rei vindicatio* of property fraudulently acquired, which in any event the plaintiff says is not its cause of action, does not prescribe. That is too far reaching a conclusion to put forward without it being premised on firm precedent.

[44] Through the exception, the plaintiff in part relying on the constitution advances a particular interpretation of the Prescription Act – an interpretation not shared by the first defendant.

[45] If I uphold the exception I will be laying down a rule of law that a claim for the recovery of property fraudulently acquired is not a ‘debt’ and that the legislature did not intend the Prescription Act to apply to such property. No binding precedent has been cited for such far reaching a conclusion. In that sense, this is a case of first impression. A court should be slow to lay down such a precedent-setting rule of law in a case of first impression without full argument and consideration of all the ramifications of doing so, especially where the Constitution is relied on, although only indirectly. The exception procedure seems to me ill-suited for such a result. An exception that disposes off a claim or defence is, for that reason, rarely allowed.<sup>34</sup>In *Colonial Industries*, the court wisely counseled against the abuse of the exception procedure. The exception procedure should never be allowed to become what Benjamin J referred to in *Colonial Industries* as the ‘pernicious evil’ it became in England with the courts of Justice ‘abnegating’ the ventilation of legitimate claims or defences. The court reiterated that an

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<sup>34</sup> *Colonial Industries Ltd v Provinsial Insurance Company Ltd* 1920 CPD 627 at 630.

excipient should make out a very clear and strong case in order to succeed with an exception.

#### Continuous wrong argument considered

[46] In the written heads of argument Mr Heathcote submitted that the *Leketi dictum* concerning 'continuous wrong' relates to a personal right and not a real right in property and that for that reason it is distinguishable.

[47] The plaintiff's foundational proposition for the exception - that a real right in property is not capable of prescription - has, with respect, not been authoritatively settled in any Roman-Dutch authority binding on this court and, at best for the plaintiff, raises an arguable exception. On the contrary, such obiter authority there is points in the opposite direction and militates against the granting of the exception without full argument, on the ground that if the most beneficial construction were placed on it, the special plea could well be upheld.

[48] The plaintiff's suggestion to the effect that holding that prescription operates to debar a rightful owner from enforcing proprietary rights would be unconstitutional, only demonstrates that the special plea is arguable and must be prosecuted and is not a proper basis for precluding first defendant from having that plea properly adjudicated after full argument.

[49] The Supreme Court of Appeal stated as follows in *Leketi*:

'The sole question for decision at the trial was. . .whether the appellant's claim had become prescribed'.<sup>35</sup>

There, as here, the transfer of the immoveable property was assailed additionally on the ground that it was procured through fraud. As the court made clear:

'A further ground advanced by the appellant for his contention that his claim has not prescribed is that fraud committed by his grandfather . . . was a continuing wrong. Mr Bokaba for the appellant, argued that for as long as the property remained registered in the name of

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<sup>35</sup> At 521, para 7.

Albert, the claim remains alive. No authority was cited for the submission that a claim based on fraud does not become prescribed.'

[50] The Supreme Court of Appeal made clear in *Leketi*<sup>36</sup> that on 'either' ground the appellant failed. The court said that, and I agree:

'Fraud is an act of deceit which resulted in a single act of transfer and registration which was completed on 25 June 1969. It is that single act which constitutes the appellant's cause of action and does not amount to a continuing wrong.'<sup>37</sup>

[51] Based on that test, it seems to me to be immaterial what label the plaintiff assigns to the relief that he seeks from the court. The factual and legal reality of plaintiff's present claim is aimed at the reversal of a registration in the deeds office of the Farm which, on its pleadings, was the result of fraud perpetrated by first defendant's director and which operated and operates to plaintiff's prejudice.

[52] The conclusion I come to is that the alleged fraud giving rise to the present claim is capable of being construed as a single act which occurred on 28 October 2002 when the Farm was transferred to the first defendant.

### Costs

[53] As regards the costs occasioned by this application, the parties were in agreement that costs of one instructing and two instructed counsel should be allowed in favour of the successful party. This matter involved quite complex legal issues and therefore costs of two instructed counsel is justified.

[54] Although it is trite that a decision on an exception does not finally determine the rights of the parties and may be re-argued when the merits are heard, the plaintiff may justifiably argue that I have expressed a very firm view on the exception, in so far as the special plea may later have to be argued. Therefore, my conscience compels me to the conclusion that it is undesirable that I further preside in the matter. For that reason, I will afford the plaintiff to make an election whether I should continue to preside in the matter. On the assumption that it will prefer that the matter be heard by another judge, I will

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<sup>36</sup> At paragraph 22.

<sup>37</sup> At 525 para 21. See also *Radebe v Government of the Republic of SA and Others* 1995 (3) SA 787(N) at 803D and 804D-E.

assign the matter to another managing judge but give the parties a choice to have it returned to me if they both agree.

[55] Consequently, I make the following order:

- (a) The plaintiff's exception dated 19 October 2011 is dismissed.
- (b) The first defendant's proposed amendment embodied in its notice to amend dated 29 February 2012 is allowed, with costs, including the costs of instructing and two instructed counsel.
- (c) The matter is enrolled on the Court's case management roll of **26 February 2014 at 15h30 before Unengu AJ**, for pre-trial and the parties are directed in preparation for that conference to hold a parties' meeting and to submit a proposed pre-trial order to the managing judge in compliance with rule 37(12).

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PT Damaseb  
Judge-President

## APPEARANCE:

Plaintiff / Respondent	R Heathcote, SC (Assisted By G Dicks)
Instructed By	Lorentz Angula Inc, Windhoek
First Defendant / Applicant	H Oosthuizen, SC (Assisted By LC Botes)
Instructed By	Ellis Shilengudwa Inc, Windhoek
Second and Third Defendant	No Appearance