REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON SPECIAL PLEA

Case no**:** HC-MD-CIV-ACT-CON-2021/00191

In the matter between:

EMPIRE FISHING COMPANY (PTY) LTD	**PLAINTIFF**
and	
BISHOP KLEOPAS DUMENI	**FIRST DEFENDANT**
DUKA TRADING ENTERSPRISES CLOSE CORPORATION	**SECOND DEFENDANT**
REGISTRAR OF DEEDS	**THIRD DEFENDANT**

Neutral citation: *Empire Fishing Company (Pty) Ltd vs Dumeni* (HC-MD-CIV-ACT-CON-2021/00191) [2022] NAHCMD 76 (24 February 2022)

Coram: SIBEYA, J
Heard on: **20 September 2021**
Order: **29 October 2021**
Reasons: **24 February 2022**

Flynote: Practice – Special plea of prescription – Raised by defendants against plaintiff's claim for vindication of property ownership – Further second special plea raised by defendants that agreement on which plaintiff relies for its claim does not comply with the provisions of s 1 of the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969 – Court holding the view that the plaintiff's monetary claim for the value of the farm became prescribed, however, not end of the matter – Main claim of vindication of ownership of property still alive and court called upon to make a determination whether a vindicatory claim similarly falls under the same definition of a 'debt' in terms of the Prescription Act or not – After review of the present precedence on the matter in South Africa and Namibia, court arrived at the conclusion that a claim of vindication of ownership of property is not a 'debt' as envisaged by the Prescription Act and defendants' special plea in this regard fails – Further on the issue raised by defendants that agreement entered into is not in compliance with the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969 – Court of the view that the agreement entered into is not a contract of sale or in the nature of a sale, and therefore s 1 (1) of the Formalities Sale of Land Act does not apply.

Summary: The court had to determine a special plea of prescription against the relief sought by the plaintiff for a vindication of ownership of property. The first and second defendants raised a special plea of prescription and further that the agreement entered into between the parties does not comply with the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969.

The defendants submitted that the plaintiff's claim for vindication of ownership of the farm constitutes a 'debt' contemplated in s 11 (d) of the prescription Act and such claim prescribed for not being instituted within a period of three years. The plaintiff submitted contrariwise, that a claim for vindication of ownership of property does not amount to a 'debt' as envisaged by the Prescription Act and therefore it cannot prescribe for not being instituted within three years.

The parties stuck to their positions on the above-mentioned legal question and the court was called upon to determine whether a vindicatory claim constitutes a ‘debt’ in terms of the Prescription Act.

Held – In interpreting legislation, courts should accord meaning to legislative provisions which promotes the spirit, purport and objects of the Constitution. The meaning to be ascribed to legislative provisions should enhance the protection of fundamental rights and freedoms entrenched in chapter 3 of the Constitution.

Held further – To limit the enforcement and protection of a real right to a debt which prescribes after three years will be contrary to the intention of the Legislature, particularly when regard is had to the distinction between extinctive and acquisitive prescription.

Held further – The finding *in Ongopolo Mining Ltd v Uris Safari Lodge (Pty) Ltd and Others* 2014 (1) NR 290 (HC) that the word ‘debt’ in s 11 of the Prescription Act 68 of 1969 has a wide and general meaning encompassing anything that is due and it includes a claim for vindication of ownership of property, cannot be correct, as it was based on decisions of *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W), *Radebe v Government of the Republic of South Africa and Others* 1995 (3) SA 787 (N), *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) and *Leketi v Tladi NO and Others* [2010] 3 ALL SA 519 (SCA), which do not constitute good law and were found to have been wrongly decided.

Held further – A vindicatory claim does not constitute a ‘debt’ as envisaged by s 11 of the Prescription Act and therefore the related defendants’ special plea of prescription cannot be upheld.

Held further – The plaintiff’s alternative claim of payment of N$15 million (alleged to be the value of the farm) constitutes a ‘debt’ as contemplated in s 11 of the Prescription Act

and the special plea of prescription to the said monetary claim for not being instituted within a period of three years succeeds.

Held further – The defendants' further special plea of non-compliance with the Formalities of sale of Land Act is found to lack merit as the transfer sought by the plaintiff does not concern the sale of land or any interest in the land. Accordingly, the special plea fails

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ORDER

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a) The special plea of prescription and non-compliance with the Formalities in Respect of Sale of Land Act 71 of 1969 raised by the Defendants, is dismissed.
b) Each party must pay its own costs with respect to the interlocutory hearing.
c) The matter is postponed to 16 November 2021 for a case planning conference.
d) The parties are directed to file a joint case plan on or before 11 November 2021.

RULING

SIBEYA, J:

Introduction

[1] This court, after hearing arguments from both parties, gave the following order on 29 October 2021:

a) The special plea of prescription and non-compliance with the Formalities in Respect of Sale of Land Act 71 of 1969 raised by the Defendants, is dismissed.
b) Each party must pay its own costs with respect to the interlocutory hearing.

c) The matter is postponed to 16 November 2021 for a case planning conference.

d) The parties are directed to file a joint case plan on or before 11 November 2021.

[2] Reasons for the order delivered were pending. Here are the reasons.

[3] This court was called upon to determine a special plea of prescription against the relief sought by the plaintiff for a vindication of property ownership. The first and second defendants raise a special plea of prescription premised on the following grounds:

a) That the agreement between the plaintiff and the first defendant was executed on or about October 2000.

b) That on or about 5 October 2015, the plaintiff noted the first defendant's refusal to transfer the farm to the plaintiff; and

c) Therefore, the plaintiff's claim prescribed for failure to institute action within a period of three years from October 2015, being the date on which the cause of action arose.

[4] The defendants further raised a second special plea that the agreement on which plaintiff relies for its claim does not comply with the provisions of s 1 of the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969 (the Formalities for Sale of Land Act). The Formalities for sale of Land Act requires such agreements to be reduced to writing and signed by both parties, so the defendants contend.

Parties and representation

[5] The plaintiff is Empire Fishing Company (Pty) Ltd, a private company duly registered and incorporated as such in accordance with the Companies Act 28 of 2004, with its principal place of business situated at 23 Kestrell Street, Hochland Park, Windhoek.

[6] The first defendant is Bishop Kleopas Dumeni, an adult male resident of Ongwediva.

[7] The second defendant is Duka Trading Enterprises Close Corporation, a close corporation duly registered in terms of the Close Corporation Act 26 of 1998, with its registered address situated at 83, Dr Frans Indongo Street, Windhoek West, Windhoek.

[8] Where reference is made to both the first and second defendants jointly, they shall be referred to as 'the defendants.' The plaintiff and the first defendant shall be jointly referred to as 'the parties.'

[9] The third defendant is the Registrar of Deeds, duly appointed in terms of the laws of the Republic of Namibia and whose address of service is the Office of the Government Attorney, Windhoek. No relief is sought against the third defendant who is merely cited for the interest that he or she may have in the matter.

[10] The plaintiff is represented by Mr. Chibwana while the defendants are represented by Mr. Shikongo.

Background

[11] According to the particulars of claim, the plaintiff alleges that around October 2000, and while duly represented by Mr. Ephraim Dozee Ileka (Mr Ileka), it entered into a partly written and partly oral agreement with the first defendant. The terms of the agreement were that first defendant would, act for and on behalf of the plaintiff; as plaintiff's nominee and enter into a written agreement of sale for the purchase of Farm Nassau No. 91, ('the farm'). It was a further term of the agreement that the first defendant would be the nominal owner while the plaintiff would be the beneficial owner of the farm.

[12] The plaintiff alleges further that the parties reached the agreement that the first defendant would apply for financing in order to purchase the farm and the plaintiff would provide the financial assistance to see the application through. It was also agreed that plaintiff would pay the monthly instalments for the said farm together with the transfer duties and taxes to enable the transfer of the farm from the seller to the first defendant as a nominal owner of the farm on behalf of the plaintiff. The parties further agreed that the first defendant would prepare a last will and testament in terms of which he would bequeath the farm to the plaintiff, so plaintiff alleges.

[13] The plaintiff alleges that it complied with its contractual obligations while the first defendant breached the terms of the agreement.

[14] The plaintiff alleges that on or about 15 May 2015, it, by letter, requested the first defendant to transfer the farm to its name as the beneficial owner of the farm per the agreement between the parties. The first defendant, by letter of his own, on or about 5 October 2015, refused to heed the request. Seemingly, as per the plaintiff's version, the said farm was allegedly sold by the first defendant to the second defendant in breach of the terms of the agreement between the parties. The plaintiff therefore claims vindication of ownership of the farm. In the alternative, the plaintiff claims payment of N$15 million (the alleged value of the farm) from the defendants.

The Special plea

[15] The defendants, in response to the plaintiff's claim, raised a special plea of prescription on the grounds that the plaintiff's claim has prescribed in that, plaintiff failed to institute its action against the defendants within the three years period prescribed in s 11 of the Prescription Act 68 of 1969. The defendants further raised another special plea that the agreement relied on by the plaintiff for its claim does not comply with the requirements set out in s 1 (1) of the Formalities for Sale of Land Act.

Prescription

[16] Plaintiff claims that first defendant breached the agreement between the parties, by refusing to transfer the farm to the plaintiff on or about 05 October 2015. By January 2021 when these proceedings were instituted against the defendants, plaintiff's claim had prescribed, as the three years regulated period had lapsed, so the defendants contend.

[17] The Prescription Act provides as follows on the prescription of debts:

'**11. Periods of prescription of debts**

The periods of prescription of debts shall be the following:

(a) thirty years in respect of –
  (i) any debt secured by mortgage bond;
  (ii) any judgment debt;
  (iii) any debt in respect of any taxation imposed or levied by or under any law;
  (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.'

[18] The defendants pleaded that in terms of s 11 of the Prescription Act, particularly s 11 (d), the plaintiff's claim, inclusive of both the vindication of ownership of the farm and the alternative monetary claim, prescribed.

[19] Prescription begins to run from the date that the debt is due. Prinsloo J in *Shiimi v City of Windhoek Municipal Council,*[1] discussed the commencement of prescription and said the following:

'[22] The general rule is that prescription commences to run as soon as the debt is due… Under s 12 of the Prescription Act a similar proviso is in place as prescription of a debt … begins running when the debt becomes due and a debt becomes due when the creditor acquires knowledge of the facts from which the debt arises, in other words, the debt becomes due when the creditor acquires a complete cause of action for the recovery of the debt or when the entire set of facts upon which he relies to prove his claim is (*sic*) in place.'

[20] It is apparent from the particulars of claim that subsequent to a letter addressed by the plaintiff to the first defendant to transfer the farm to the plaintiff, the first defendant, on or about 5 October 2015, responded and refused to transfer the farm to the plaintiff. By then, the plaintiff became aware of the alleged defiance by the first defendant to comply with the agreement between the parties.

[21] Mr. Shikongo submitted that the monetary claim falls squarely within the ambit of a debt as set out in the Prescription Act and has thus prescribed. There was no contestation from the plaintiff on this score. It is, in my view, beyond dispute that the monetary claim raised by the plaintiff in alternative to that of vindication of ownership of the farm was instituted after the expiry of a period of three years. A monetary claim constitutes a debt and therefore its prescription is regulated by s 11 (d) of the Prescription Act. I find that the failure to institute the claim for the value of the farm, within a period of three years from the date that the cause of action arose (5 October 2015), results in the monetary claim having prescribed. The only live matter remaining

[1] 2018 (1) NR 292 (HC).

for consideration is therefore, the main claim of vindication of ownership of property, which I now turn to address.

[22] Mr. Shikongo submitted that the plaintiff's claim for vindication of ownership of the farm constitutes a debt contemplated in s 11 (d) which has prescribed for not being instituted within a period of three years. Mr. Chibwana submitted contrariwise, that a claim for vindication of ownership of property does not amount to a debt as envisaged by the Prescription Act and therefore cannot prescribe for not being instituted within a period of three years.

[23] The parties locked horns on the above-mentioned legal question. This question requires of me to engage my mental faculties in order to determine as to who of the said protagonists is on the right side of the law, which I hereby do.

[24] The defendants placed great store on a decision of this court by Damaseb JP, delivered in 2014 in the matter of *Ongopolo Mining Ltd v Uris Safari Lodge (Pty) Ltd and Others*[2] wherein a "debt" as contemplated by s 11 (d) of the Prescription Act was discussed and the court stated as follows:

'**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*:[3]

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

[31] It was stated in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*,[4] relying on *Leviton*, that:

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[2] 2014 (1) NR 290 (HC).
[3] 1914 CPD 685 at 691 in fin.
[4] 1981 (3) SA 340 (A) at 344F-G.

"[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 and Others*,[5] 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 ss 10 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 NO v Desai and Others*[6] it is stated:

> "Section 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*[7] the Supreme Court of Appeal stated:[8]

> "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." …

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[5] 1995 (3) SA 787 (N) at 804B-C.
[6] 1996 (1) SA 141 (A) at 146I-J.
[7] 2007 (6) SA 313 (SCA).
[8] At para 19.

[37] In *Evins v Shield Insurance Co Ltd*,[9] 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 NO and Others*[10] 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 to with approval by the Supreme Court of Appeal in *Leketi*.'

[25] The court in *Ongopolo* examined the above case law and correctly found that the said case authorities provide that the word "debt" set out in the Prescription Act has a wide and general meaning including anything that is due. A debt, according to the above-mentioned authorities, means anything due which one person is obliged to render to another. A claim for redelivery of land by registration of title in the name of the claimant constitutes a debt, so the above case authorities dictate.

[26] The Court in *Ongopolo* was not persuaded by the opposing view that prescription does not apply to cases where the owners seek to vindicate ownership of their properties, as found in *Staegemann v Langenhoven and Others.*[11] The court in *Ongopolo* stated that Blignaut J in *Staegemann* cited no authority for the conclusion that prescription does not apply to vindication claims and did not even refer to the *Leketi* matter and therefore did not distinguish it.

[27] In *Ongopolo*, the court placed heavy reliance on the decision of *Evins* where it was stated that the word "debt" in the Prescription Act should be widely interpreted and

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[9] 1979 (3) SA 1136 (W) at 1141F-G.
[10] [2010] 3 ALL SA 519 (SCA).
[11] 2011 (5) SA 648 (WCC).

includes a claim for vindication of ownership of property. The court in *Ongopolo* proceeded to rely on the *Leketi* decision, which in turn was buttressed by the decision in *Evins* in its finding that a claim for transfer of immovable property allegedly fraudulently transferred constitute a debt in terms of the Prescription Act. It is beyond dispute that by the time that the *Ongopolo* decision was delivered, the leading cases in South Africa, relied on as stated herein above, accorded a wide and general meaning to the word "debt" in terms of the Prescription Act, so as to cover anything and any service due, including vindication of ownership of property.

[28] In *Ongopolo*, the court found comfort in the fact that the wide meaning of a debt which is inclusive of vindication was confirmed by the Supreme Court of Appeal in *Leketi*.

[29] Notwithstanding the above finding, the court in *Ongopolo* proceeded to state that:

> '[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,…'

[30] The court in *Ongopolo*, out of cautioun, then went on to dismiss the exception raised against a vindication claim that it prescribed.

[31] Mr. Chibwana submitted that the court in *Ongopolo* had two compelling propositions. The one being the proposition in *Staegemann* that prescription does not apply to vindication of ownership of property. The other is that the word "debt" in the Prescription Act has a wide meaning and includes clams for vindication of ownership of property as found in the decisions of *Leketi, Barnett, Radebe* and *Evins*, cited *supra*.

[32] The court in *Ongopolo* cannot be faulted for it is apparent that the wider interpretation of the word “debt” in the Prescription Act received large recognition in different courts in South Africa including the Supreme Court of Appeal, as compared to the narrow definition set out in the High Court decision of *Staegemann*.

[33] The question to be decided at this stage is whether to this day, it can be said that the word ‘debt’ in the Prescription Act carries a wide meaning in the general sense as to encompass anything or any service due including a claim for vindication of ownership of property and whether the authorities relied on in *Ongopolo* still constitute good law.

[34] In 2015, a year after the *Ongopolo* judgment was delivered, the Supreme Court of Appeal in South Africa, in *Absa Bank Ltd v Keet*,[12] was seized with a question whether a claim for *rei vindicatio* constitutes a debt and therefore prescribes after three years in terms of the Prescription Act. The *Keet* matter, in the High Court, concerned a special plea of prescription that was raised against Absa Bank when the bank sought an order to repossess the vehicle which was sold to *Keet* in November 2003 on the basis of an instalment sale agreement. *Keet* defaulted in payment. In November 2011 an action was instituted against *Keet* and summons were served on him in December 2011. *Keet* raised a special plea of prescription. The High Court did not follow the decision in *Staegemann* where it was held that a vindicatory claim which is a claim of ownership and not a claim for payment of a debt, does not prescribe after three years, and concluded that *Staegemann* was wrongly decided. In upholding the special plea of prescription, the High Court relied on the decisions of *Evins, Barnett* and *Leketi*, just as was the case in *Ongopolo*.

[35] On appeal, in *Keet*, the Supreme Court of Appeal had to decide a question of law whether a vindicatory claim constituted a debt that is subject to extinctive prescription in terms of the Prescription Act. The Supreme Court of Appeal found that the *Evins* case concerned a motor vehicle accident claim for personal injuries and damages for loss of support. There was no vindicatory claim in *Evins*. In the High Court case of *Evins*, King

[12] 2015 (4) SA 474 (SCA).

J, notwithstanding that the matter before him did not involve a claim for delivery of property, went on to compare a claim sound in money and a claim for delivery of property.

[36] In *Barnett*, the Supreme Court of Appeal was faced with a special plea raised by persons who occupied and built structures on state land. On a vindicatory relief raised by the state, the persons contended that the state's claim constituted a debt which prescribed after a period of three years from the date that the state became aware of the debtors and the underlying facts of such debt.[13] Brand JA who wrote for the Supreme Court of Appeal said that vindicatory relief constitutes a debt as provided for in the Prescription Act. But, notwithstanding the said finding, the Supreme Court of Appeal dismissed the special plea on the ground of the application of the concept of a continuous wrong.[14]

[37] In *Leketi,* the Supreme Court of Appeal was seized with a claim where the appellant alleged that his grandfather fraudulently caused certain property to be registered in his own name instead of the name of the appellant's late father. This appellant sought to set aside the registration of property in his grandfather's name and then have the transfer of the property from his late father's name. This was not a vindicatory claim, strictly speaking.

[38] The Supreme Court of Appeal in *Keet*[15] discussed the approach adopted in *Leketi* in respect of vindicatory claim and plainly put it that:

> 'The claim was not a vindicatory claim and accordingly the reference to *Barnett* was obiter and irrelevant to the decision, which turned on the appellant's knowledge of the allegedly fraudulent transfer.'

[13] Para 19.
[14] Para 20 – 21.
[15] Para 18.

[39] The Supreme Court of Appeal in *Keet* endorsed the reasoning in *Staegemann* where it was held that a vindicatory claim does not constitute a debt in terms of the Prescription Act. The Supreme Court of Appeal in *Keet* said it in the following manner:

'[20] In my view there is merit in the argument that a vindicatory claim, because it is a claim based on ownership of a thing, cannot be described as a debt as envisaged by the Prescription Act. The High Court in *Staegemann* (para 16) was correct to say that the solution to the problem of prescription 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*). 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 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.

[21] That distinction between real rights and personal rights has consistently been recognised in our case law and was recently explained by this court in *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd*[16] 25 para 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."

[22] Wessels points out at 3 – 4 that:

"In a real right we have the owner in direct relation to the thing he claims, but in a personal right the claimant must claim his right to a thing or act indirectly through an intermediate person called a debtor. The person who claims from his debtor money lent has no

[16] 2011 (2) SA 157 (SCA).

absolute right to particular coins, but he has the right of compelling his debtor to pay him what is due to him by virtue of the loan. The debtor is under a legal obligation to pay his creditor what is due to the latter."

[23] The obligation which the law imposes on a debtor does not create a real right (*jus in rem*), but gives rise to a personal right (*jus in personam*). In other words, an obligation does not consist in causing something to become the creditor's property, but in the fact that the debtor may be compelled to give the creditor something or to do something for the creditor or to make good something in favour of the creditor.'

[40] The Supreme Court of Appeal in *Keet* proceeded to state that a vindicatory action is not a debt in terms of the Prescription Act, which is subject to expiry after three years. The Supreme Court of Appeal concluded with the following remarks:

'[25] In the circumstances the view that the vindicatory action is a 'debt' as contemplated by the Prescription Act, which prescribes after three years is in my opinion contrary to the scheme of the Act. It would, if upheld, undermine the significance of the distinction which the Prescription Act draws between extinctive prescription on the one hand and acquisitive prescription on the other. In the case of acquisitive prescription one has to do with real rights. In the case of extinctive prescription one has to do with the relationship between a creditor and a debtor. The effect of extinctive prescription is that a right of action vested in the creditor, which is a corollary of a 'debt', becomes extinguished simultaneously with that debt. In other words, what the creditor loses as a result of operation of extinctive prescription is his right of action against the debtor, which is a personal right. The creditor does not lose a right to a thing. To equate the vindicatory action with a 'debt' has an unintended consequence in that by way of extinctive prescription the debtor acquires ownership of a creditor's property after three years instead of 30 years that is provided for in s 1 of the Prescription Act. This is an absurdity and not a sensible interpretation of the Prescription Act.'

[41] In *Makate v Vodacom Ltd*,[17] the Constitutional Court of South Africa had an opportunity to interpret the meaning of the word 'debt' stipulated in the Prescription Act. It referred to the wide definition accorded to the word 'debt' in *Desai* (*supra*). At p. 146I,

[17] 2016 (4) SA 121 (CC).

Desai defines the word 'debt' widely and generally so as to include an obligation to do something or refrain from doing something. The Constitutional Court in *Makate* did not support the finding in *Desai* but adopted the line of reasoning in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd (Escom)*[18] where the meaning of the word 'debt' as it appears in the *Shorter Oxford English Dictionary* was ascribed to the word 'debt' mentioned in the Prescription Act, as follows:

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

[42] The narrow meaning of a "debt" stipulated in the Prescription Act, accorded to it in *Escom* and approved in *Makate* was followed by the Constitutional Court of South Africa in *Off-Beat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Ltd and Others.*[19]

[43] It is apparent from the above cited cases that it is correct that the *Evins* decision of 1979, which was to the effect that a 'debt' has a wide and general meaning and includes a claim for vindication, received the approval of the Supreme Court of Appeal in *Barnett* in 2007, which was also followed by the same Supreme Court of Appeal in *Leketi* in 2010. These decisions, which stood in total contrast to *Staegemann*, birthed the finding in *Ongopolo* in 2014 that a claim for vindication amounts to a debt in terms of the Prescription Act.

[44] The Supreme Court of Appeal in *Keet*, in 2015; the Constitutional Court in *Makete,* in 2016 and in *Off-Beat Holiday Club,* in 2017; and Our Supreme Court in *Council of the Itireleng Village Community v Madi and Others*,[20] in 2017 have one common denominator in their findings on the meaning of a 'debt' in terms of the Prescription Act. It is that the meaning accorded to the word 'debt' in *Evins* and *Desai*

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[18] (Supra) fn4.
[19] 2017 (5) SA 9 (CC).
[20] 2017 (4) NR 1127 (SC).

that has a wide meaning covering anything and any service due including a vindication claim is wrong. The highest courts in South Africa adopted with approval the limited meaning of the word 'debt' as defined in *Escom,* namely, that which is owed or due, anything (as money, goods or services) which one person is obliged to pay or render to another and this does not include a vindicatory claim.

[45] It is untenable that *Evins, Radebe, Barnett* and *Leketi* limit persons claim to real rights. The said decisions interpret the word 'debt' in the Prescription Act widely so as to include a claim for vindication of ownership of property which prescribes after a period of three years. It is settled law, at least in South Africa, that these decisions do not constitute good law and were wrongly decided. It subsequently follows that the finding in *Ongopolo* which was premised on said decisions of *Evins, Radebe, Barnett* and *Leketi* that a 'debt' includes a vindication claim cannot continue to be authority on the definition of a 'debt' in terms of the Prescription Act.

[46] In our jurisdiction, Masuku J in *Louw v Strauss*,[21] had the occasion to consider whether a claim of *rei vindicatio* constitutes a debt contemplated in the Prescription Act. After traversing through the terrain of several South African cases where contrasting views appear on whether *rei vindicatio* amounts to a debt or not, Masuku J, said the following:

'[28] In *Desai*, FH Grosskopf JA, at 146I referred to *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd supra* at 344F – G, regarding the meaning to be ascribed to the term 'debt' which 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. See *Shorter Oxford English Dictionary*; and see also *Leviton and Son v De Klerk's Trustee* 1914 CPD 685 at 691 in fin. Whatever is due — debitum — from any obligation."

I am therefore in full agreement with the conclusion of the Constitutional Court in *Makate* that what was ascribed by the court in *Desai*, is not correctly captured. I say this for the reason that the extended meaning of debt is not found in *Escom* as alleged in *Desai*. …

[21] 2017 (3) NR 808 (HC).

[30] The Constitutional Court in *Makate* went a step further and impressed on the courts in South Africa the imperative to construe legislation in a manner that takes into account the Bill of Rights as enshrined in s 39 of the South African Constitution, which the court a quo was adjudged not to have done in coming to the decision it did. In para 91, the Constitutional Court expressed itself as follows on the correct interpretation of the word in question:

> "On this approach an interpretation of debt which must be preferred is the one that is least intrusive on the right to access to courts." …

[34] ... This is the pernicious result that the upholding of the special plea could have on the plaintiff's right to access the court as dealt with by the Constitutional Court in *Makate*. I am the first to accept that in Namibia, we do not have an equivalent section to s 39 of the Constitution of the Republic of South Africa, which mandates, if not peremptorily requires the courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. In this regard, the Constitutional Court reasoned as follows in *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae*):[22]

> "Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights."

[35] In my search, I have failed to find an article in our Constitution that is in *pari materia* with the above-quoted section of the South African Constitution. That notwithstanding, I am of the considered view that we cannot stand tall and claim that because we have no equivalent provision in our Constitution, we, as the courts of this Republic are at large to interpret legislation in a manner that conflicts with the Constitution, particularly one that would offend the fundamental rights and freedoms enshrined in ch 3 of our Constitution. To hold otherwise would, in my view, amount to an abdication by our judges of their constitutional mandate and responsibility, which would be sufficient basis to cast a vote of no confidence and call upon us as judges to vacate the offices we occupy without further ceremony.

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[22] 2007 (3) SA 484 (CC) (2007 (3) BCLR 219; [2006] ZACC 24) para 47.

[36] I am accordingly of the firm view that notwithstanding the absence of such a provision, we are impelled to follow the same approach that the South African courts do in the interpretation of legislation. In this particular regard, I am of the view that the guidance that some of the South African courts give on such matters is applicable to our jurisdiction.

[37] In this regard, I am of the considered view that the approach of the Constitutional Court in South Africa to the issue of the proper interpretation of the word 'debt', namely that it should be accorded a restrictive meaning, fully resonates with the position in this country. I say so for the reason that an elastic interpretation of the word would have debilitating consequences to some people's right to access the court to receive the justice which they crave.'

[47] I agree with the reasoning in *Makate* as expounded in *Louw*, that in interpreting legislation, courts should accord meaning to words provided therein which promotes the spirit, purport and objects of the Constitution. The meaning to be ascribed to legislative provisions should enhance the protection of fundamental rights and freedoms entrenched in chapter 3 of the Constitution. A meaning that limits a claim for vindication of ownership of property to three years by labelling such as a debt offends against the right to ownership of property. I therefore find that a wider interpretation of the word 'debt' as suggested in *Desai* offends against the right to ownership of property.

[48] Our Supreme Court in *Itireleng* entertained a plea of prescription, notwithstanding its finding that the plea of prescription was not established in view of the lack of standing by the applicants who sought such relief. Smuts JA writing for the court with Damaseb DCJ and Frank AJA concurring, engaged in the discussion of what constitutes a "debt" in terms of the Prescription Act. The Supreme Court quoted extensively the following from *Makate*:[23]

'The applicable principles were recently eloquently summarised by Wallis AJ in the South African Constitutional Court in *Makate v Vodacom Ltd*[24] in the following way:

"[187] Section 10 of the Prescription Act provides for a debt to be extinguished by prescription. In terms of s 12(1) prescription begins to run when the debt is due. The meaning that has been

[23] Para 65.
[24] *(Supra).*

given to the word debt since the Prescription Act came into force has been in accordance with the definition in the *New Shorter Oxford Dictionary*,[25] namely:

1. Something owed or due: something (as money, goods or service) 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 of being so obligated.

I agree with the main judgment that if the statement in *Desai* that debt has a wide and general meaning, and includes an obligation to do something or refrain from doing something was intended to extend this meaning that was an error.

[188] The correlative of a debt in this sense is a right of action vested in the creditor in which the payment of money, or the delivery of goods, or the rendering of services is claimed. And, when payment, delivery or the rendering of services extinguishes the debt, the right of action is likewise extinguished. That is why s 12(1) of the Prescription Act provides that prescription will commence to run once the debt is due. If the debt is not due then prescription cannot run. Debts become due when they are immediately claimable or recoverable.[26]

[189] Not all rights of action give rise to debts. That is well illustrated by the recent decision in *Keet*. Based on an ambiguous and obiter statement in the first instance court in *Evins* it had been said in a series of cases in the Supreme Court of Appeal that a vindicatory claim, that is, a claim to assert a right of ownership in an asset, gave rise to a debt capable of being extinguished by extinctive prescription under s 10 of the Prescription Act. This occasioned confusion because the owner would remain the owner of the asset, but would not be entitled to exercise its rights of ownership against the possessor thereof. In effect it would be deprived of its rights of ownership by way of extinctive prescription, whereas the loss of the right of ownership by way of prescription is a matter of acquisitive prescription, which is dealt with in ch I and ss 1 – 5 of the Prescription Act, not ch III and ss 10 – 12 of that Act.

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[25] This meaning was first adopted in *Escom* above n54 at 344E – G. It was followed thereafter in *Joint Liquidators of Glen Anil* above n56 at 110A – B; *Oertel* above n56 at 370B – C; and *cape Town Municipality and Another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) (*Cape Town Municipality*) at 330F – H.

[26] *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd 1991* (1) SA 525 (A) ([1990] ZASCA 136) at 532G, approved in *… Road Accident Fund* above n62 para 13.

[190] The court in *Keet* overruled these earlier cases and held that acquisitive prescription dealt with the acquisition (and corresponding loss) of real rights such as ownership, while extinctive prescription dealt with the extinguishment of debts and their correlative rights of action, in other words, with personal rights. The relevance of the case to the present one is that it illustrates that not every right to approach a court for relief will amount to a debt for the purposes of extinctive prescription. So the right to claim delivery of the motor vehicle in that case did not give rise to a debt for the purposes of extinctive prescription in terms of s 10 of the Prescription Act.

[191] It will be apparent from this that, depending on their source, rights of action directed at the same purpose and seeking identical relief may in one case give rise to a debt for the purposes of prescription and in another not. For example, a right to claim occupation under a lease is a personal right and the obligation to satisfy that right by delivering possession of the property leased will be a debt capable of prescribing. But a claim to possession of the same property arising from a registered right of usus or habitatio will not.

[192] In the case of a continuing wrong there can be no question of prescription, even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that while the original wrongful act may have occurred in a time past, the wrong itself continues for so long as it is not abated. But the running of prescription in respect of any financial claim arising from the same wrong will not be postponed. Accordingly, if financial loss was occasioned by the original wrongful act, the debt in relation to that loss would become due and prescription would commence to run when the original wrongful act occurred and loss was suffered. The result is that the impact of prescription on claims having their source in the same right may differ, depending on the nature of the claim.'

[49] It follows from *Itireleng* that our Supreme Court has adopted the narrow meaning of a ‘debt’ as set out in *Escom* and endorsed in *Keet* and *Makate*, as discussed herein above. In the premises, I find that the reliance by Mr. Shikongo on *Ongopolo*, as the *locus classicus* on which defendants’ special plea of prescription is based and rests for the wide meaning of the word ‘debt’ to include action of vindication of property is misplaced. Prior to 2015, the courts may have ascribed a wider meaning to the word ‘debt’ but the genesis of such wide meaning was the wrong interpretation afforded to the

word ‘debt’ in *Evis* and *Desai*. The correct meaning of the word ‘debt’ therefore is the narrow interpretation accorded to it in *Staegemann, Escom, Keet, Makate Itireleng* and *Off-Beat Holiday Club*, as stated above.

[50] By elucidation, a claim based on a contract is, beyond dispute a personal not a real right. This is so because, a claim to one’s portion of the contact amounts to a demand for the other to perform and cannot be said to be a real right. To the contrary *rei vindicatio* constitutes asserting one’s right to ownership of property and that is a real right. To limit the enforcement and protection of a real right to a debt which prescribes after three years will be contrary to the intention of the Legislature, particularly when regard is had to the distinction discussed above about extinctive and acquisitive prescription. In the premises I find that a claim of vindication of ownership of property is not a debt as envisaged by the Prescription Act.

[51] In view of the foregoing, it follows that, the defendants’ special plea of prescription lacks merit on the claim that a vindicatory claim constitutes a debt, and falls to be dismissed.

Formalities of sale of land

[52] The defendants, as alluded to above, raised another special plea of non-compliance with the Formalities in respect of Contracts of Sale of Land Act 71 of 1969. The essence of the defendants’ plea is that the partly written and partly oral agreement relied on by the plaintiff for its cause of action falls short of the requirements of s 1 of the Formalities of the Sale of Land Act.

[53] Mr. Shikongo submitted that the alleged agreement between the parties relates to an interest in land in respect of both the plaintiff and the first defendant. The said agreement was not reduced to writing nor was it signed by both parties, and therefore offends against the Formalities of Sale of Land Act and is inevitably of no force or effect.

[54] S 1 of the Formalities of the Sale of Land Act provides that:

"1. (1) No contract of sale of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority."

[55] The plaintiff, on the other hand, submitted that it does not plead a case to the effect that the plaintiff paid monies to the first defendant to purchase the land or the interest in the land from the first defendant, therefore there is no sale contemplated between the parties.

[56] The case advanced by the plaintiff is that the first defendant is the nominee owner of the immovable property who at all material times was acting on behalf of the beneficial owner, being the plaintiff in this instance. All that the plaintiff seeks in the present litigation is to compel the nominee owner to transfer the farm to the true owner.

[57] Mr. Chibwana referred this court to a decision of the Supreme Court of Appeal in *Du Plooy and Another v Du Plooy and Others*[27] in order to emphasise that the South African courts have recognized nominee holdings. He submitted that the agreement to transfer ownership is not required to be in writing (even though in this matter the true beneficial owner's entitlement to claim the transfer of the farm was reduced to writing). The Supreme Court of Appeal in *Du Plooy* held that:

'[32] That does not mean that Robert Du Plooy was free to dispose of the houses. He held them, once transfer had been effected, on behalf of himself and his siblings. His nomination placed him in a position of trust in relation to all of the affairs of the family, including its proprietary interests. In that sense, he was in a similar position to the respondent in *Dadabhay v Dadabhay* who, on the strength of an oral agreement entered into with the appellant, bought a house on behalf of and as nominee for her but refused to transfer it to her when called upon to do so. This court held that the oral agreement was not hit by s 1(1) of the

[27] (417/11) [2012] ZASCA 135; [2012] 4 All SA 239 (SCA) (27 September 2012).

Alienation of Land Act 68 of 1967 because it was “in no sense a contract of sale between the appellant and the respondent” and neither was it a cession in respect of an interest in land because it was not a “cession in the nature of a sale”. In the context of the particulars of claim, the court held that the word “nominee” may well have been used to denote that the respondent would act as a trustee in buying the property and would thereafter sign all documents, when called upon by the appellant, in order that it could be registered in her name’.

[58] The preamble of the Formalities of Sale of Land Act sets out the objective of the Act as follows:

‘To provide for the formalities in respect of a contract of sale of land and certain interests in land; to repeal section 1 of the General Law Amendment Act, 1957; and to provide for incidental matters.’

[59] I find, after consideration of the decision in *Du Plooy*, that *Du Plooy* speaks to the objective of the Formalities of the Sale of Land Act and breathes meaning to s 1 thereof. I therefore find *Du Plooy* to be persuasive, to the extent that, a nominee ownership agreement need not be in writing for such an agreement to have legal force. This is premised on the fact that such an agreement is not a contract of sale of land or any interest in land or in the nature of a sale, and therefore s 1 (1) of the Formalities Sale of Land Act, in my view, does not find application.

Conclusion

[60] Considering the above findings and conclusions, I hold that the defendants’ special plea of prescription to a vindication claim cannot be upheld. The defendants’ special plea of prescription to the alternative claim of N$15 million (alleged to be the value of the farm), found hereinabove to constitute a debt in terms of the Prescription Act, succeeds. The defendants’ further special plea of non-compliance with the Formalities of sale of Land Act is found to lack merit. Accordingly, the special plea must at this stage, fail.

Costs

[61] With respect to the issue of costs, this court takes note that the special plea raised by the defendants was not vexatious in any manner, shape or form. The defendants, although unsuccessful to a large extent in their special plea, they nevertheless enjoy success albeit to a limited degree. The defendants succeeded in their quest to convince the court that the alternative claim by the plaintiff for the monetary value of the farm had prescribed.

[62] The defendant further genuinely relied on *Ongopolo* when it could arguably be said that *Ongopolo* represented the true exposition of the law. Having found that *Ongopolo* does not present the correct position of prescription in the meaning of the word 'debt' in terms of the Prescription Act, I hold the view that this is not a matter where the defendants should be hit with an adverse cost order. In the exercise of my discretion, I find that, it will meet the interests of justice for each party to pay its own costs regarding the preparation and hearing of the interlocutory application.

[63] As a result, I made the following order:

a) The special plea of prescription and non-compliance with the Formalities in Respect of Sale of Land Act 71 of 1969 raised by the defendants, is dismissed.
b) Each party must pay its own costs with respect to the interlocutory hearing.

c) The matter is postponed to 16 November 2021 for a case planning conference.
d) The parties are directed to file a joint case plan on or before 11 November 2021.

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O S SIBEYA

JUDGE

APPEARANCES:

PLAINTIFF: T CHIBWANA
Instructed by Sisa Namandje & Co. Inc
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DEFENDANTS:

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