THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 696/11

In the matter between:

L VON W BESTER NO	**FIRST APPELLANT**
E M DORFLING NO	**SECOND APPELLANT**
P Q NAIDOO NO	**THIRD APPELLANT**
C P VAN ZYL NO	**FOURTH APPELLANT**
ABSA BANK LIMITED	**FIFTH APPELLANT**

v

SCHMIDT BOU ONTWIKKELINGS CC	**RESPONDENT**

Neutral citation: *Bester and others NNO v Schmidt Bou Ontwikkelings CC* (696/11) [2012] ZASCA 125 (21 September 2012).

Coram: Brand, Snyders, Leach, Theron and Wallis JJA

Heard: **28 August 2012**

Delivered: **21 September 2012**

Summary: **Claim for rectification of deed of transfer – not a 'debt' as contemplated by the Prescription Act 68 of 1969 – first to fourth appellants' defence of prescription accordingly dismissed – fifth appellant's defence of estoppel dismissed because of its failure to establish that it had relied on the misrepresentation in the deed of transfer to its detriment.**

ORDER

On appeal from: Western Cape High Court, Cape Town. (Louw J sitting as court of first instance):

Both appeals are dismissed. The first, second, third and fourth appellants, in their capacities as liquidators, and the fifth appellant are ordered, jointly and severally, to pay the respondent's costs of appeal.

JUDGMENT

BRAND JA (**SNYDERS, LEACH, THERON AND WALLIS JJA CONCURRING**):

[1] The first four appellants are cited in their capacities as the liquidators (the liquidators) of a company, Innova Holdings (Pty) Ltd t/a Procon (in liquidation)(Innova). The fifth appellant is Absa Bank Limited (Absa). The respondent is Schmidt Bou Onwikkelings CC (Schmidt Bou). Proceedings commenced with an application by Schmidt Bou against the appellants in the Western Cape High Court, Cape Town. In broad outline it sought an order consisting of four distinct elements, namely: (a) a declarator that it is the owner of an immovable property situated in Sedgefield, which is at present registered in the deeds registry, Cape Town, in the name of Innova; (b) rectification of the deed of transfer pertaining to that property so as to reflect the true owner of the property as Schmidt Bou instead of Innova; (c) cancellation of a bond registered over the property in favour of Absa as security for its claims against Innova; (d) authorising and directing the Registrar of Deeds, Cape Town, to give effect to the orders in the previous paragraphs. The Registrar, who was cited as the sixth respondent in the court a quo, abided the decision of the court, but the application was opposed by the liquidators and Absa. When the matter came before Louw J, he granted the application, in the exact terms sought, with costs.

The appeals against that judgment by both Innova and Absa, are with the leave of the court a quo.

[2] The background facts are for the most part not in dispute. Historically, Schmidt Bou was the registered owner of a property known as erf 3117, Sedgefield, being 1,9795 hectares in extent, which was referred to on the papers as 'the mother erf'. On 2 October 2003, Schmidt Bou sold a portion of the mother erf, approximately 1,4 hectares in extent, to Innova for R1,1m. The deed of sale contained a suspensive condition requiring subdivision and registration of a separate title for that portion.

[3] In due course the subdivision was granted and, in accordance with the diagrams approved by the Surveyor-General on 31 January 2005, the mother erf was divided into two portions. The one was named 'erf 4675, a portion of erf 3117, Sedgefield, being 1,3965 hectares in extent' (the Portion) while the other was described as 'the remainder of erf 3117 Sedgefield, being 0,583 hectares in extent' (the Remainder). The Portion, in turn, was further subdivided into a number of smaller erven, in accordance with the development plans of Innova. The representatives of both Schmidt Bou and Innova always intended that only the Portion would be transferred to the latter while the former would retain ownership of the Remainder. This was the evidence of Mr C J Schmidt, on behalf of Schmidt Bou, which remained uncontested, because there was no evidence by the erstwhile directors of Innova and the liquidators were not themselves in a position to dispute these facts. In any event, this evidence was, of course, consistent with the clear terms of the deed of sale. What is more, that the representatives of Innova appreciated that it was to become the owner of only the Portion and not the whole of the mother erf, is also borne out by a letter to Schmidt Bou prior to transfer being effected under the deed of sale, in which they offered, on behalf of Innova, to purchase the Remainder for an additional R500 000. Although such agreement was never concluded, it indicated that Innova was aware that it had not purchased the whole mother erf.

[4] After the conclusion of the agreement of sale, an attorney, Mr André Kleynhans, was instructed to attend to the transfer of the property sold. But, despite the fact that Kleynhans was in possession of the deed of sale, he proceeded to transfer, not only the Portion, but the entire mother erf to Innova. How this happened is not clear. Apparently Kleynhans did so on the strength of a power of attorney which was filed with the Registrar of Deeds. This power of attorney which was, on the face of it, signed by Schmidt in November 2003 on behalf of Schmidt Bou, indeed authorised the transfer of the whole mother erf to Innova. Though Schmidt admitted that he signed a power of attorney in connection with the transaction without reading it, he questioned the validity of the power of attorney filed with the Registrar which, in the light of Schmidt's comments, is a curious document.

[5] Be that as it may, whatever the explanation might be for the curious power of attorney, the undisputed evidence of Schmidt remains that it was never the intention of either Schmidt Bou or Innova that the Remainder should be transferred; that their intention was that only the Portion should be so transferred; and therefore that the transfer in the deeds office of the whole mother erf, including the Remainder, was a mistake. Based on this evidence, Schmidt Bou contended that, as a matter of law, Innova never became the owner of the Remainder and that despite the registration of transfer of this property to Innova in the deeds office, Schmidt Bou was still the owner of that property. In support of its submission on the law, Schmidt Bou relied on certain statements by this court in *Legator McKenna v Shea* 2010 (1) SA 35 (SCA) para 22, to which I shall presently return. On the papers the liquidators disputed the correctness of this conclusion. In addition they contended that Schmidt Bou's claim had become prescribed under the Prescription Act 68 of 1969. Hence, they refused to consent to the rectification of the deed of transfer pertaining to the property so as to reflect Schmidt Bou as the true owner. As we now know, they also opposed Schmidt Bou's application for an order to that effect and continued to do so on appeal.

[6] Before I deal with the merits of that opposition, I must first complete the résumé of the facts. On 11 December 2007 Innova registered a continuing covering mortgage bond over the Remainder in favour of Absa as security for the sum of R4 million that might become owing to Absa by Innova. At the time, the representatives of Schmidt Bou were blissfully unaware that the Remainder had been transferred to Innova. As far as they were concerned, the Remainder was still registered in the name of Schmidt Bou. Moreover, they were also unaware of the fact that Innova had passed a bond over the property in favour of Absa. Details of the circumstances in which this bond was registered were not provided by either the liquidators or Absa. The deponent to the answering affidavit on behalf of Absa was Mr J C Rabe who did not profess to have any personal knowledge of how the registration of the bond came about, nor of the particulars of the transaction between Innova and Absa. From the documents filed for the proof of Absa's claim against the insolvent estate of Innova – which were annexed to the answering affidavit – it became apparent, however, that the registration of the bond formed part of a much larger composite transaction in which covering mortgage bonds were registered over at least twelve properties of Innova to secure four different loans made to it. A further inference unavoidable on the papers is that, since the directors of Innova always knew that it was not entitled to the transfer of the remainder, they opportunistically exploited the mistaken transfer of the property to the advantage of Innova.

<u>The claim against the liquidation of Innova and the defence of prescription</u>

[7] Against this background I now turn to consider Schmidt Bou's claim that, despite the registration of the transfer of the Remainder in its name in the deeds office, Innova never became the owner of the property. For the legal basis of this claim, Schmidt Bou relied, as I have said by way of introduction, on the statements by this court in the *Legator* case (para 22) which reads as follows:

'In accordance with the abstract theory [of transfer which was held, in the previous paragraph, also to apply to immovable property] the requirements for the passing of ownership are twofold, namely delivery - which in the case of immovable property is

effected by registration of transfer in the deeds office - coupled with a so-called real agreement or "saaklike ooreenkoms". The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. (See eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 922E-F; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* [2006 (5) SA 548 (SCA)] para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass - despite registration of transfer - if there is a defect in the real agreement . . .'

[8] Despite the liquidators' arguments to the contrary on the papers, the court a quo held that, according to the undisputed facts, there was no real agreement to transfer the Remainder and therefore that, on the authority of *Legator*, Innova never became the owner of the property. On appeal, the liquidators did not challenge the correctness of these conclusions and I find them incontrovertible. From the finding that Schmidt Bou remained the owner of the Remainder, it should also follow, as a matter of course, that Schmidt Bou was entitled to rectification of the deed of transfer in the records in the deeds registry so as to reflect the true ownership of that property. As I see it, this flows, not only from s 4(1)(b) of the Deeds Registries Act 47 of 1937 – which allows such rectification – but also from the following explanation by Wessels JA in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 293:

'The Roman law did not know of the transfer of property by registration: that is an innovation of the Roman Dutch law. The object of our law of registration of transfer is that a person shall hold his title in accordance with what is found upon the register. . . . The policy of our registration laws with regard to fixed property requires the true contract under which the land is held to be reflected on the register.'

[9] Nonetheless the liquidators contended that Schmidt Bou was not entitled to an order declaring that it is the owner of the Remainder, nor to the rectification of the deed of transfer of the property so as to reflect the true ownership. On appeal, their sole basis for that contention was that Schmidt Bou's claims had

become extinguished by prescription in terms of the Prescription Act. With regard to extinctive prescription, the operative provisions of the Act are to be found in s 10. This section proclaims that, after the lapse of the relevant prescriptive period determined by s 11 – which the liquidators contend is the three years laid down in s 11(d) – 'a debt shall be extinguished by prescription'. Though the Prescription Act does not define the term 'debt' it has been held by this court that it presupposes an obligation to do something or to refrain from doing something (see eg *Oertel v Direkteur van Plaaslike Bestuur* 1983 (1) SA 354 (A) at 370B; *Desai NO v Desai* 1996 (1) SA 141 (A) at 146H-J).

[10] Proceeding from the premise of this judicial definition of a 'debt', the court a quo held that neither the declaratory order nor the order for rectification sought by Schmidt Bou constituted the enforcement of a 'debt' as contemplated by the Prescription Act and that Innova's defence based on prescription could therefore not succeed. It found authority for this line of reasoning in the judgment of this court in *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* 2009 (3) SA 447 (SCA). What this court essentially held in *Boundary Financing* was that a claim for rectification of a contract is not susceptible to extinctive prescription. The reasons for that finding appear from the following statement by Streicher JA (para 13):

'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. It is a declaration of what the parties to the agreement to be rectified agreed.'

[11] In his argument on appeal, counsel for the liquidators sought to distinguish *Boundary Financing* on the basis that the rectification of a contract is not on all fours with the rectification of the deed of transfer. While rectification of an agreement does not alter the rights of the parties, so the argument went, rectification of the deed of transfer in the deeds registry would constitute a

symbolic delivery of the property. This is so, counsel contended, because by rectification of the deed of transfer, Innova would cease to be the registered owner while Schmidt Bou would become the new registered owner of the Remainder. I do not agree with this argument. Absent any real agreement, Innova, as a matter of law, never became the owner of the Remainder, despite the entry in the deeds registry. Schmidt Bou thus remained the owner. In consequence the deed of transfer does not reflect the correct state of affairs. Thus understood, the rectification sought will not constitute any delivery, symbolic or otherwise, of the property. Nor will it change the rights and obligations of the parties: it will simply correct the erroneous reflection of those rights.

[12] In the end, I therefore believe that there is no difference in the present context between rectification of a contract, on the one hand, and rectification of a deed of transfer, on the other. Hence I agree with the court a quo that Schmidt Bou's claim for rectification of the deed of transfer did not constitute a claim for delivery of property in the form of a *rei vindicatio*. Nor did the relief claimed rely on any obligation by Innova to do, or to refrain from doing, anything. As in the case of rectification of a contract, it therefore had no correlative 'debt', as contemplated by the Prescription Act, which could be extinguished by prescription.

[13] The further argument raised by counsel for the liquidators on appeal relied on the following statement by Nugent JA in *Duet and Magnum Financial Services CC v Koster* 2010 (4) SA 499 (SCA) para 24:

'A "debt" for purposes of the [Prescription] Act is sometimes described as entailing a right on one side and a corresponding "obligation" on the other. But if "obligation" is taken to mean that a "debt" exists only when the "debtor" is required to do something, then I think the word is too limiting. At times the exercise of a right calls for no action on the part of a "debtor", but only for the "debtor" to submit himself or herself to the exercise of the right. And if a "debt" is merely the complement of a "right", and if all "rights" are

susceptible to prescription, then it seems to me that the converse of a "right" is better described as a "liability" which admits of both an active and a passive meaning.'

[14] What appears from the statement, so the argument went, is that 'debt' has a wider meaning that the one ascribed to that term in the decisions of this court – such as *Oertel* and *Desai* – that were relied upon by the court a quo. This extended meaning, so the argument proceeded, also includes an obligation on the part of a debtor to submit himself or herself to the exercise of a right to rectification. From this it follows, so the argument concluded, that the claim for rectification is a 'debt' because it requires the party in the position of Innova to submit to the rectification. I am not convinced that Nugent JA really intended to extend the meaning of a 'debt' beyond that which was attributed to the term in cases like *Oertel* and *Desai.* But even if he did, I do not believe that it takes the liquidators' case any further. Rectification of the deed of transfer will require Innova to submit to nothing more and nothing less than any other member of the public. Even if that, in a sense, amounts to a 'submission' it is clearly not a 'liability' within any meaning of that term. It is no more a 'liability' or a 'debt' than a claim for rectification of a contract or the rectification of a company's register of members (see *Gaffoor v Vangates Investments (Pty) Ltd* 2012 (4) SA 281 (SCA) paras 35-36).

[15] Hence I agree with the court a quo's conclusion that Schmidt Bou's claims were not extinguished by prescription. It follows that, in my view, the liquidators' appeal cannot succeed. The conclusion thus reached renders it unnecessary to decide whether a claim based on the *rei vindicatio* is a debt which prescribes after three years. This issue arose from the liquidators' submission that a claim for rectification is to be equated with the *rei vindicatio.* For the proposition that a claim of the latter kind prescribes after three years, they relied on the judgment of this court in *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA) para 19. But the correctness of that judgment has since been doubted in *Staegemann v Langenhoven* 2011 (5) SA 648 (WCC) paras 14-28. Though *Barnett* has been

confirmed by this court in *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 18; and in *Leketi v Tladi NO* [2010] JOL 25260 (SCA) paras 8 and 21, I must admit that I find the reasoning in *Staegemann* attractive and, at least on the face of it, quite convincing. I therefore have no doubt that the case will come where this court will have to reconsider the correctness of the decisions in *Barnett, Grobler* and *Leketi* that the *rei vindicatio* is extinguished by prescription after three years. But this is not that case, simply because the liquidators' prescription defence has already been held to founder on other grounds.

The claim against Absa and the defence of estoppel

[16] This brings me to Schmidt Bou's claim for the cancellation of the mortgage bond in favour of Absa and the shield of estoppel raised by the latter against that claim. The finding that Innova never owned the Remainder inevitably leads to the conclusion that it had no right to pass the mortgage bonds over the property without the permission of the owner as and when it did. Apart from the defence of estoppel raised by it, Absa would therefore have no answer to Schmidt Bou's claim for cancellation of the bond.

[17] Broadly stated, the concept of estoppel, borrowed from English law as applied by our courts, amounts to this: when a person (the representor) has by words or conduct made a representation to another (the representee) and the latter acted upon the representation to his or her detriment, the representor is estopped, that is precluded, from denying the truth of the representation (see eg *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 49). As the party who raised the defence of estoppel, Absa therefore bore the onus to allege and prove a misrepresentation by Schmidt Bou upon which Absa relied and which reliance was the cause of it acting to its detriment (see eg *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 2011 (2) SA 508 (SCA) para 19).

[18] The factual basis relied upon by Absa for this defence, was rather tersely stated as follows in the answering affidavit filed on its behalf:

'[Schmidt Bou] is also clearly estopped from denying that the immovable property in question was validly transferred and registered in the name of Innova. [Absa] relied upon the representation made by [Schmidt Bou's] duly authorised attorney and the subsequent registration to pass a bond over the property and advance moneys to the purchaser pursuant thereto.'

And that:

'Innova is the registered owner of the property in question and [Absa] relying upon the representation of [Schmidt Bou] (and its duly authorised agent, its attorney) passed a mortgage bond over the immovable property and advanced money to Innova pursuant thereto.'

[19] As I understand these terse statements, the representation relied upon is the one contained in the deed of transfer that Innova was the owner of the Remainder. That representation, so Absa seemed to contend, had been caused by the conduct of Schmidt Bou's representative, Schmidt, in signing the power of attorney and its attorney, Kleynhans, in passing transfer of the Remainder to Innova. Although not expressly doing so, the court a quo appears to have accepted, at least by implication, the validity of Absa's contentions thus far. For the sake of argument, I propose to do the same.

[20] The court a quo held, however, that Absa had failed to establish that the misrepresentation in the deed of transfer had been the cause of it acting to its detriment. The reasoning of the court a quo that led to this finding proceeded from the distinction, that has become well settled in the law of delict, between factual causation, on the one hand, and legal causation, on the other. As explained by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700F-G, factual causation is generally determined by applying the *causa sine qua non* or 'but-for' test. This test requires a hypothetical enquiry as to what probably would have happened, but for the wrongdoing relied upon – in this case, the misrepresentation in the deed of transfer that Innova was the

owner of the Remainder. If the wrongdoing is shown in this way to be a *causa sine qua non* of the consequences complained of – in this case, the advance of the loan to Innova – causation has been established.

[21] On the other hand, demonstration that the wrongdoing was a *causa sine qua non* of the consequences does not automatically result in legal responsibility for those consequences. Whether or not legal responsibility should follow, is determined by a second enquiry into legal causation, referred to by some as the remoteness issue. Broadly stated, the enquiry at this stage is whether, as a matter of public and legal policy, it is reasonable, fair and just to impose legal responsibility for the consequences that resulted from the wrongful conduct (see eg *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765A-B; *Smit v Abrams* 1994 (4) SA 1 (A) at 15B-18H; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 33). On the authority of the judgment of this court in *Stellenbosch Farmers' Winery Ltd v Vlachos t/a the Liquor Den* 2001 (SA) 597 (SCA) paras 19-21, the court a quo accepted that the two-stage approach to causation in delict can be transposed, without qualification, to matters of estoppel by representation. Proceeding from this premise, the court a quo then held that since the direct cause of the consequences complained of by Absa – ie the advance of the loan to Innova – was the fraudulent conduct of the directors of Innova in passing the bond over the Remainder well knowing that the transfer of that property was a mistake, it would not be fair to hold Schmidt Bou legally responsible for the consequences resulting from the advance of the loan. In the result, so the court a quo concluded, Absa had failed to establish estoppel because it had failed the legal causation test.

[22] Though I am not prepared to say that the court a quo erred in this line of reasoning, I prefer to adopt a different approach to the causation issue. According to para 22 of the *Stellenbosch Farmers' Winery* judgment, the question whether or not the delictual approach to causation can, without

qualification, be transposed to matters of estoppel, had not been finally decided. It was also not decided in that case. On the view that I hold on the outcome of this appeal, it is again unnecessary to dispose finally of that question. As I see it, Absa failed the test of factual causation. It is true that Mr Rabie, who deposed to Absa's answering affidavit, made the bald unmotivated statement that Absa relied on the representation that Innova was the owner of the Remainder to pass the bond over the property and to advance money to Innova. It is clear, however, that Mr Rabie does not profess to have personal knowledge of the pertinent facts. If the mortgage bond over the property was a discrete bond securing a single loan, the inference might have been warranted from these facts that, but for the bond, this loan would not have been advanced. However, those are not the facts of this case. Though details of the circumstances in which the bond was registered were not provided by Absa, one is aware from the claim documents annexed to Absa's answering affidavit that this bond formed part of a composite transaction in which bonds were registered over at least twelve different properties to secure four different loans. In these circumstances it cannot be said, in my view, that on the inherent probabilities Absa would have acted any differently if Innova could offer one less property as security. In the replying affidavit on behalf of Schmidt Bou, pertinent reference was made to these deficiencies in Absa's case. Yet no attempt was made by the latter to remedy the position. It follows that, in my view, Absa's defence of estoppel was rightly dismissed.

[23] In the result both appeals are dismissed. The first, second, third and fourth appellants, in their capacities as liquidators, and the fifth appellant are ordered, jointly and severally, to pay the respondent's costs of appeal.

F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For 1st – 4th Appellants: A LE GRANGE SC

For 5th Appellant: F SIEVERS

Instructed by: TRUTER ATTORNEYS
WITTEDRIFT

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BLOEMFONTEIN

For Respondent: J A NEWDIGATE SC

Instructed by: VAN DER SPUY ATTORNEYS
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