

**THE DEVELOPER'S RIGHT TO ENFORCE A
REVERSIONARY RIGHT WHEN THE
BUYER FAILS TO ERECT DWELLINGS
WITHIN A PRESCRIBED PERIOD:
A REAL OR PERSONAL RIGHT?**

***Bondev Midrand (Pty) Ltd v Puling and Another
and a Similar Case 2017 (6) SA 373 (SCA)***

1 Introduction

The SCA, in *Bondev Midrand (Pty) Ltd v Puling and Another and a Similar Case* (2017 (6) SA 373 (SCA)) (*Bondev v Puling*), made significant pronouncements on whether a right to claim a re-transfer of immovable property (commonly known as a reversionary right) has prescribed in terms of the Prescription Act (68 of 1969) in circumstances where a buyer has failed to erect dwellings within a prescribed period. In response to one of the defences to this claim, it had to decide whether such a reversionary right is a real or personal right. In order to come to its decision, the SCA also referred to the question whether the reversionary right violates the constitutional right not to be arbitrarily deprived of property as well as of the right to have access to adequate housing. More importantly, it had to determine whether a condition incorporating a right to claim a re-transfer of immovable property could be separated into two rights, one constituting a real right, and another a personal right. The purpose of this note is to critically discuss the case in *Bondev v Puling*. The discussion seeks to critically analyse the correctness of the court's decision in applying the established test for registration of conditions in terms of section 3(1)(r) read with section 63(1) of the Deeds Registries Act (47 of 1937) (DRA). This note also questions the SCA's decision that it is possible to separate a condition in the title in order to determine whether parts thereof are real or personal. Before embarking on this discussion, the facts of the case, as well as the issues and decision will be discussed.

2 Facts

The case involved two matters brought against the property developer Bondev Midrand (Pty) Ltd (henceforth, Bondev or the developer) in the lower courts. The issues in both matters were based on similar disputes and therefore raised similar legal issues on appeal. The respective disputes arose from agreements of sale of immovable property between Bondev and one Puling, and between Bondev and one Ramokgopa. The appellant, Bondev, developed residential dwellings on an estate known as Midstream

Estate (the estate). It sold a piece of immovable property in the estate to each of the respondents (Erf 2268 Midstream Estate Extension 26 to Puling, and an unspecified erf to Ramokgopa). Ownership of the properties was transferred to them during March 2000 and November 2006 respectively (par 2). In respect of both properties, one of the conditions of title required the purchasers to build a dwelling on the property within 18 months of a date specified in the deed of transfer – 15 May 2008 for Ramokgopa, and 6 September 2008 for the Puling family (pars 3 and 4). The main elements of this condition were: first, that “[t]he [t]ransferee or his [s]uccessor in [t]itle will be liable to erect a dwelling on the property within ... eighteen months” (par 2); secondly, that the condition entitled the developer to claim a re-transfer of the property upon failure of the transferee to erect the dwelling within such a period (par 2). However, the developer was not obliged to claim such a re-transfer of the property. Re-transfer is claimed at the cost of the transferee against repayment of the purchase price (par 2, the relevant condition erroneously refers to “payment by the Transferee”).

It was common cause in both matters that the transferees failed to comply with the above-mentioned condition in their deeds of transfer. In other words, Mr Ramokgopa failed to erect the dwelling in terms of this condition (par 3). In the case of the Puling family, the period of eighteen months also elapsed without any dwelling being built on the property. However, the developer did not immediately enforce its right to claim re-transfer of the property. Almost four and a half years later, the Puling family (through their attorney) informed the developer (also through its attorney) that they were not intending to erect a building on the property, but that they intended to consolidate their property with the adjacent erf, which they had also purchased (par 4). The developer did not agree with the arrangement for consolidation of the two properties. In March 2014, the developer instituted an application in the High Court for an order to enforce the obligation to re-transfer the properties to it, against payments of the original purchase prices in terms of the reversionary condition of title (par 4).

3 Issues

The main issue raised in this case was whether a purchaser of immovable property is obliged to re-transfer the property to the developer where the title deed of the property contains a condition that requires the purchaser to erect a dwelling on the property within a specified period. The developer’s applications to enforce the conditions of title for re-transfer of properties were met with several defences from the respondents. The first defence relates to the timing of the application to enforce the conditions, and the possible prescription of the developer’s claim. The respondents’ argument was that more than three years had elapsed since the date upon which the appellant’s claim for re-transfer of the property became due (par 5). As a result, it was argued that the claim had prescribed. The respondents’ second defence was based on estoppel. The argument was that the appellant had consented to the consolidation of the Puling family’s two properties and that it should therefore be estopped from relying on the fact that the property had not been developed within the period of 18 months (par 5). Another defence raised by the respondents relates to the alleged differences between the

conditions for re-transfer of the properties in, respectively, the deeds of sale, and the title deeds of the properties. They therefore argued that the issue relating to the re-transfer of the property must be based on the terms of the deed of sale, and not of the deed of transfer (par 5).

In refuting the appellant's claim, the respondents also relied on the earlier High Court decision in *Bondev Midrand (Pty) Ltd v Madzhie* (2017 (4) SA 166 (GP) (*Bondev v Madzhie*). This case involved the same legal question as the case under discussion. It involved an application by Bondev, as a developer, against the purchaser of immovable property, subject to a similar reversionary right in the title deed. Although the matter came before the court initially for default judgment, which application was later withdrawn, the court commented on the enforceability of these types of condition. The court per Jansen AJ expressed a personal opinion on the question, notwithstanding the fact that it was no longer in dispute. The court found it difficult to enforce these types of term (referring to the terms of the condition as they appear in the deed of sale) against ordinary retail purchasers who are buying these erven to build homes for themselves (par 16). In the court's view, such a clause is either against public policy, as the term is used in the law of contract, or it "is inconsistent with the rights of an ordinary purchaser in terms of section 26(1) of the Constitution, and even section 25(1) of the Constitution" (that is, respectively, the right not to be arbitrarily deprived of property, and the right to have access to adequate housing) (par 16). The decision in this judgment had an impact on the practice of registering similar conditions by the Registrar of Deeds (the Registrar). The Registrar viewed the judgment as binding, and refused to register deeds containing similar clauses (par 11).

With regard to the respondents' argument that the claim for re-transfer of property (flowing from their failure to erect a dwelling on their respective properties within the 18-month period) had prescribed, the respondent argued that the claim for re-transfer of the property constituted a "debt" in terms of the Prescription Act (68 of 1969). In particular, the respondents relied on section 11(d) of the Act, which provides for a three-year prescription period for "any other debt" (par 6). No argument was raised on whether section 11(d) was the applicable provision of the Act for the type of claim in question. However, more important for the purpose of this discussion is a counter-argument raised by the appellant in response to the argument based on the Prescription Act.

In its response to the prescription argument, the appellant argued that the registered condition providing for a re-transfer of the property is not merely a personal right in its favour, but also "gives rise to a real right which does not prescribe within three years" (par 6). As a result, before it could consider the prescription defence, the court had to address the question as to whether this condition constitutes creates a real or personal right.

4 The decision of the court

The court was faced with the task of resolving the arguments relating to the defences and counter-arguments brought by the parties in support of and against a claim for re-transfer of the property to the developer. The court did

not address the argument relating to the difference between the condition reflected in the deed of sale and that in the title deed. The reason advanced was that there was no order sought for rectification of the title deed to incorporate the correct version of the condition (par 5). It therefore concluded that the matter must be dealt with solely on the basis of the condition as stipulated in the title deed of the property (par 5).

The court continued its judgment by addressing the impact of the decision in *Bondev v Madzhie* on the practices of the Registrar of Deeds pertaining to the registrability of these types of condition, and whether they are registrable based on constitutional and public policy grounds. The legal representative of the parties in *Bondev v Puling* drew the court's attention to the decision in *Bondev v Madzhie*. In particular, the respondents used this decision to support its view that the appellant's claim against them was similarly not enforceable (par 8). The SCA questioned the court *a quo*'s pronouncement on this issue and, in particular, the "judge's personal viewpoint" in this regard (par 9). According to the SCA, since the applicant in the *Madzhie* case had wished to abandon the application for default judgment, it was not necessary for the lower court to provide a formal judgment or to discuss the constitutional issues that had not been raised in the papers. As a result, the SCA warned the court to refrain from dealing with legal issues that it did not need to determine, more particularly where it did not have the opportunity to hear various parties who may have an interest in the matter (par 9). In light of its decision, it also viewed the impact of the judgment on the registrability of similar clauses as "extremely unfortunate" and ordered the Registrar of Deeds not to regard this decision as authoritative and binding (par 11).

The SCA then discussed the main issue before it, which was whether the claim for re-transfer constituted a personal right or a real right. Considering the conditions in question, the court interpreted the condition as consisting of two clauses (par 12). The first clause obliges the transferee or its successors in title to erect a dwelling on the property within a period of 18 months, while the second provides for the developer's entitlement to have the property re-transferred to it against the return of the purchase price (par 12). In its interpretation, the first part of the condition reflects an intention to bind not only the transferee, but also its successors in title. The court also found support for its view in the requirement in the condition that a dwelling must be erected on the property. This, in the court's opinion, "results in an encumbrance upon the exercise of the owner's right of ownership of its land" (par 13). Therefore, it concluded that the first clause in the condition confers a real right in the developer's favour (par 13).

With regard to the second clause of the condition, the court found that the claim to re-transfer the property against repayment of the purchase price did not amount to an encumbrance upon the exercise of the owner's right of ownership (par 14). The reasons advanced by the court were first that this right can only be enforced by a particular person against a determined individual, and that it does not bind third parties. Secondly, it assumed the second clause was a stand-alone one – that is, that the condition incorporated only this part of the clause. The court concluded that the right incorporated in the clause "would not have carved out a portion of the

respondents' *dominium*" (par 14). Therefore, the clause created a personal right (par 13).

The approach of the court in separating the condition in question into two separate clauses raises the question as to whether these conditions are legally separable. The appellant submitted that, although the second clause appeared to create a personal right, this clause "is so inextricably wound up with the first clause ... that the two clauses were to be read together as creating a real right" (par 15). The appellant relied on a similar argument raised in the SCA decision in *Cape Explosive Works Ltd v Denel (Pty) Ltd* (2001 (3) SA 569 (SCA)) (*Cape Explosive*). In *Cape Explosive*, the question was also whether the relevant title condition, which required the property to be used for the manufacture of armaments, could be regarded as inseparable from another condition of title that offers a right in favour of the transferor to have a first option to repurchase the land. For reasons that will be discussed below, the SCA in this case concluded that the two clauses were to be read together as they were dependent on one another, and therefore formed "a composite whole" (par 15).

5 Critical analysis

Tests to determine whether a right is personal or real have been part of our common law for many years. They have seen different interpretations of a particular set of facts or the type of right in question. These tests have become the focus of judicial scrutiny. The test is relevant to determine whether a particular right is registrable by the Registrar of Deeds in terms of the power vested in that office to register real rights, and the non-registrability of any "condition which does not restrict the exercise of any right of ownership in respect of immovable property" (see ss 3(1)(r) and 63(1) of the Deeds Registries Act 47 of 1937 (DRA)). Although the DRA provides for the registration of real rights and prohibits the registration of personal rights, it does not provide a clear-cut definition of these rights. This has left the interpretation of these conditions to the Registrar and the courts. The DRA entrusts the interpretation to the Registrar, who serves as the gatekeeper to ensure that rights are registered in terms of specified requirements. As has been argued elsewhere with regard to the power of the Registrar, the delegation of the determination as to whether a particular right is real or personal to the Registrar is a problem brought about by the DRA (Tuba "The Legal Status of Registered Home Owners' Association Conditions: *Willow Waters Homeowners Association (Pty) Ltd v Koka* (499/2013) [2014] ZASCA 221" 2016 *THRHR* 339). This problem is evidenced in numerous cases related to the determination as to whether an already registered right is real or personal. As in *Bondev v Puling*, recent cases do not concern themselves with the question whether a particular right should be registered in terms of section (3)(1)(r) read with section 63(1) of the DRA. Instead, many of them dealt with the enforceability of a registered right. Arguments as to whether a right is real or personal are used as defences to claims such as the prescription of an obligation under such rights (see *Bondev v Madzhie* and the cases referred to therein). In these instances, courts are, therefore, asked to declare whether a registered right can be a bar to prescription based on these defences. Recently, cases such

as *Bondev v Madzhie* and *Bondev v Puling* have stretched the reach of the test further, by asking whether one condition in the title can be partly real and partly personal.

In *Bondev v Puling*, the SCA, in answering the main question, applied the decision in earlier cases to arrive at its decision. In particular, it relied on the test discussed in the recent decision in *Willow Waters Homeowners Association (Pty) Ltd v Koka NO* (2015 (5) SA 304 (SCA) (*Willow Waters*); see Tuba above for a discussion of this case) and several cases referred to therein (see also *Cape Explosive supra* and *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 251 (C) par 13). The analyses of the test, as laid down in *Cape Explosive* and *Willow Waters*, are instructive for this discussion. In *Cape Explosive*, the SCA laid down a test comprising two requirements. First, the focus of the test is on the intention of the person creating the right, and asks whether he or she intended to bind not only the present owner of the land, but also successors in title (par 12). Secondly, “the nature of the right or condition must be such that the registration of it results in a ‘subtraction from the *dominium*’ of the land against which it is registered” (par 12). In *Willow Waters*, the court emphasised the need to look at the terms of the instruments, their ordinary meanings “construed in the light of the relevant and admissible context, including the circumstances in which the instrument came into being” (par 16). The court in this case placed emphasis on the wording of the specific condition to determine whether the first leg of the test in *Cape Explosive* was satisfied. In the earlier case of *Lorentz v Melle* (1978 (3) SA 1044 (T)), it was held that the obligation to pay attaches not to the property, but to the owner thereof, and is “essentially a personal right sounding in money” (1052D–E). A question that may be raised with regard to the application of these tests in the case under discussion is whether it was the intention of the developer, in terms of the reversionary condition, to bind not only the original purchasers, but also successors in title. Secondly, following on the decision in *Lorentz v Melle*, the relevant question with regard to the second clause is whether the developer’s right to claim re-transfer of the property against repayment of the original purchase price, as set out in the second clause does amount to any encumbrance on the property?

Setting aside for a moment the discussion about separating the condition into two clauses, and reading the clause in its totality, the first question that may be asked is whether the main intention of the developer was to claim the re-transfer of the property against the repayment of the purchase prices in case of default. The question, in particular, is whether the obligation to re-transfer the property is so interwoven with the claim to re-transfer the property? To answer this question, it was required in terms of the first leg of the *Willow Waters* analysis to look at, among others, the term of the instrument in its ordinary meaning. The courts have recently taken a literal approach to specific words in the title condition (see also Nel *Jones: Conveyancing in South Africa* (1990) 209). For instance, in *Willow Waters*, the court viewed the words “[the owner of the property] ... or any person who has an interest therein” as an indication that the embargo restricting transfer of property subject to a clearance certificate from the homeowners’ association, also binds successors in title (in this case, the Master and the trustees), and is therefore a real right (par 8, emphasis added). Recently, the

SCA in *eThekweni Municipality v Mounthaven (Pty) Ltd* (2018 (1) SA 384 (SCA)) also followed a literal approach. In this case, the court placed emphasis on the words “the [p]urchaser and its successors in title” (par 15). The SCA, however, reached a conclusion that the “right [to claim retransfer of the property] ... can only be enforced against a determined individual or a class of individuals, i.e [the developer] or its successor in title, and not against the whole world” (par 15). Nevertheless, the decision in this case is an indication of a literal approach to specific words in the condition in order to determine whether the condition is a real or personal right.

Similarly, the decision in *Bondev v Puling* followed the SCA’s literal approach. In coming to its decision on the first clause of the condition, the SCA followed *Willow Waters*. It concluded that this clause reflects an intention to bind “not only the transferee but its successors in title” (par 13). It therefore concluded that the first clause gives rise to a real right. On a literal interpretation, the court is correct that the condition binds successors in title. Although the court decides whether a right is intended to be real or personal by looking at the wording, words such as “binding successors in title” also have an impact when analysing whether the condition is a subtraction from the *dominium* (see *Ex Parte Geldenhuys* 1926 OPD 155). Since a condition that is literally intended to bind successors in title is meant to impose an obligation on all persons who have a right in the property, such condition will in effect encumber the land, and therefore subtract from the *dominium* of the land. As was correctly held in *Ex parte Geldenhuys*, it becomes important to look not only at the right, but also at the correlative obligation (163–164). Therefore, in addition to the interpretation of the wording, the court must determine whether the conditions burden the land. The SCA in *Bondev v Puling* correctly considered, in addition to its literal interpretation of clause one, the correlative obligation. In its conclusion, the SCA held that the requirements for the erection of a dwelling on the property result in an encumbrance upon the exercise of the owners’ rights of ownership of their land (par 13). Although it did not refer to *Ex parte Geldenhuys* and the test of subtraction from the *dominium*, the SCA implied that the literal approach, looking only at the right, without looking at the correlative obligation, is not sufficient.

Regarding the second clause of the condition, the question is whether the SCA correctly found that it created a personal right. Taking the clause as a stand-alone condition, the SCA’s analysis of the clause is correct on both legs of *Cape Explosive*, read with *Willow Waters*. The SCA decided that the first clause is binding on successors in title (par 19). The reason advanced is that successors in title have no right under this clause to bring the restriction in the clause to an end. However, unlike the obligation in the first clause to build a dwelling on the property, successors in title are not parties to the second clause on repayment of the purchase prices in order to bring the operation of this clause to an end. The SCA was correct in its finding that the second clause, by providing an option to recover the property against payment of the purchase price upon failure to build a dwelling, “is akin to providing ... an option to purchase which is essentially a personal right” (par 19). As an option to the main obligation to re-transfer the land, the SCA correctly concluded that “the second clause under which [the developer] has the election to claim re-transfer of the property, creates no more than a

personal right akin to an option to purchase which is not inseparably bound up with the first clause (par 20). This analysis is also correct on the application of the subtraction from the *dominium* test, as well as the test in *Lorentz v Melle*. The option to recover the land will not encumber the land, and will therefore not subtract from the *dominium* of the land. The re-transfer of the land against repayment of the purchase prices is a claim essentially “sounding in money” and is therefore the exercise of a personal right. The SCA was therefore correct that the second clause created a personal right. The question that remains is whether this condition was separable from the first.

The SCA addressed this question by referring to the pronouncement in *Cape Explosive* on the question as to whether two conditions, one creating a real right and another a personal right, were inseparable. An analysis of the approach to severability of a condition in this context is necessary. In *Cape Explosive*, the issue related to two conditions in the title deed. Condition 1 imposed upon the transferee (Arm Scor) and its successor in title an obligation to use the land only for the manufacture of armaments (par 2). Condition 2 provided that when the land was no longer required for that purpose, Arm Scor undertook to advise the transferor (Capex) of this fact and give Capex the first right to repurchase the land (par 2). The dispute arose when the second part of the condition was omitted from the document of title subsequent to the original transfer to Arm Scor. Denel sought a declaratory order that its ownership was not subject to condition 2. This was countered by an application to rectify the title deed to incorporate condition 2. The question then became whether condition 2 was registrable, which raised the further question as to whether the two conditions were separable. This boiled down to whether the two clauses, read together, constituted a real right notwithstanding that the court had analysed them separately. The SCA concluded that condition 2, unlike condition 1, constituted a personal right, as it did not restrict the use of the property, but merely placed an obligation on the transferee to advise (*Cape Explosive*, par 14). It then looked at whether the two conditions were separable. The SCA decided that they were not (*Cape Explosive*, par 15). Having decided that condition 1, unlike condition 2, burdens the land, the court then concluded that the clauses were specifically stated to be binding on the transferee “and its successor in title” (*Cape Explosive*, par 15). In addition, the court added that they burdened the land or qualified as a subtraction from the *dominium* of the land, and therefore the clauses read together created a real right. It concluded that they were not separable and formed a composite whole (par 15).

The court in *Bondev v Puling* used the test applied in *Cape Explosive* to determine whether the conditions in the title were separable. Unlike in *Cape Explosive*, the SCA in *Bondev v Puling* did not find that the conditions in the two clauses constituted a composite whole and nor that they were therefore inseparable. In neither court, however, is there a specific pronouncement on what test should be used to determine whether conditions in the title or different parts of the same condition can be separable. What is observable from these judgments is that in order to determine whether different parts of a condition are separable, the court must begin by determining whether each of the parts of the condition is a real or a personal right. For instance, in

Cape Explosive, the court began by asking whether each of the rights is a real or personal right. The SCA concluded that condition 1 is a real right that burdens the land, while condition 2 is a personal right. However, when it came to determining whether they were separable or not, the SCA changed its approach. It first held that they were binding on the transferee and its successors in title, and secondly that they constituted a burden on the land or a subtraction from the *dominium* of the land. As a result, the clauses together constituted a real right that could be registered in terms of the DRA. What can be learned from these judgments is that whether a condition of title is registrable or not depends on whether the condition is a real or personal right. In addition, whether two related conditions are separable depends on the same test. What is questionable, however, is whether, once a determination has been made that different parts of a condition constitute real and personal rights respectively, the conclusion can subsequently be drawn that both parts of a condition are nonetheless either personal or real rights. The real question should be whether the parts of the condition are separable, as in *Cape Explosive*.

In *Bondev v Puling*, the SCA was guided by the application of the test to determine whether conditions or parts thereof are personal or real rights, in order to decide whether they are separable. Unlike in *Cape Explosive*, condition 2 was not specifically binding on successors in title. The obligation to re-transfer the land was binding only on the transferee (par 2). On this basis, the SCA in *Bondev v Puling* was able to distinguish between the circumstances in *Cape Explosive* and the facts of the case in *Bondev v Puling*. The SCA therefore reached a conclusion that the two clauses read together do not “constitute a composite whole” as in *Cape Explosive*. The precedent established by these cases in determining whether parts of a condition are separable is therefore whether the two parts constitute a composite whole. However, the SCA in *Bondev v Puling*, as in *Cape Explosive*, did not provide clear guidelines as to when it is possible to separate different aspects of the same condition, particularly where the determination concludes that one aspect is real and another personal. Therefore, the test to determine whether two parts of a condition constitute a composite whole will still have to be developed by our courts.

The decision in *Bondev v Puling* also raises a question on the practical impact of registering these types of condition in the Deeds Office. Such a question arose after the North Gauteng High Court decision in *Bondev v Madzhie*. The decision in *Bondev v Madzhie* illustrates how the ruling on the registrability of title conditions can have an adverse impact on the practice at the Deeds Offices. That case involved similar conditions to those in *Bondev v Puling*. What is relevant for this discussion is a question that was put before the court as to whether a re-transfer clause is consistent with public policy, and with the provisions of section 26(1) of the Constitution of the Republic of South Africa, 1996, which provides for the right of access to adequate housing (par 6). The court concluded that the reversionary clause is both against public policy and is unconstitutional, since it violates the right to adequate housing (par 16). The details of the constitutional discussion in the judgment fall outside the scope of this article. However, the court found that the clause was grossly unfair to the purchaser, who intended to build a residential home (*Bondev v Madzhie*, par 21). As indicated in the *Bondev v*

Puling decision, the decision in *Bondev v Madzhie* caused confusion at the offices of the Registrar. The Registrar abided by the decision and subsequently refused to register deeds containing similar clauses (*Bondev v Puling*, par 11). What is unfortunate about the decision in *Bondev v Madzhie* is that it did not seem to anticipate the implications of invalidating these types of condition on the practices of the Registrar. In addition, the court did not provide any guidelines to the Registrar (who was also one of the parties to the litigation) on whether it should or should not register titles containing these types of condition. Registrars are already faced with the challenge of determining whether a condition in the title constitutes a real or personal right in terms of section 3(1)(r), read with section 63(1) of the DRA. These sections arguably require the examining officials to make a judicious decision, based on the tests laid down by the court, on whether a condition is real or personal. It seems a mammoth task for deeds officials to decide on the validity of conditions in relation to constitutional standards and public policy, which are not provided in the DRA.

The decisions in both *Bondev v Madzhie* and *Bondev v Puling* have failed to consider the relevant provisions of the DRA and the deeds office practices on the issue of whether reversionary rights are enforceable or not. In particular, the court in these decisions has not considered the application of section 53(2) of the DRA which is applied by the Registrar together with the relevant Registrars Conference Resolution (RCR). This section generally prohibits the passing of a mortgage bond by two or more mortgagors “unless it purports to bind immovable property of each mortgagor”. The proviso to this section is the most relevant concerning the registrability of reversionary rights. This proviso provides that:

“land held subject to a condition that, on the happening of a certain event, such land shall revert to a person named in such condition, may be mortgaged by the owner thereof and such person by means of a bond passed by them jointly and severally, or may be mortgaged by the owner of such land with the consent of such person.”

The interpretation of these provisions has created headaches for both practitioners and the courts (see West “Reversionary Rights” (29 July 2010) *GhostDigest* <http://www.ghostdigest.com/articles/reversionary-rights/53192> (accessed 2018-11-28)). The challenge with the interpretation of this section has been the distinction between what is called a reversionary right proper (a condition that does not constitute a real right) and a reversionary right condition (which binds successors in title) (West <http://www.ghostdigest.com/articles/reversionary-rights/53192>). In 2011, the Registrars resolved to address the challenge of interpreting this section with RCR 27/2011, passed in terms of section 2(1)(a) of the DRA to bring uniformity to the practices and procedures of various deeds offices. In terms of this RCR, the question was whether section 53(2) applies in respect of revisionary rights proper or also to revisionary right conditions. The Registrars resolved that it only applies to reversionary rights that do not bind successors in title – that is, mortgage bonds in terms of this section that provide for a reversionary right will be registered notwithstanding that they do not bind successors in title. This section has been applied by the deeds offices to register reversionary rights even when they do not bind successors in title. As a result, this may create confusion between the interpretation of the reversionary rights by the courts,

and the continuous registration of these rights in terms of section 53(2). The court's failure to interpret the provisions of this section and the relevant RCR in this case, creates further confusions among the practitioners who have for many years registered reversionary rights in terms of these sections. This will require clarification from the Registrars or when similar cases come before the SCA. Such clarification must take into account the provisions of section 53(2), read with section 63(1). The reading of the main provision of section 53(2) attests to the provision of section 63(1): a right that does not attach to immovable property or bind successors in title cannot be registered. However, it is quite clear that section 53(1) creates an exception to this general rule. Such exception allows the registration of a reversionary right notwithstanding that such right does not bind successors in title. The court should arguably have considered the interpretation of section 53(2) and RCR 27/2011 and should have concluded that a reversionary right in this case is enforceable notwithstanding that it did not constitute a real right. This would be the case even without its exercise to separate the condition into two clauses or to determine whether they constitute a composite whole and, as a result, a real right.

The decision in *Bondev v Puling* must therefore be commended, partly for ruling that the *Bondev v Madzhie* decision on the constitutionality of the reversionary conditions should be ignored by the Deeds Office (par 11). However, the SCA did not pronounce on whether the reversionary conditions will pass constitutional muster, or whether they are generally against public policy. The SCA only questioned the High Court's pronouncement on the substance of the matter in a case that was brought to court as a default judgment. As a result, the question as to whether reversionary conditions are generally against section 26 of the Constitution was disposed of on procedural grounds. The SCA has managed to provide clarity to the Registrar on whether these conditions are registrable or not. However, the question remains whether this type of condition violates the provisions of the Constitution, and/or goes against public policy.

Section 26(1) of the Constitution provides everyone with the right to have access to adequate housing. This section also requires the State to take reasonable measures to progressively realise this right. It also provides protection for those who have been afforded this right (*Government of the Republic of South Africa v Grootboom* (2001 (1) SA 46 (CC)) par 2). It protects against arbitrary eviction and eviction or demolition without an order of court (s 26(3)). The relevant context to understand this right has been encapsulated in the *Grootboom* case. The Constitutional Court held that it is not only the State that is responsible to provide housing. Legislative and other measures must enable other agents within our society to provide housing (par 35). It also requires the State to create conditions for adequate housing of people at all economic levels of society (par 35). The court went further, making a distinction between those who can afford housing and those who cannot. In this regard, it held the State must provide the right through provision of social welfare and development, and must "unlock the system by providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance" (par 36). In *Jaftha v Schoeman; Van Rooyen v Stoltz* (2005 (2) SA 140 (CC)), the

Constitutional Court held that section 26(3) encompasses all evictions and not only those following upon the attachment and sales in execution of immovable properties that are persons' homes (par 40, see Steyn "*FirstRand Bank Ltd t/a First National Bank v Seyffert and three similar cases* 2010 (6) SA 429 (GSJ); *Seyffert & Seyffert v Firstrand Bank Ltd* 2012 ZASCA 81: Bringing Home the Inadequacies of the National Credit Act 34 of 2005: Recent Case Law" 2012 45 *De Jure* 639, for a discussion of this and other cases).

The constitutionality of this reversionary right must be looked at from perspective of the Constitutional Court's approach to the sales-in-execution of immovable properties and the relevant right. In the *Jaftha v Schoeman*, the Constitutional Court determined the constitutionality of section 66 of the Magistrates' Court Act (32 of 1944), which permitted the sale in execution of the home of the judgment debtor by the Registrar, resulting in the permanent loss of the home. The court concluded that the section was unconstitutional for lack of judicial oversight, in terms of which the court would be able to look at various factors for and against the execution (par 56–60). Looking at both the interests of the judgment debtor and those of the creditor, the court held that an order of sale in execution could be appropriate if it does not constitute gross disproportionality (par 52). An execution is grossly disproportionate "if the sale of the home is to render the judgment debtor and his or family completely homeless" (par 56–60). The Constitutional Court adopted a similar approach in *Gundwana v Steko Development CC* (2011 (3) SA 608 (CC)); see the discussion of this case in Van Heerden "The Impact of the Right of Access to Adequate Housing on the Enforcement of Mortgage Agreements and Other Credit Agreements" 2012 75 THRHR 632) with regard to section 27A of the Supreme Court Act (59 of 1959) and Rule 45(1) of the Supreme Court Rules, which read together allow the Registrar to grant default judgment and possible execution of immovable property. The Bank argued in favour of execution on the basis that "mortgagors willingly accept the risk of losing their secured property in execution when entering into a mortgage loan agreement" (par 42). The court refuted this argument and applied the argument in *Jaftha*. The court found that though the mortgagor willingly provides her immovable property as security for the loan, that willingness cannot imply that she accepts that she has waived her right to have access to adequate housing under section 26(1) and (3) of the Constitution. What is evident from this case is that while the court takes into account the right of the judgment creditor to enforce its debts, the right of the judgment debtor not to be evicted from his or her home receives a heavier consideration as it is protected by the Constitution. Arguably, the purpose of the reversionary right in *Bondev v Puling* (that is, to ensure that the buyer builds a house of a required standard and specification) carries less weight than that of the judgment debtor who stands to lose his or her home. Applying the test of proportionality in *Jaftha*, the means to achieve this purpose appears grossly disproportionate, and to violate the protection under section 26 that guarantees the right to adequate housing. Applying the *Jaftha* case to similar cases, the court is likely to decide that such clauses contravene section 26 of the Constitution, rather than ruling in favour of the reversionary right, which in essence protects the right of the developers (see

Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (LLD Stellenbosch University 2010) 100–101).

6 Conclusion

The decision in *Bondev v Puling* will have a significant impact on the jurisprudence and the tests for determining whether a condition in the title is real or personal. Furthermore, the decision follows on from *Cape Explosives* to invigorate judicial and practical approaches to the interpretation of conditions for both registration and enforcement purposes. For practitioners in the area of title registration, the following lessons can be learned. In order to determine whether a condition is registrable in terms of sections 3(1)(r) and 63(1) of the DRA, it must be asked whether the person creating the right intended to bind not only the present owner of the land, but also successors in title. As can be observed from the literal approach adopted in this case and previous cases, it is important to incorporate in the conditions words having the effect of such an intention, or simply to incorporate the words “his or her (or its) successors in title” after the name of the transferee or beneficiary. With regard to the test on whether there is a subtraction from the *dominium*, the literal approach of looking at the intention to bind successors in title is also useful. The subtraction from the *dominium* may be easily established in the type of condition present in *Bondev v Puling*, where the purchaser is required to erect a dwelling. Such a duty to erect, as was held in this case, “results in an encumbrance upon the exercise of the owner’s right of ownership of its land” (par 13). However, where such encumbrance is not clear from the correlative obligation, the literal approach will assist in that a condition “binding successors in title” implicitly results in an encumbrance upon the exercise of the owner’s right of ownership of its land, and is therefore a subtraction from the *dominium*.

The case however does not establish a clear guide for the courts to decide matters where it is alleged that different aspects of a condition are separable, in order to determine whether part or the whole of the condition is a real or personal right. While it may be easier for the courts to decide whether two parts of the conditions are either real or personal, based on the literal approach and other established tests, the same cannot be guaranteed when applying the composite whole test, as in *Cape Explosive* and *Bondev v Puling*. It is quite clear that in both cases, the test for whether parts of a condition are separable depends on the tests established for determining whether a right is real or personal. If, based on this test, neither of the conditions binds successors in title, both conditions are personal rights, and *vice versa*. However, if one condition binds successors in title and one does not, it is evident that the composite whole test adopted in the case does not yield any precedential guidelines. It will therefore be left to the court in future to provide guidance as to when two conditions are separable as they do not constitute a composite whole.

The decision in *Bondev v Puling* has failed to clarify the practice at the Deeds Office with regard to the registration of deeds containing similar conditions. In particular, the court failed to interpret the reversionary right with reference to the existing practice applying the provision in section 53(2) of the DRA, read with RCR27/2011. This provision makes an exception to

section 63(1) and allows the mortgaging of reversionary rights of a personal nature and has been invoked in practice to register reversionary rights similar to the one in *Bondev v Puling*. The court should have discussed the implications of these provisions and ruled on whether or not the existing practice is correct and should be continued. Failure to pronounce on the effect of these provisions and their application to reversionary rights is a missed opportunity for clarifying the application of these provisions.

The SCA also refrained from pronouncing on the constitutional and public policy grounds. It relied on the procedural errors and the absence of parties to make submissions on an application for default judgment. However, the decision in *Jaftha* and *Gundwana* and the proportionality test applied in these cases would, arguably, not have been satisfied in the *Puling* case. A court in future is unlikely to rule in favour of a developer's right to maintain a minimum standard of buildings in the area over the right of buyers to have a home as protected by section 26 of the Constitution. It is therefore unlikely that a claim to enforce a reversionary right as in *Bondev v Puling* will pass constitutional muster. While the test to determine whether a right is real or personal is settled, *Bondev v Puling* has not clarified the circumstances under which different aspects of a reversionary right may be separated, where one constitutes a real and the other a personal right. Also as the *Jaftha* and *Gundwana* cases have addressed the right to adequate housing as against a judgment creditor's rights to recover debts, it remains to be seen how courts will decide similar competing rights where this relates to the reversionary right of a developer as against the right protected in section 26 of the Constitution.

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