



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 499/2013

In the matter between:

**MONICA GEZINA COWIN NO
ORIEL RAMPOLOKENG SEKATI NO
SILVER TUNNEL INVESTMENTS 7
(PTY) LTD**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

and

**KYALAMI ESTATE HOMEOWNERS
ASSOCIATION
KYALAMI EQUESTRIAN CENTRE CC
THE MASTER OF THE HIGH COURT
THE REGISTRAR OF DEEDS,
PRETORIA**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

And

**ASSOCIATION OF RESIDENTIAL
COMMUNITIES CC
NATIONAL ASSOCIATION OF
MANAGING AGENTS**

**First Amicus Curiae
Second Amicus Curiae**

Neutral citation: *Cowin NO v Kyalami Estate Homeowners Association* (499/2013) [2014] ZASCA 221 (12 December 2014)

Coram: **Maya, Theron, Saldulker JJA, Mocumie and
Gorven AJJA**

Heard: **15 September 2014**

Delivered: **12 December 2014**

Summary: Land – a title condition in a deed of transfer which prohibits the transfer of immovable property without a clearance certificate or the consent of a homeowner’s association constitutes a real right – the title condition is thus binding on successors in title including the liquidators of the insolvent property owner – amounts owed by insolvent owner not ‘taxes’ as envisaged in s 89(5) of the Insolvency Act 24 of 1936.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Mashile AJ sitting as a court of first instance):

Save for the amendment of the order of the court below by the deletion of paragraph 36.1 thereof, the appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Maya JA: (Theron, Saldulker JJA, Mocumie and Gorven AJJA concurring):

[1] This is an appeal against the judgment of the South Gauteng High Court, Johannesburg (Mashile AJ). The high court dismissed an application for an order declaring, inter alia, that a title condition contained in a deed of transfer prohibiting the transfer of immovable property registered in the name of the liquidated third appellant (the insolvent) without a clearance certificate from the first respondent (the association), confirming that all levies and penalties due to the latter had

been paid, binds only the insolvent and the association and is not enforceable against the insolvent's liquidators.

[2] The first and second appellants are the insolvent's joint liquidators. The insolvent, a company in liquidation, is the registered owner of Portion 2 of Erf 219, Kyalami Estates Extension 10 Township (the property) which it purchased before its liquidation. It is situated in a residential secured estate comprising 1106 residential units which was developed in accordance with the Township and Development Ordinance of the province. The estate is operated by the association.

[3] In terms of the association's constitution (constituted by its Memorandum and Articles of Association) its main business is 'to promote, advance and protect the communal interest of the occupiers' within the estate and in particular 'to ensure acceptable aesthetic, architectural, environmental standards in the [estate], to promote security services and systems to ensure acceptable security standards within the [estate] and to maintain recreational facilities within the [estate]'.¹ Its members consist of registered owners of all the dwelling units within the estate who automatically acquire such membership upon becoming owners.² The members are bound to observe all rules made by the association's trustees from time to time at a general meeting with regard to various matters of communal interest. These include restrictions on a member's right to use his property as he pleases, the buildings, structures and installations which may erected on the property, levies imposed upon members for purposes of meeting all the expenses incurred or reasonably expected to be incurred by the association in the pursuit of its business,

¹ Clause 2 of the Memorandum of Association.

² Article 3.4 of the Articles of Association.

finances imposed for non-compliance with the Articles and interest charged on any arrear levies.³

[4] The title deeds of each of the dwelling units, including the one in respect of the property,⁴ contain the following restrictive title conditions:

‘...’

[B2] Imposed by the KYALAMI EQUESTRIAN CENTRE CC [the second respondent] ... for the benefit of [the association] and which are binding on the Transferee [the insolvent] and its Successors in title, namely:

Every owner of the erf or any subdivision thereof or any interest therein or any unit thereon as defined in the Sectional Titles Act, shall automatically become and shall remain a Member of [the association] and be subject to its constitution until he ceases to be an owner as aforesaid. Neither the erf nor any subdivision thereof nor any interest therein nor any unit thereon shall be transferred to any person who has not bound himself to the satisfaction of such Association to become a Member of [the association].

The owner of the erf or any subdivision thereof or any interest therein or any unit thereon as defined in the Sectional Titles Act, shall not be entitled to transfer the erf or any subdivision thereof or any interest therein or any unit thereon without a clearance certificate from [the association] stating that the provisions of the Articles of Association of [the association] have been complied with.’

[5] The relevant provisions of the articles of association referred to in the title condition include:

- (i) clause 7.9 which provides that ‘No unit shall be capable of being transferred without a Certificate first being obtained from the Association confirming that all levies and interest have been paid up to date and including date of registration of transfer of a unit’;
- (ii) clause 7.8 which provides that ‘[a]ny amount due by a Member by way of fines, levy and / or interest shall be deemed to be a debt by him to

³ Articles 6.2, 7 and 8 of the Articles of Association.

⁴ Deed of Transfer No. T 165574/2004 dated 25 November 2004.

the Association. The obligation of the Member to pay a levy and interest shall cease upon his ceasing to be a Member without prejudice to the Association's rights to recover all arrear levies and interest. No fines, levies or interest paid by a Member shall under any circumstance be payable to the Association upon his ceasing to be a Member. A Member's successor in title to a unit shall be liable from the date upon which he becomes a Member pursuant to the transfer of that unit, to pay the levy and interest thereon attributable to that unit';

(iii) clause 6 which provides that the 'right and obligations of a Member shall not be transferrable ...'; and

(iv) clause 8.6 in terms of which any fine imposed upon any Member shall be deemed to be a debt due by the Member to the Association and shall be recoverable by ordinary civil process.

[6] The insolvent registered three mortgage bonds over the property in favour of Absa Bank Ltd (Absa) in terms of which it declared 'to bind specially ... [the property] ... subject to the conditions contained [in the deed of transfer] and especially to the reservation of rights to minerals and to the rights of [the association]'. After its liquidation on 8 June 2010, Absa obtained judgment against it and the property was also declared executable. Thereafter, the joint liquidators concluded an agreement of sale of the property with a third party, Oxter Construction Projects CC, for a purchase price of R2,25 million. The purchaser fulfilled its obligations under the agreement and the municipal rates clearance amounts were duly settled. However, the association refused to issue a clearance certificate to facilitate the transfer of the property before it had been paid a sum of R887 408,94 which comprised arrear levies.

[7] The joint liquidators took the view that the association's stance prejudiced the *concursum creditorum*, particularly the rights of Absa as the secured creditor over the property, and that any amounts due to the association could not supersede those of secured creditors who hold mortgage bonds over the immovable property. As far as they were concerned, the association was confined to proving its claim as a concurrent creditor in the insolvent estate. And they did not consider themselves at all bound by title condition B2 which they contended merely creates a personal relationship between parties to the agreement (the Articles of Association), ie the owner of the property and the association, and does not bind third parties upon liquidation. It is on that basis that they approached the high court, mainly for declaratory relief that would allow transfer of the property and its registration in a prospective purchaser's name without the association's consent. Among the relief sought was an order declaring that the amounts due by the insolvent do not constitute tax as defined in s 89(5) of the Insolvency Act 24 of 1936 (the Act).

[8] The association and the amici curiae, which joined the fray as the only recognised representative bodies in the country for homeowners associations and managing agents, contended otherwise. They argued that the title condition, a convenient method to enable homeowners associations to maintain infrastructure and provide services to their members which does not offend public policy and enjoys longstanding and widespread registration and enforcement, constitutes a real right as it results in a subtraction from dominium of the property against which it is registered. It binds the owner of the property and his successors-in-title. Thus, in insolvency, it binds the liquidators of the insolvent estate, who in this case could not, in any event, extricate the insolvent from the

restrictive condition or its contract with the association in respect of services pertaining to the property which could not be discontinued. The amounts due fell to be dealt with either as ‘costs of realisation’ in terms of s 89(1) of the Act read with ss 342 and 391 of the Companies Act 61 of 1973, or ‘costs of administration (liquidation)’ in terms of s 197 of the Act read with ss 342 and 391 of the Companies Act or, otherwise, under the common law. The amici curiae also submitted that the interpretation of the title condition contended for by the joint liquidators would result in the arbitrary deprivation of the association’s property in the form of the real right in breach of s 25 of the Constitution.

[9] This appeal, in which the issues remain the same as in the high court, was heard in this court together with *Willow Waters Homeowners Association (Pty) Ltd & another v Koka NO & others*,⁵ which is a matter similar to this one. The reasons given for upholding the appeal in that matter apply equally to this case. I do not, therefore, intend to repeat them here. Suffice it to say that I agree with the reasoning and conclusion of the high court except for the declaratory relief which it granted in respect of s 89(5) of the Act – that the moneys due to the association by the insolvent constitute ‘tax’ within the meaning of this section. Apart from the fact that the issue simply did not arise for determination as the association never contended that the amounts do constitute such tax, this court has expressly said that they do not in *Barnard NO v Regspersoon van Aminie en ‘n ander*.⁶ As for title condition B2, it does constitute a real right that is binding on the insolvent company and the joint

⁵ *Willow Waters Homeowners Association (Pty) Ltd & another v Koka NO & others* (768/13) [2014] ZASCA x (x 2014).

⁶ None of the parties contended that it does, correctly so in light of this court’s decision in *Barnard NO v Regspersoon van Aminie en ‘n ander* 2001 (3) SA 973 (SCA) paras 25-29.

liquidators who stepped into its shoes consequent to its liquidation. For the same reasons stated in *Willow Waters*, it is not necessary to engage the constitutional argument. Accordingly, the appeal must fail with costs to follow the result.

[10] In the result, the following order is made:

Save for the amendment of the order of the court below by the deletion of paragraph 36.1 thereof, the appeal is dismissed with costs including the costs of two counsel.

MML MAYA
JUDGE OF APPEAL

APPEARANCES:

For Appellants:	FH Terblanche SC (JE Smith) Instructed by: Tim du Toit & Co Inc., Johannesburg Phatshoane Henney Attorneys, Bloemfontein
For 1 st Respondent:	EA Limberis SC (A De Kok) Instructed by: Fluxmans Inc, Johannesburg Lovius-Block, Bloemfontein
For Amicus Curiae:	S Budlender Instructed by: Adams & Adams Attorneys, Pretoria Honey Inc, Bloemfontein