

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
Date: 12 December 2014
Status: Immediate

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

The Supreme Court of Appeal handed down judgment today in an appeal from the South Gauteng High Court, Johannesburg. The high court dismissed an application by the appellants (the liquidators of an insolvent company) 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.

The insolvent company had purchased a property prior to its liquidation, which property is operated by the association. It had registered three mortgage bonds over the property in favour of Absa Bank Ltd (Absa), which were made subject to the conditions contained in the deed of transfer. After its liquidation, 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. The purchaser fulfilled its obligations under the agreement and 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 comprising arrear levies.

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 such secured creditors. The association was thus confined to proving its claim as a concurrent creditor in the insolvent estate. The liquidators further contended that the conditions in the title deed merely created a personal relationship between parties to the agreement (being the owner of the property and the association) and does not bind third parties upon liquidation.

The liquidators then 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).

The association and the *amici curiae* (the only recognised representative bodies in the country for homeowners associations and managing agents) argued that the title condition 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. 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 contended 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.

Before this Court, the appeal was heard together with the similar matter of *Willow Waters Homeowners Association (Pty) Ltd & another v Koka NO & others*. The reasons given for upholding the appeal in that matter apply equally to this case. In sum, this Court agreed 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*. As for the relevant title condition, it does constitute a real right that is binding on the insolvent company and the joint 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.

In the result, the appeal fails with costs to follow the result.