IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED ✓

25/02/2013

DATE SIGNATURE

CASE NO: 12/11377

In the matter between:

MONICA GEZINA COWIN N.O. First Applicant

ORIEL RAMPOLOKENG SEKATI N.O. Second Applicant

SILVER TUNNEL INVESTMENTS 7 (PTY) LIMITED

(IN LIQUIDATION) Third Applicant

and

KYALAMI ESTATE HOMEOWNERS ASSOCIATION First Respondent

KYALAMI EQUESTRIAN CENTRE CC Second Respondent

MASTER OF THE HIGH COURT Third Respondent

THE REGISTRAR OF DEEDS, PRETORIA Fourth Respondent

JUDGMENT

MASHILE AJ :

[1] This is an application by which the First and Second Applicants, the joined provisional liquidators of the Third Applicant, seek the following:

[1.1] An order declaring that the provisions of Section 89(5) of the Insolvency Act No. 24 of 1936 are not applicable in accordance with paragraph 2 of the Conditions of the Title under Title Deed T165574/2004 in respect of Kyalami Estate Homeowners Association;

[1.2] An order declaring that Title Condition B.2 (condition) is applicable only to the *inter partes* agreement between the Kyalami Estate Homeowners' Association and the third applicant as the owner of the property and is not enforceable against the liquidator of an estate.

[1.3] An order declaring that the amount due to the First Respondent is a concurrent claim in the estate of the third applicant.

[1.4] An order requiring the Fourth Respondent to register the transfer of the immovable property, notwithstanding the absence of a clearance certificate issued by the First respondent.

[2] The Third Applicant is a company in liquidation that is the registered owner ofPortion 2 of Erf 219, Kyalami Estates Extension 10 Township, Registration Division JR, Gauteng, measuring 1106 square meters and held by Deed of Transfer T28872/2003 ("hereinafter "the property"). The Property is situated in the Kyalami security estate which is currently run and controlled by the First respondent .

[3] The Second Respondent has registered a condition in the title deed of the Third Applicant for the benefit of the First Respondent which is binding on the Transferee and its Successors in title. This condition reads:

> **"Every owner of the erf or any subdivision thereof or any unit thereon as defined in the Sectional Title Act, shall automatically become and shall remain a Member of the Homeowners 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 Homeowners Association.**
>
> **The owner of the erf or any subdivision thereof of any interest therein or any unit 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 Homeowners Association, stating that the provisions of the**

Articles of Association of the Homeowners Association have been complied with.

The terms "Homeowners Association in the aforesaid conditions of title shall mean Kyalami Estates Homeowners Association (Incorporated Association not for gain)."

[4] The essence of the second declaratory sought by the Applicants is that the First Respondent should be classified as a concurrent creditor in the insolvent estate of the Third Applicant. Put differently, the First Respondent's claim should not be part of the costs of the winding up of the Third Applicant.

[5] The third order for which the Applicants pray is that the court must direct the Fourth Respondent to disregard the condition appearing on the title deed of the Third Applicant and register transfer of the property in favour of the purchaser.

[6] The Association of Residential Communities and National Association of Managing Agents are applying to join as Fifth and Fourth Respondents respectively in this matter as amici curiae. Their interest is understandable from the reading of their description below:

"ARC was established with the primary purposes of providing support, best practice and consulting services to the governing bodies of residential estates (including homeowners associations) with the intention of unifying the industry for lobbying on issues relating to residential estates and to assist the industry in achieving internationally and nationally

accepted standards. It is estimated that the governing bodies of approximately 45% of all properties situated within residential estates within South Africa are associated with ARC, and several of the homeowners associations within its membership, including the first respondent in the main application, have been confronted with disputes and litigation relating to the enforceability of title conditions of the type to which the main application pertains.

NAMA was established with the intention of unifying all managing agents of residential communities to promote and advance their interests and those of their clients. NAMA acts as a national representative body in negotiations, accredits the providers of educational courses in respect of the governing bodies managed by its members, conducts regulatory and disciplinary tasks in respect of the industry and makes and revises regulations for the attainment of any of the objectives, particularly those of a professional and ethical nature, of its members. NAMA's members manage the affairs of approximately 13 550 security estates (including both bodies corporate and homeowners associations controlled estates)."

[7] The intervention application by the amici curiae is uncontested in the main because the Applicants's condition that the amici curiae must not broaden the scope of the relief sought in the main application was honoured. Accordingly the First and Second respondents having given their consent and the Third and Fourth Respondents not opposing the joinder application the court ruled that the amici curiae be so joined.

[8] Now that all the preliminary matters have been sorted out, the issues to be decided are:

[8.1] Is the condition in the title deed of the Third Applicant only enforceable against the Third Applicant alone? In other words, is it a real right or a personal right?

[8.2] Is the First Respondent to be regarded as a concurrent creditor in the insolvent estate of the Third Applicant?

[8.3] Should the Fourth Respondent register transfer of the property in the name of the purchaser compliance with the condition in the title deed of the Third Applicant notwithstanding?

REAL OR PERSONAL RIGHT

[9] The distinction between a real and a personal right is that the former is absolute and can triumph against the whole world while the other cannot. A real right is registerable and may be enforced against all successors in title. A personal right on the other hand may only be enforced against a specific person.

[10] The discriminationofthe one right from the other can be done with relative ease. A complex topic lies in determining whether the one right constitutes the other. There is an overabundance of literature on the subject but most significant is the pronouncements made by other courts on the matter. In Cape Explosive Works

Ltd v Denel (Pty) Ltd 2001 (3) SA 569 (SCA)the court set out two requirements to establish whether or not a right in respect of land is real.

[10.1] the intention of the party who creates the real right must be to bind not only the present owner of the land, but also his successors in title; and

[10.2] the nature of the right or condition must be such that the registration of it results in a subtraction from dominium of the land against which it is registered.

[11] What was then the intention of the Second Respondent in registering the condition in favour of the First Respondent. It appears that the intention could not have been any other but to create a right that could prevail against the whole world. In this regard I agree with Counsel for the amici curiae that if the intention was not to create such a right then a simple contract between the parties would have sufficed. In addition, one must not lose sight of one of the objectives of registering this condition - to elevate homeowners associations to the level of bodies corporate and municipalities, which are protected by legislation. The condition ensures that residents of homeowners associations are not burdened with the costs of the owner of an insolvent estate.

[12] Turning to the second requirement, it is indubitable that the result of the registration of the right restricts the owner from dealing with the land in the manner in which any other owner with full dominium would. The restriction does not only apply to the present owner but to his successors in title. His ownership is therefore limited by the condition in the title deed.

[13] The Applicants argue that one must separate sale and registration of transfer of the property to the transferee. The owner can sell, so the argument goes, but is merely prohibited from registering transfer into the name of the transferee prior to compliance with the condition in the title deed. If an owner is incapable of passing ownership free of encumbrances then his ownership is indeed restricted. See in this regard the case **of Pearly Beach Trust v Registrar of Deeds 1990 (4) SA 614 (C).**

[14] Ownership of land is accomplished through registration of transfer. The causa for such registration of transfer could be triggered by a number of things such as sale, donation, etc. A condition that an owner cannot pass ownership to the next person unless there is compliance with a condition such as in the present case must be a subtraction in dominium because the owner cannot deal with it freely like any other owner of property.

[15] The argument of the Applicants must be rejected because one must understand the sale or donation in the case of land is interwoven with registration of transfer. Contrast this with a sale or donation of any other thing. Ownership would occur immediately upon the exchange of money in the case of the latter.

[16] If a successor in title were to decline to observe the restriction he would not acquire ownership of the land. The condition that ownership cannot pass to the next person unless there has been compliance with the condition will always remain on the land. It is therefore a subtraction in the dominium of the land.

[17] If transfer of the land is successfully registered the transferee will acquire it subject to the condition. Understood in this sense the right is enforceable against the whole world. I am therefore satisfied that the right is not personal but real and it is accordingly registerable.

IS THE FIRST RESPONDENT A CONCURRENT CREDITOR IN THE ESTATE OF THE THIRD APPLICAANT

[18] The Applicants assert that the First Respondent is a concurrent creditor in the insolvent estate of the Third Applicant while the First Respondent contends that in addition to being a concurrent creditor it is also entitled in terms of the condition in the title deed of the Third Applicant to claim from the costs of the realisation of the insolvent estate as envisaged in Section 89(1) of the Insolvency Act 24 of 1936. The former arises on account of the Third Applicant's membership with the First Respondent while the latter occurs as a result of the registered condition.

[19] The argument is in essence that the First Respondent has a choice whether to lodge and prove its claim as a concurrent creditor or to claim in terms of the condition in the title deed. This right to claim from the costs of the realisation of the property does not elevate the First Respondent to the status of a secured or preferred creditor in the concursuscreditorum. This must be the situation especially if one regards, as I do, the distinction that the Applicants draw between bodies corporate and municipalities on the one hand and home owners associations on the other as unwarranted.

[20] Accepting that there is no distinction that one should make between Municipalities and bodies corporate on the one hand and homeowners associations on the other, as I jusdt did, in the case of **City of Johannesburg v Even Grand 6 CC 2009 (2) SA 111(SCA) at par 14** it was held:

> ***"Section 118(1) of the Systems Act gives the appellant the right to veto the transfer of property until such time as the rates and other amounts due in respect of the period of two years preceding the date of application for the certificate have been fully paid. In the result the appellant's claim is indeed in effect given a preference over other creditors. However, the section does not create any preference in favour of a municipality when it comes to the distribution of the assets or the proceeds of the assets in the estate. It provides a municipality with adifferent remedy to the one provided by s 118(3)."***

[21] Again,accommodating the argument of the First Respondent that the right to claim from the costs of the realisation of the property of the Third Applicant is comparable to bodies corporate and municipalities,Section 15B(3) of the Sectional Titles Act No. 95 of 1986 stipulates:

"The Registrar of Deeds shall not register the transfer of a unit in a sectional title scheme or an undivided share therein unless there is produced to him a conveyancer's certificate confirming that as at date of registration the body

corporate has certified that all monies due to the body corporate in respect of the said unit have been paid or provision has been made to the satisfaction of the body corporate for the payment thereof."

[22] A similar provision but in the context of municipalities is to be found in Section 118(1) of the Systems Act which reads:

> *"Aregistrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate-*
>
> *(a) issued by the municipality or municipalities in which that property is situated; and*
>
> *(b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid."*

[23] The position is that bodies corporate and municipalities are statutorily authorised to veto registration of transfer unless the transferor exhibits a certificate to the Registrar of Deeds as proof that all monies due to the body corporate or the municipality have been settled. This position does not putbody corporates or

municipalities above all other creditors in the concursus creditorum but they are by virtue of legislation allowed to veto registration of transfer until payment of what is due to them has been made.

[24] Homeowners association haveacquired similar status by the registration of the condition in the title deed of their members who are in the same position as the Third Applicant. The functions and purpose of homeowners associations are indistinguishable from those provided by municipalities and body corporates.

[25] It will indeed be unconscionable to draw a distinction when it is obvious that the role that homeowners associations play is exactly similar to those of municipalities and body corporates. Traditionally townships were created and run by municipalities and when the concept of sectional title ownership caught up with South Africa a need to establish bodies corporate arose.

[26] For a number of years sectional title form of ownership was perceived as a viable management system that could run parallel to the township form of ownership. However it soon became apparent that with the stagnation of township development and that sectional titles were serving a different market, a need to have a parallel system to township development soon crept in and with it came a management system to run them and this is the homeowners association.

[27] Security estates are private initiative and since laws normally lag behind developments in most instances, the legislature may still be looking at passing legislation to regulate the position of homeowners associations. One must be quick to add that if the current homeowners'association management kind of system works without any problems the legislature may be content to leave matters as they are. If the legislature does this it will not mean that it wants residents within security estates such as the First respondent to be vulnerable to absorb costs that should otherwise be for the insolvent estates but it will be a recognition that they have an efficient management system with which the legislature sees no need to interfere.

SHOULD THE FOURTH RESPONDENT REGISTER TRANSFER OF THE PROPERTY IN THE NAME OF THE PURCHASER COMPLIANCE WITH THE CONDITION IN THE TITLE DEED OF THE THIRD APPLICANT NOTWITHSTANDING?

[28] The Applicants have approached this court to declare that the Registrar of Deeds should not require a clearance certificate from the First and Second Applicants prior to the registration of the Third Applicant's property. Properly understood the Applicants are asking this court to disregard the provisions of Section 20(1)(A) of the Insolvency Act No. 24 of 1936 which provides:

"The effect of the sequestration of the estate of an insolvent shall be-

(a) to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him."

[29] If the position is as stated in the aforesaid section, the effect of the insolvency of the Third Applicant is that upon the occurance of insolvency the Master acquired the property with all restrictions associated with it. Similarly the trustees and / or liquidators acquired it subject to all those encumbrances. Declaring that registration of the property should take place free of the burdens on the property is tantamount to saying that the Master passed on to the liquidators more rights than he himself had. Needless to state that this goes contrary to the general rule that an owner of property cannot pass more rights than he himself has. See in this regard **Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CCAnd Others 2011 (2) SA 508 (SCA) at par 26**. The argument of the Applicants to the contrary must for that reason fail.

[30] The amici curiae maintain that the right held by the First Respondent in the property of the First Applicant is a real right. Failure to recognise it will be tantamount to arbitrary deprivation of property, which will constitute a violation of Section 25 of the Constitution of the Republic of South Africa (Constitution).

[31] Section 25(1) of the Constitution stipulates:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

Broadening the definition of the word, property, mentioned in Section 25(1) above Section 25(4)(b) of the Constitution reads:

> ***"For the purposes of this section-***
>
> ***(b) property is not limited to land."***

[32] In order to ensure that this court observes Section 25 of the Constitution the amici curiae argues that the court must take into account the provisions of Section 39(2) of the Constitution, which requires that when interpreting any legislation, every court must promote the spirit, purport and objects of the Bill of Rights. No court has discretion not to think about and exercise this duty. This is so even if a litigant has failed to rely on section 39(2).

See in this regard, **Phumelela Gaming and Leisure Limited v Grundlingh and Others 2007 (6) 350 (CC) at par 26 – 27**

[33] Three duties have been articulated by the Constitutional Court and these are:

[33.1] If a provision is reasonably capable of two interpretations and one renders it unconstitutional and the other not, courts are under a duty to adopt the interpretation that would render the provision congruent with theConstitution.The amici curiaerelies on the following extract from the case of **Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC):**

".....judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."

[33.2] **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd andAnother 2009 (1) SA 337 (CC)**Pronounced the secondobligation of judicial officers that i*f a provision is reasonably capable of two interpretations,* section 39(2) requires the adoption of the interpretation that "*better*" promotes the spirit, purport andobjects of the Bill of Rights. This is so even if neither interpretation would render the provision unconstitutional.

[33.3] Thirdly, where a judicial officer is faced with an interpretation of legislation that limits fundamental rights and one that does not, it is required to adopt the latter. See in this respect **National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another 2003 (3) SA 513 (CC).**

[34] The court is urged to adopt an interpretation of the Insolvency Act that will not result in the deprivation of property of the First respondent.I am persuaded and satisfied that in light of the conclusion that I have reached regarding whether or not the right of the First Respondent is personal or real, embracing the Applicants' argument on the interpretation of the Insolvency Act will no doubt result in the annihilation of the First Respondent's real right.

[35] The conclusion above is inescapable when one considers the test of deprivation as formulated in the case of **First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC),**

> **"*A deprivation of property occurs where there is* "any interference with the use, enjoyment or exploitation of private property." *It should suffice to state that this test has been approved and adopted in subsequent cases."***

[36] In conclusion therefore I hold that:

[36.1] the provisions of Section 89(5) of the Insolvency Act No. 24 of 1936 are applicable in accordance with paragraph 2 of the Conditions of the Title under Title Deed T165574/2004 in respect of Kyalami Estate Homeowners Association;

[36.2] The condition for the production of a clearance certificate that all rates and taxes have been paid prior to registration of transfer by a transferor who is a member of the First Respondent is enforceable against the owner of the unit situated in the security estate of the First Respondent and any other person.That is to say, the nature of the right held by the First Respondent in the property of the Third Applicant is real and can prevail against the whole world;

[36.3] A recognition of the First Respondent's real right does not confuse or change the status of the First respondent in the concursuscreditorum.The First Respondent remains a concurrent creditor. However, it has a choice whether to lodge and prove its case in the concursuscreditorum or exercise the right afforded to it by the registered condition in the property of the Third Applicant to claim from the costs of realisation of the property; and

[36.4] A disregard of the requirement that any member of the First Respondent wishing to sell and to register transfer must exhibit proof that all rates and taxes owed to the First Respondent have been paid will amount to a contravention of Section 25 of the Constitution in that it will result in an arbitrary deprivation of property.

[37] In the premises the application fails and I make the following order:

1. The application is dismissed with costs;

2. Such costs to include those of two counsel.

BA MASHILE

ACTING JUDGE OF THE HIGH COURT