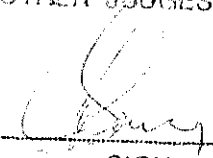


IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA
NORTH GAUTENG, PRETORIA

Case Number 20361/12

In the application between	DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE YES/NO (2) OF INTEREST TO OTHER JUDGES YES/NO (3) REVISED ✓
JERRY SEKETE KOKA N.O.	DATE <u>19/06/2013</u> SIGNATURE  First Applicant
CATHERINA ELIZABETH OOSTHUIZEN N.O.	Second Applicant
TANIA OOSTHUIZEN N.O.	Third Applicant
and	
WILLOW WATERS HOME OWNERS ASSOCIATION (PTY) LTD	First Respondent
THE REGISTRAR OF THE DEEDS OFFICE, PRETORIA	Second Respondent
FIRSTRAND BANK LIMITED	Third Respondent
ASSOCIATION OF RESIDENTIAL COMMUNITIES CC	First <i>Amicus Curiae</i>
NATIONAL ASSOCIATION OF MANAGING AGENTS	Second <i>Amicus Curiae</i>

JUDGMENT

BAM AJ

1. The applicants are the joint trustees in the insolvent estate of C P and L van der Walt. One of the assets of the estate is an immovable property, a partly erected dwelling, situated at Van Riebeeckpark Extention 26 Township, Registration Division IR, Province of Gauteng, a residential township established in terms of the Articles of the first respondent, a Homeowners Association, incorporated in terms of the provisions of section 21 of the Companies Act, No 61 of 1973. The third respondent is the entity holding a mortgage bond over the property. The *amici curiae*, interested parties, were granted leave to intervene. The parties are represented as follows: Mr Terblanche SC with Mr Meintjes for the applicants; Mr de Koning SC with Mr Cowley for the first respondent; and Mr Budlender with Mr Ferreira for the *amici*.

2. In terms of a written agreement between the insolvents and the first respondent, the insolvents, subject to certain conditions, became members of the first respondent. The property was duly registered in the names of the insolvents.
3. The Deed of Transfer incorporated the following conditions:

Condition 5B:

"(i) Every owner of the erf, or any subdivision thereof, or any person who has an interest therein shall become and shall remain a Member of the Home Owners Association and be subject to its constitution until he/she ceases to be the an owner as aforesaid. Neither the erf nor any subdivision thereof nor any interest therein shall be transferred to any person who has not bound himself/herself to the satisfaction of such Association to become a member of the Home Owners Association.

(ii) The owner of the erf or any subdivision thereof, or any person who has an interest therein, shall not be entitled to transfer the erf or any subdivision thereof or any interest therein without a clearance certificate from the Home Owners Association that the provisions of the Articles of Association have been complied with."

4. It is undisputed that the insolvents, before their sequestration, owed the amount of R426 319 83, for outstanding levies and penalties, in terms of the provisions of the aforementioned contract, to the first respondent, and that the said amount was, and still is, due and payable. The property was subsequently, after sequestration, valued for forced sale purposes at R700 000 00.
5. The amount due is described, in terms of the said contract, as a "*debt*". Pertaining to the effect of a Member failing to pay a "*debt*", the relevant clause of the "*ARTICLES OF A COMPANY*" of the first respondent, provide as follows:

Clause 46:

"No Member shall transfer his Unit until the Board of Trustees under the hand of one of its members has certified that the Member has at date of transfer fulfilled all his financial obligations to the Association. Such consent shall not be withheld unless:-

46.1 Such member is indebted to the Association in any way in respect of levies or other amounts which the Association may in terms of these presents be entitled to claim from him;

46.2 The proposed transferee has agreed to become a Member of the Association;

46.3 Such Member remains in breach of any of the provisions of these presents or any rules after notice from the Trustees requiring him to remedy such breach."

6. The two points *in limine* raised on behalf the first respondent in its heads of argument were abandoned and require no further attention.
7. On the merits of the matter, based on the aforementioned conditions, it was first respondent's main contention that the transfer of the property in the name of any new owner cannot be effected without the consent of the first respondent. The first respondent informed the applicants that the conditions of sale of the property had to include that the new owner must accept and sign the Body Corporate Rules. It further demanded payment of all outstanding levies and penalties before it would have been prepared to consent to the transfer of the property. In this regard the first respondent relied on, what it is contended to be, a real right registered in terms of the bond conditions.
8. It was contended by the first respondent that the levies and penalties are "*akin to tax*", as provided for in section 89 of the Insolvency Act, Act 24 of 1936 (the "*Act*"), and therefore that the first respondent is preferentially entitled to payment of the outstanding amount, before first respondent would be obliged to consent to the transfer of the property after the sale in execution.
9. This approach by the first respondent prompted the applicants to lodge this application for a declaratory order with the following contents:
 1. *The claim by the first respondent in respect of outstanding levies and penalties against the insolvent estate does not constitute a claim in terms of section 89 of the Insolvency Act, Act 24 of 1936.*
 2. *That the second respondent may effect transfer of the immovable property in question, held by a mortgage deed, without any consent of the first respondent*

10. The first respondent opposed the application. The *amici curiae* supports the first respondent. The third respondent withdrew its notice to oppose.

11. During argument, Mr Terblanche moved that the order sought by the applicants, as submitted in the applicants' supplementary heads of argument, be amended as follows:
 1. *That a declarator issue in the following terms:*
Title condition 5B(ii) in Title Deed 06/99802 in favour of Willow Water Homeowners Association, No 96/99802 (an association incorporated in terms of Section 21 of the Companies Act, No 61 of 1973, as amended), constitutes a personal right.
 2. *The Second Respondent may effect transfer of the immovable property from the insolvent estate of Christiaan Petrus van der Walt (Master's Ref No. T1229/2009 and Lorette van der Walt (Master's Ref No T1228/0090 and more fully described as Portion 7 of Erf 2461, Van Riebeeckpark Extention 26 Township, Registration Division IR, Province of Gauteng, held by Deed of Transfer T99802/2006, without any consent and/or certificate as envisaged in Title Condition 5B(ii) of the First Respondent.*
 3. *The First Respondent and First and Second amici curiae pay the costs of this application, jointly and severally, the one to pay the other to be absolved – which costs shall include the costs occasioned by the employment of two counsel (including senior counsel.)*

12. It need to be recorded that in regards to the proposed amendment of the order, Mr de Koning, in reply, objected on the basis that the proposed amendment is not substantiated by the applicants in their founding affidavit. Apparently the main concern of the *amici curiae* was the costs order sought against them. Mr de Koning further pointed out that the applicants, for the first time in their replying affidavit, contended that the contract between the insolvents and the first respondent was an "executory" contract and that the applicants became entitled to an election to abide the agreement or not. In this regard Mr de Koning submitted that the applicants were bound by the contract and that they were obliged, in terms of the contract to tender complete performance of all the obligations of the insolvents. In this regard Mr de Koning relied on *Cohen NO v Verwoerdburg Town Council 1983(1) 334 (AD)* at 352 B–C.

13. The real problem in this matter turns upon the question whether the applicants should be permitted to transfer the property in question without the consent of the first respondent, and thus, without the required clearance certificate issued in terms of Title Condition 5(B)(ii). It involves the issue whether the right first respondent claimed to have is a real right or a personal right.

14. The first respondent clearly indicated that the consent to transfer the property would not be granted if the outstanding levies and penalties had not been paid. The issues in regards to the relief sought were, in my view, properly addressed and ventilated in the papers and the arguments of counsel. At no stage could there have been any misunderstanding what the relief sought entailed. The amended relief sought by the applicants is, in my view, nothing more than a refined consolidation of a practical solution to the problem. See *Trinity Asset Management (Pty) Ltd & Others v Investec Bank Ltd and Others 2009(4) SA 89 SCA*.

15. The first respondent's contention is that the applicants, failed to satisfy the requirements for a declaratory order. Both the applicants and the first respondent relied on the *Trinity Asset Management* case, *supra* in this regard. In the said case the provisions of section 19(1)(a)(iii) of the Supreme Court Act, No 59 of 1959, were discussed, and at 106, par [62], the requirements for a declaratory order, quoted as follows, were approved:

"(T)he two stage approach under the subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an "existing, future or contingent right or obligation". At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise this discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

My eventual conclusion will reflect my views in this respect.

16. In order to determine whether the rights the first respondent derived from the contract in question is personal or a real right, it appears that, for a real right, as stated in *Cape Explosive Works Ltd v Denel (Pty)Ltd 2001(3) SA 569 (SCA) at 578 D-E*, par [12], two requirements have to be complied with:

"In terms of s 3 of the Deeds Registries Act all real rights in respect of immovable property are registrable. To determine whether a particular right or condition in respect of land is real, two requirements must be satisfied:

- (1) the intention of the person who creates the real right must be to bind not only the present owner of land, but also his successors in title; and*
- (2) the nature of the right or condition must be such that the registration of it results in a 'subtraction of dominium' of the land against which it is registered."*

17. Regarding the first requisite, with reference to what is stated in Clause 46 of the "Articles", it was conceded by the applicants that those conditions also bind any subsequent purchaser to become a member of the association and that he/she should comply with the conditions of the association from the time he/she becomes a member.

In respect of the outstanding levies and other related debts, however, it was submitted that the association could never have intended that any subsequent purchaser should be held liable for any outstanding levies and penalties and that that condition only binds the present owner and not any subsequent owner. This condition therefore constituted nothing more than a personal right against the insolvents, and the applicants, in this matter.

18. Regarding the second requisite Mr Terblanche referred to what was stated by Professor vd Walt (THRHR 92(55) *supra*, page 180:

"The test boils down to the question whether a certain right or obligation amounts to a diminution of the ownership of land. If it does, the right in question is a real right, but if it merely affects the owner in his personal capacity without diminishing the ownership as such the right is personal."

It follows, so it was submitted by Mr Terblanche, that if the condition that the outstanding levies and penalties had to be paid by a present owner, and not any subsequent owner, there can be no "*subtraction of dominium*" of the property and that such a condition creates nothing more than an obligation that the insolvents, and therefore the applicants, should pay the outstanding amount. The payment of the levies and other related amounts, argued Mr Terblanche, related to the member in his capacity as member and the reference to "*financial obligations*" cannot be construed to mean anything more than personal obligations. It was further submitted that the title conditions in question, therefore, did not at all relate to the enjoyment of the land.

19. In this respect the applicants referred to the following cases: *Lorentz v Melle and Others* 1978(3) SA 1044 (T); *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) 391 SCA par [10] and *National Stadium South Africa (Pty) Ltd and Others v Firststrand Bank Ltd* 2011(2) SA 157 SCA.

20. Mr Terblanche emphatically relied on the case of *Lorentz v Melle, supra*, a decision of the full bench of this division, where the Court ruled that the fact that a profits clause contained in the contract between the parties pertaining to sharing of profits, after sale of certain property, was a personal right and did not confer any real right, even after registration thereof. That right did not restrict the rights of ownership and/or enjoyment of property in a physical sense. The fact that the profits clause referred to in that case was registered, was found not to have resulted in an encumbrance (subtraction of dominium) of the land.

The Court stated as follows at 1055E-F:

"In the result I am of the opinion that that part of the notarial deed under consideration, namely the township clause, confers only personal rights, which even on (their incorrect) registration, were not capable of becoming and did not become a praedial servitude."

And at 1059G:

"I have already rejected the contention that the registration of the deeds resulted in the township clause becoming a real encumbrance against the land."

21. It is the first respondent's argument that the right in question vested in it in terms of the aforementioned Title Condition 5(B)(ii), and that that right diminished the rights of ownership of the insolvents to the extent that the insolvents were not entitled to transfer the property without a clearance certificate issued by the first respondent. This right, it was contended, is indeed a real right directly related to the property. It was further submitted by the first respondent that the applicants did not acquire any better rights than what the insolvents originally had and that the applicants were bound by the said terms. It was also contended by the first respondent that the said right is in any event a real right entrenched in Section 25(1) of the Constitution.

22. The contention on behalf of the first respondent that the right in question embodied a real right was based on the discussion of personal and real rights in *The Law of South Africa*, 1st re-issue, Vol 27 paragraphs 234 – 240. It was further argued by Mr de Koning that the *"factual matrix (or context) against which the condition found its way into the title deed and "Giving a commercially sensible meaning to the*

title conditions concerned” should be heeded in deciding the question. In the latter instance Mr de Koning referred to *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund 2010 (2) 498 SCA* par [13] where the following appears: *“The principle that a provision in a contract must be interpreted not only in context of the contract as a whole, but also to give it a commercially sensible meaning, is now clear.*

23. The question in this matter whether the conditions in the Title Deed, Condition 5(B), constitute a real right, which goes to the heart of the problem, is not easy to answer. This is where the parties are at odds. It is common cause that there are no *numerous clauses* of real rights in our law. This Court was also referred to, *inter alia*, following decisions which specifically dealt with the issue.

In the *Cape Explosive* case *supra*, the Supreme Court of Appeal dealt with a matter where the restrictions in question in that case were directly related to the use of property. The Court found that the rights in that case were real rights.

In the *National Stadium* case *supra* it was found that the right in the title condition to name a certain soccer stadium constituted a real right.

In the *Cohen NO v Verwoerdburg* case *supra*, at 346 D-G, the Court referred with approval to earlier decisions, and stated the following:

“it is relevant in this regard to point out that it has been held that a municipality claiming road rates which were due in terms of a statute did not, in the absence of any provision in that respect, enjoy any preference and ranked as a concurrent creditor in the insolvent estate of the owner.”

24. Regarding the nature of contractual rights, whether the right is real or personal, Professor AJ van der Walt, professor of Private Law, University of South Africa (as he then was), in an article on Personal and Limited Real Rights, published in THRHR 1992(55), referred to by Mr Terblanche, stated the following pertaining to the question whether a right is personal or real (Page 179):

“In this context the investigation usually entails three main questions, namely whether the right was intended to be real; whether the contract actually constitutes a right that is essentially real; and whether public policy allows for such a real right to be created.

In the rest of this article it is indicated that these three questions constitute a recurring theme, which might be regarded as the core of the theme. It is also suggested that this theme should be judged with specific reference to the essential distinction between contractual obligations that create limited real rights in land when properly constituted, and contractual obligations which create essentially personal rights that merely resemble such limited real rights.”

25. The first respondent further contended that it should have similar protection than bodies corporate as provided for in section 15B(3)(a)(1)(aa) of the Sectional Titles Act, No. 95 of 1986. This section reads as follows:

"The Registrar shall not register a transfer of a unit or of any undivided share therein, unless there is produced to him---

(a) a conveyancer's certificate confirming that as at date of registration---

(i)(aa) if a body corporate is deemed to be established in terms of section 36(1), that body corporate has certified that all monies due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof;"

26. It is of importance to note that in *First Rand Bank Ltd v Body Corporate of Geovy Villa 2004(3) SA 362 SCA*, par[22], the Court discussed the provisions of section 15B(3)(b) of the Sectional Titles Act, No 95 of 1996, which provides for a similar protection than what the first respondent claims it should have, and remarked as follow:.

"If the owner of a unit in a sectional title development is sequestrated or liquidated the statute in effect creates as against the insolvent estate a preference in favour of a body corporate and that payment of outstanding levies is treated as part of the 'cost of realisation' envisaged by s 89(1) of the Insolvency Act 24 of 1936. The fact that the debt to the body corporate is satisfied as part of the process of realisation produces the same result as if the rights conferred by an embargo provision were preferent in the strict sense."

27. It was however common cause that the first respondent, as Home Owners Association, is not covered by the provisions of Sectional Titles Act in that the first respondent is not a body corporate. In this regard it was submitted on behalf of the applicants that the protection of Bodies Corporate cannot be extended to cover home owners associations. I agree with this submission. This Court does not have the power or jurisdiction to do so. Similar protection in law of home owners associations falls squarely within the domain of the legislature.

28. It was further common cause between the parties that if the conditions regarding the consent by the first respondent to transfer the property is a real right, the applicants stand to lose the application and the first respondent will in law be entitled to refuse to grant its consent until the outstanding debt had been paid. It follows that the claim for payment of the levies and penalties will then be elevated to a preferent claim, in the same category as, for example, taxes, as contemplated by Section 89 of the Insolvency Act.
29. The first respondent also raised a constitutional point contending that the relief sought by the applicants amounted to arbitrary deprivation of property, guarded against by section 25 of the Constitution, Act 108 of 1996. The section reads as follows:
 “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”
30. In this regard Mr Budlender, supporting the first respondent’s contentions, referred to the recent decision of *National Credit Regulator v Opperman and Others* 3013 (2) SA 1 CC, in which case it was confirmed that no law may permit arbitrary deprivation of property.
24. The first respondent’s reliance on the provisions of section 25 of the Constitution must however be considered against the backdrop whether there will be an arbitrary deprivation where the provisions of the Insolvency Act are applicable and mandatory. In terms of the Insolvency Act the applicants are obliged to administer the insolvent estate, and, accordingly, to sell the property. The administration of an insolvent estate is governed by the Insolvency Act, subject only to any applicable overriding provision of the Constitution, our supreme law.
25. I was referred to a another recent judgment under case no. 12/11377, handed down by Mashile AJ, in the South Gauteng High Court, in the matter of *Cowin NO & Others v Kayalami Estate Homeowners Association & Others*, which judgment confirms the submissions made by the first respondent, and the *amici curiae*, in regards to the issue whether the right in question is a real right. The applicants contended that the learned judge in that matter erred in arriving at the conclusion favouring the first respondent’s submissions.

26. In *Cohen NO v Verwoerdburg Town Council, supra*, the Court stated the following:
(at 346 G-H)

"The order of preference in s 99 of the Insolvency Act, includes, as we have seen, statutory obligations. Had it been intended to give preference to clause (1)(3) type conditions

[(i) to submit a detailed scheme to the Council for the construction of storm water works and streets; and (ii) on approval of the scheme by the Council, to carry out the scheme at its own expense on behalf of and to the satisfaction of the Council] this would have been stated there. Not all the amounts referred to s 99 are amounts owing to the State. For instance, s 99(1)(f) refers to amounts to a medical and pension fund. Pneumoconiosis payments are also referred to in the section. All these preferences are obviously for the public benefit"

At 347 A-C.

"What the Council is seeking is, in effect, to obtain a preference in respect of an obligation which became due prior to the winding-up order. Its contentions are contrary to the well-established principle that a winding-up order, like a sequestration, order "crystalizes the insolvent's position" and that "the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration" and that "the claim of each creditor must be dealt with as it existed at the issue of the sequestration (or winding-up) order"

27. The applicants contended that they are compelled, in terms of the provisions of the Insolvency Act, to administer the insolvent estate. This included the applicants' duties, so it was contended, of realising all movable and immovable property belonging to the estate. The powers, duties and obligations of the applicants, in their capacity as trustees, are provided for in Section 89 of the Insolvency Act. The relevant sub-sections read as follows:

Sub-section (1):

"The cost of maintaining, conserving, and realizing any property shall be paid out of the proceeds of that property, if sufficient, and if insufficient and that property is subject to a special mortgage, landlord's legal hypothec, pledge, or right of retention, the deficiency shall be paid by those creditors, pro rata, who have proved their claims and who would have been entitled, in priority to other persons, to payment of their claims out of those proceeds if they had been sufficient to cover the said cost and those claims. The trustee's remuneration in respect of any such property and a proportionate share of the costs incurred by the trustee in giving security for his proper administration of the estate, calculated on the proceeds of the sale of the property, a proportionate share of the Master's fees, and if the property is immovable, any tax as defined in sub-section (5) which is or will become due thereon

in respect of any period not exceeding two years immediately preceding the date of the sequestration of the estate in question and in respect of the period from that date to the date of the transfer of that property by the trustee of that estate, with any interest or penalty which may be due on the said tax in respect of any such period, shall form part of the costs of realization."

Sub-section (4):

"Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any tax as defined in sub-section (5) due thereon has been paid, that law shall not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if he has paid the tax which may have been due on that property in respect of the periods mentioned in sub-section (1) and no preference shall be accorded to any claim for such a tax in respect of any other period."

Sub-section (5):

"For the purposes of sub-sections (1) and (4) "tax" in relation to immovable property means any amount payable periodically in respect of that property to the State or for the benefit of a provincial administration or to a body established by or under the authority of any law in discharge of a liability to make such periodical payments, if that liability is an incident of the ownership of that property."

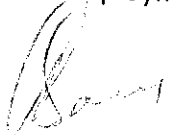
28. It is the applicant's contention that the effect of sequestration is to establish a *concursum creditorum*. See *Walker v Syfret* 1911 AD 141, at 160. That is trite. Any preferent claim will need to be substantiated in law, either by the provisions of the Insolvency Act or the existence of real right in accordance with the Common Law.
29. It was further contended by the applicants that a trustee is not obliged to give effect to a registered contractual pre-emptive right, and for the liquidator to abide by the contract in question, would be to elevate a pre-sequestration unsecured creditor to a post sequestration preferent creditor.

30. It was also submitted on behalf of the first respondent that the order sought by the applicants will result in an arbitrary deprivation of the property, as alluded to above. The reasons for this submission, referred by Mr Terblanche as sentimental reasons, can be summarised as follows:
- (i) The purpose of the submission can be found in estate life. The order will have the affect that the motivation and existence of the condition that a home owners association may control the affairs of the estate be ignored;
 - (ii) A restriction will be placed on the first respondent to have the right to be paid, amongst others, levies. That will have the effect that trustees of insolvent estates will be able to lay claim on unencumbered property;
 - (iii) The applicants did not state what the conditions of sale of the property would be. It follows that any would be purchaser would not be subject to the conditions of the first respondent.
31. The aforementioned reasons submitted on behalf of the first respondent lose sight of the fact that granting of the order sought will not affect or distract from the fact that the sale will remain subject to the condition 5(B) of the contract, defining the relationship, and thus the rights and obligations of the parties, between the new purchaser and the first respondent. Anybody purchasing the property will be personally subject to the conditions in question and will have to abide by the rules of the first respondent. The fact remains that the whole issue turns upon the realization of the property and not the conditions regulating possession or occupation thereof.
32. With regard to Mr de Koning's submission that a commercially sensible meaning should be given to the conditions, it appears that I would indeed be "*commercially sensible*" to grant the relief sought by the applicants, in that no other practical solution to the problem seems to be possible. The situation has developed into a deadlock situation where the applicants are apparently unable to pay the first respondent before transfer of the property can be effected. The present situation has the effect, to use the wording in *Cohen NO v Verwoerdburg Town Council, supra*, at 347 E-G, that it will:
- "delay the winding up for an indefinite period";*
"disturb the process of winding up and the distribution of assets";
"distort the order of preferences for which the law provides"; and
"Prejudice the concurrent creditors (and possibly others)."

33. After having considered all the aspects and contentions alluded to above, and the submissions of counsel, I have arrived at the conclusion that the right in question is indeed a personal right in that it does not subtract from the dominium of the property. The said rights are personal rights binding the present owner of the property, and therefore the applicants. The first respondent's right to refuse to give its consent to the transfer of the property was not elevated to a real right, even upon registration. In this regard this Court is in any event bound by the full bench of this division's decision in *Lorentz v Melle, supra*, in which matter a similar problem was discussed and ruled upon. For these reasons I am also unable to agree with the result in the *Cowin v Kayalami* case *supra*.
34. As stated above the first respondent's reliance on the provisions of Section 25 of the Constitution is, in my view subject to the mandatory provisions of the Insolvency Act. There is no provision in any other act, including the Constitution, regulating the administration of estates. The argument that the first respondent will be arbitrarily deprived of the property is therefore without substance.
35. Regarding the question whether the applicants are entitled to a declaratory order as prayed for, I am of the opinion that the applicants have indeed established that they have the right to realize the property and to transfer it, without the consent of the first respondent, to any prospective purchaser. The applicants have, in my view, complied with the requisites stated in the Trinity Asset Management case, *supra*. The submission on behalf of the first respondent that the application for a declaratory order is disguised as a final interdict, is therefore rejected.
36. Regarding the issue of costs, Mr Terblanche submitted that the *amici curiae* should be ordered to pay the costs of the application with the first respondent, based thereon that the *amici* actively associated themselves with the first respondent's case.
- Mr Budlender countered this submission in contending that the *amici* merely endeavoured to assist the Court. In this regard Mr Budlender referred to *inter alia* the case of *Hoffman v South African Airways 2001(1) SA 1 CC* at par [63].
- Although the impression was created that the *amici* vigorously supported the first respondent, the *amici* were surely entitled to elect which party to support. Accordingly I am not of the opinion that a vigorous support by the *amici* should, in the circumstances, merit a costs order against them.

37. Accordingly the application succeeds and the following order is made.

1. A declaratory issue in the following terms:
Title condition 5B(ii) in Title Deed 06/99802 in favour of the Willow Waters Homeowners Association, No 96/19651/08, (an association incorporated in terms of Section 21 of the Companies Act, No 61 of 1973, as amended) constitutes a personal right.
2. The Second Respondent may effect transfer of the immovable property from the insolvent estate of Christiaan Petrus van der Walt (Master's Ref No. 1229/2009) and Lorette van der Walt (Masters Ref No. T1228/0090) and more fully described as Portion 7 of Erf 2461, Van Riebeeckpark Extension 26 township, Registration Division IR, Province of Gauteng, held by Deed of Transfer T99802/2006, without any consent and/or certificate as envisaged in the Title Condition 5(B)(ii) of the First Respondent.
3. The First Respondent is ordered to pay the costs of the application, consequent upon the employment of two counsel – including the costs of senior counsel.


A J BAM ACTING JUDGE OF THE HIGH COURT

13 June 2013