THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 768/2013

In the matter between:

WILLOW WATERS HOMEOWNERS ASSOCIATION (PTY) LTD **Appellant**

and

JERRY SEKETE KOKA NO **First Respondent**
CATHERINA ELIZABETH OOSTHUIZEN NO **Second Respondent**
TANIA OOSTHUIZEN NO **Third Respondent**
REGISTRAR OF DEEDS, PRETORIA **Fourth Respondent**
FIRSTRAND BANK LIMITED **Fifth Respondent**

And

ASSOCIATION OF RESIDENTIAL COMMUNITIES CC **First Amicus Curiae**
NATIONAL ASSOCIATION OF MANAGING AGENTS **Second Amicus Curiae**

Neutral citation: *Willow Waters Homeowners Association (Pty) Ltd v Koka* (768/13) [2014] ZASCA 220 (12 December 2014)
Coram: Maya, Theron, Saldulker JJA and Mocumie and Gorven AJJA
Heard: **15 September 2014**
Delivered: **12 December 2014**
Summary: Land – whether a condition of title in a title deed of immovable property which prohibits the transfer thereof without a clearance certificate or the consent of a homeowner's association constitutes a real or personal right – whether the embargo remains binding on the Master and trustees of the property owners in

sequestration.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bam AJ sitting as a court of first instance)

1 The appeal is upheld with costs including the costs of two counsel.
2 The order of the court below is set aside and replaced with the following:
'The application is dismissed with costs including the costs of two counsel.'

JUDGMENT

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

[1] The central issue in this appeal is whether embargo provisions in a title condition registered against the title deed of immovable property preventing the transfer thereof without a clearance certificate from a homeowner's association constitute real or personal rights. The North Gauteng High Court, Pretoria (Bam AJ) held that the embargo is a mere personal right which did not bind the trustees of an insolvent estate in whom ownership of the immovable property sought to be transferred vested. Consequently, the court allowed the fourth respondent (the Registrar) to effect transfer of the property without a clearance certificate from the appellant (the association). The appeal is with the leave of the high court.

[2] The appellant, the Willow Waters Homeowners Association, (Pty) Ltd, (the association) is duly incorporated in terms of s 21 of the Companies Act 61 of 1973[1] in respect of the Willow Waters Estate (the estate) in the estate of Van Riebeeckpark Extension 26. Its membership comprises registered owners of property in the estate. All owners automatically assume that status and are bound by the association's Articles of Association and Rules until such ownership ceases.[2] The estate consists of 13 full title erven and one erf with communal facilities. The association owns the communal facilities and operates the estate's infrastructure including its roads, water, electricity, sanitation, telecommunications network and security services as well as ingress and egress to the development for the members' benefit.

[3] The association recovers its costs from the members by way of monthly levies[3] as well as fines and penalties for breaches of its rules.[4] No member is allowed to transfer his (perhaps 'their' then it is neutral gender) property until the board of trustees has certified that the member has at date of transfer fulfilled all financial obligations to the association.[5] Furthermore, rule 2.5 entitles the association to refuse clearance of a transfer in the event of any outstanding levies and penalties.

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[1] It is now deemed to be a non-profit company in terms of Item 4(1)(*a*) of Schedule 5 of the Companies Act 71 of 2008.

[2] In terms of Article 3.3 which provides that '[w]hen a member becomes the registered owner of a Unit, he shall ipso facto become a member of the Association, and when he ceases to be the owner of any Unit … he shall ipso facto cease to be a member of the Association'. 'Unit' is defined in Article 1.1 as 'a dwelling unit for a single family…with or without outbuildings, and whether held under tenure in terms of the Sectional Titles Act 66 of 1971, as amended, or situated on its own residential lot or individual subdivision of a residential lot, tenure of which may be registered in the Land Register of the Deeds registry'.

[3] Article 4 empowers the trustees (directors) of the association to impose levies upon members for the purpose of meeting all the expenses incurred or reasonably anticipated to be incurred in the attainment of the association's objects and to determine the rate of interest chargeable upon arrear levies in accordance with the Limitation and Disclosure of Finance Charges Act 173 of 1968.

[4] Article 5 vests the trustees of the association with the power to impose a system of fines and penalties for the enforcement of any of the rules made for the running of the estate.

[5] Article 46.

[4] In 2006, Mr Christiaan Petrus van der Walt and his wife, Lourette, jointly purchased one of properties in the estate, Portion 7 of Erf 2461 (the property), which had an incomplete dwelling, for a sum of R900 000. They took transfer of the property under Deed of Transfer T06/99802 dated 8 August 2006. The Van der Walts simultaneously caused a mortgage bond to be registered over the property as security for a loan of R1,6 million and an additional sum of R320 000 in favour of Firstrand Bank Limited, the fifth respondent, which abides the decision of this court in the appeal.

[5] In June 2006, the association had caused the Van der Walts to sign an agreement in terms of which they bound themselves to its rules, regulations and guidelines. According to this agreement they would, inter alia, submit building plans for the association's approval within two months and finalise the renovation of the property as stipulated in the approved building plans within nine months from its registration. They further acknowledged that a breach of these timelines would result in the imposition of a fine in accordance with the rules of the association.

[6] The Van der Walts failed to complete the renovations within the prescribed period. They also fell behind with the payment of their levies and consequent penalties were? imposed by the association. Subsequently, Mrs Van der Walt was sequestrated on 13 March 2009 and her husband shortly thereafter, on 1 April 2009. The first to third respondents (the trustees) were appointed joint trustees of their insolvent estates. At that stage, the Van der Walts' debt stood at R129 789. By the launch of this? application in April 2012, it had increased to R771 049. The market value of the property itself is not clear from the papers. On 9

September 2009, auctioneers had valued it at R1,1 million. A year later, on 23 September 2010, the bank valued it for purposes of a forced sale at R700 000. But a municipal valuation dated 2 November 2011 placed it at R1 667 000. Nothing however turns on this uncertainty.

[7] In anticipation of a sale of the property, the association required the new owner to accept and bind itself to its rules and regulations. It also required payment of three months' levies in advance from date of registration and all outstanding levies and penalties up to the date of registration prior to transfer of the property. The association's demand was made on the basis that the outstanding levies and building penalties are akin to realisation costs stipulated in s 89(1) of the Insolvency Act 24 of 1936 (the Act)[6] which gives a local authority or a body corporate under the Sectional Titles Act[7] the power to veto transfer of immovable property until all moneys owing to them by the transferor are fully paid.

[8] For this stance, the association relied on one of the conditions prescribed in the Deed of Transfer, title condition 5(B)(ii) (the embargo). The embargo, which echoes the provisions of Article 46 and rule 2.5,

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[6] The section reads:
'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 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 subsection (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.'

[7] Section 15B(3)(*a*)(i)(*aa*) of the Sectional Titles Act 95 of 1986 provides for a statutory embargo. This court has held that the effect of that section is to create an 'effective preference' and to render the costs of settling all arrear monies in respect of a unit as a cost of administration in an insolvent estate. See *Barnard NO v Regspersoon van Aminieen 'n ander* 2001 (3) SA 975 (SCA) para 15; *Nel v Body Corporate of the Seaways Building & another* 1996 (1) SA 131 (A) at 140H-141A.

decrees that '[t]he owner of the [property] or any subdivision thereof, or any person who has an interest therein, shall not be entitled to transfer the [property] 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 of the Home Owners Association have been complied with'. The association took the view that the trustees had no power to transfer the property to any purchaser without the clearance certificate envisaged in the embargo because (a) the embargo vested it with a real right which diminished the rights of ownership in relation to the property and bound the trustees too, as the Van der Walts' successors in title; (b) the trustees as successors to the Van der Walts' rights acquired no greater rights of ownership than those held by the latter; and (c) the Van der Walts' undisputed breach of their obligation to keep their levies up to date under the association's Articles of Association entitled it to withhold the clearance certificate in terms of the embargo.

[9] The bank, relying on the security provided by the mortgage bond, had lodged and proved a claim against both estates of the Van der Walts. The association's attitude to that claim was that the bond was registered pursuant to the Van der Walts' acquisition of ownership in the property and was therefore registered over the property subject to the association's real right and the concomitant diminution of the Van der Walts' rights of ownership in terms of the embargo. But, according to the trustees, the association had no right to demand payment before transfer as the embargo merely constituted a personal right which was not binding on them but was limited to a concurrent claim in the insolvent estate.

[10] The trustees approached the high court seeking orders declaring

that the association's claim in respect of the outstanding levies and penalties against the insolvent estate did not constitute a claim in terms of s 89(1) of the Act and that the Registrar could therefore pass transfer of the property without the association's consent. In the high court, and in addition to the above contentions, the association, supported by the first and second amici curiae, argued that the trustees' interpretation of the Act would result in an arbitrary deprivation of its real right in insolvency and would be inconsistent with the constitutional provisions which entrench the right to property. The parties agreed that if the embargo constitutes a real right, the trustees' application would fail and that the association would, in law, be entitled to refuse to give its consent until the outstanding amounts had been paid.

[11] As stated earlier, the high court found that the embargo is a mere personal right which does not detract from the *dominium* of the property or bind the trustees. The court rejected the amici curiae's constitutional argument and granted the declaratory relief sought by the trustees. This decision, however, contradicted an earlier judgment of the high court[8] which held that a similar title condition constituted a real right binding upon the liquidators of an insolvent close corporation.

[12] The issues remain unchanged on appeal. The thrust of the association's argument was that the embargo is a real right intended to bind the owner of the land and his successors in title in that it results in a subtraction from *dominium* of the land against which it is registered. The embargo thus remained binding on the Master and the trustees, so they argued, because these parties stepped into the shoes of the insolvent parties and acquired the same rights of ownership held by the insolvents.

[8] *Cowin NO v Kyalami Estate Homeowners Association* [2013] ZAPGJHC 121 (25 February 2013).

[13] The trustees, on the other hand, submitted that whilst the embargo prohibited the transfer of property by its owner, (a) there was no evidence showing an intention to create a real right in the land; (b) that the true object of the embargo was not to diminish ownership in the land but to achieve specific performance of a contract by a member of the association who also happens to be the owner of the land; (c) that the right created by the embargo is a personal one attaching not to the land but only to the current owner of the land, which is subject to the *concursus creditorum* of insolvency; (d) that if a real right is created at all, the envisaged transfer of land is voluntary and not a transfer consequent upon a forced sale under insolvency law; and (e) that the matter raises no constitutional issues.

[14] The amici curiae, the Association of Residential Communities CC (ARC) and the National Association of Managing Agents (NAMA) which are the only recognised representative bodies in South Africa for homeowners associations and managing agents,[9] participated in the proceedings both in the high court and on appeal. Their contentions before us related mainly to the constitutional implications of the matter regarding the right to property of homeowners associations across the country under ss 25(1) and 39(2) of the Constitution which respectively entrench the right to property and require a statutory interpretation that

[9] ARC was established to provide support, best practice and consulting services to the governing bodies of residential estates such as homeowners associations, boards of directors and bodies corporate. Governing bodies of about 45 per cent of all properties situated in residential estates in South Africa are associated with it. NAMA was established with the primary objective of promoting and advancing the interests of managing agents of residential communities in South Africa. It manages the affairs of approximately 13 550 security estates representing approximately 495 000 individual property owners.

promotes the spirit, purport and objects of the Bill of Rights.[10]

[15] They argued that the interpretation of the Act for which the trustees contended was inimical to these constitutional provisions because it results in arbitrary deprivation of property. This is so, they contended, because on this construction, upon an owner's insolvency, the right of the homeowners association to resist transfer without a clearance certificate would be extinguished. Some of their further contentions were that homeowners associations constitute a more recent form of communal residential development for which no statutory protection, such as that provided for municipalities and sectional title developments, has yet been promulgated. Therefore the embargo, the insertion of which is a standard and well-established practice, provides the associations with critical protection as the only effective mechanism for ensuring the collection of levies which are their lifeblood.

[16] To determine whether a right or condition in respect of land is real, two requirements must be met: (a) the intention of the person who creates the right must be to bind not only the present owner of the land, but also successors in title; and (b) the nature of the right or condition must be such that its registration results in a 'subtraction from *dominium*' of the land against which it is registered.[11] Whether the title condition embodies a personal right or a real right which restricts the exercise of ownership is a matter of interpretation.[12] the intention of the parties to the title deed

[10] In terms of the section 25(1) '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.' And s 39(2) provides: '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[11] *Cape Explosive Works Ltd & another v Denel (Pty) Ltd & others* 2001 (3) SA 569 (SCA) para 12; *Erlax Properties (Pty) Ltd v Registrar of Deeds and others* 1992 (1) SA 879 (A) at 885B.

[12] *National Stadium South Africa (Pty) Ltd & others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) para 33.

must be gleaned from the terms of the instrument ie the words in their ordinary sense, construed in the light of the relevant and admissible context, including the circumstances in which the instrument came into being.[13] The interest the condition is meant to protect or, in other words, the object of the restriction, would be of particular relevance.[14]

[17] Here, one of the pre-conditions which the developer of the township was required to meet for the local authority to authorise the subdivision of the erf on which the township was established (in terms of s 92 of the Town-Planning and Townships Ordinance 15 of 1986) and the Registrar to register the subdivision, was the insertion of the embargo in all the title deeds of all the properties in the township. It was thus common cause that the subdivision and the subsequent development of the township would not have occurred without the insertion of the embargo.

[18] According to the trustees, this meant no more than that the township could not be subdivided without such title conditions being inserted into the relevant title deeds. They disavowed any intention to create a real right binding on successors in title, and trustees in the event of insolvency, arguing that the embargo made no reference to successors in title but instead required each new owner to bind himself and become a member in his own right.

[19] In support of this contention, the trustees relied on the case of *Bodasing v Christie NO*.[15] There, a testator bequeathed a farm to each of his two sons, subject to testamentary clause 24 which was registered

[13] *Bothma-Batho Transport* v S Bothma & Seun Transport 2014 (2) SA 494 (SCA) paras 10-12.
[14] Ibid. See also *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 at 16.
[15] *Bodasing v Christie NO* 1961 (3) SA 553 (A) at 561.

against the respective title deeds. The clause granted each son a right of pre-emption over the farm of the other to the effect that if either of them wanted to sell he could do so only to the other at a specified price and on specified terms and conditions. One son hypothecated his farm whereafter his estate was sequestrated. The trustee subsequently sold the farm by public auction to a third party against the other son's objection that he had a right to purchase the farm at the price fixed in the will which was far less than that offered at the sale. The provincial division granted the latter an interdict restraining transfer to the third party who appealed successfully to the Full Bench. On further appeal to this court it was held that the restraint imposed on the alienation of the immovable property, which was bequeathed to each legatee giving each legatee a right of pre-emption to the other legatee, bound the legatee only and not the trustee as it only restrained a voluntary sale and not a sale made compulsory by the law.

[20] *Bodasing* is, in my view, distinguished by its own facts and it does not assist the trustees' case. As this court pointed out, there was nothing in clause 24 to indicate that the testator intended any right of pre-emption to operate on the sequestration of the estate of either of the legatees. The restraint imposed by clause 24 was intended for an entirely different reason to that in this case ie to give a right of pre-emption specifically to each of the legatees. Here, the underlying purpose of the embargo was to create a general security for the payment of a debt as in the case of a lien or a mortgage bond. Clearly, to achieve that purpose it had to bind all the successive owners in the township. This object is also evident from the plain language of the embargo which must be read with the provisions of Article 46. It seeks to bind 'the owner of the erf or any subdivision thereof or any person who has an interest therein'. In so doing, it employs

generic, unqualified terms such as the 'owner' and 'any person'. These classes must, of necessity, include every owner or holder of a real right in the property from time to time. This is further bolstered by the embargo prohibiting transfer unless the purchaser has undertaken, on transfer, to become a member of the association and to be bound by its rules. The first aspect required for a real right is therefore satisfied.

[21] For a condition to be capable of valid registration as a real right, the second aspect requires that it must carve out a portion of, or take away something from, the *dominium*.[16] This principle is embodied in s 63(1) of the Deeds Registries Act 47 of 1937 in terms of which '[n]o deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration'.

[22] It is established that ownership comprises a bundle of rights or competencies which include the right to use or exclude others from using the property or to give others rights in respect thereof.[17] One of these rights or competencies is the right to freely dispose of the property, the *ius disponendi*. If that 'right is limited in the sense that the owner is precluded from obtaining the full fruits of the disposition … [then] one of his rights of ownership is restricted'.[18] In this matter the embargo registered against the property's title deed 'carves out, or takes away' from the owner's *dominium* by restricting its *ius disponendi*. Thus, it

[16] *Edelor (Pty) Ltd v Champagne Castle Hotel (Pty) Ltd* 1972 (3) SA 684 (N) at 689F-690 B; *Venter v Minister of Railways* 1949 (2) SA 178 (E); *National Stadium SA* fn 9 para 33.
[17] *Van den Berg v Dart & another* 1949 (4) SA 884 (A) at 885; *Geyser & another v Msunduzi Municipality & others* 2003 (5) SA 18 (N) at 37A-B; *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA) para 17; *National Stadium SA* fn 9 para 31.
[18] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C).

subtracts from the *dominium* of the land against which it is registered. It satisfies the second aspect and is, therefore, a real right.

[23] I agree with the association and the amici curiae that the trustees' argument that the embargo is meant to achieve specific performance of a contract, which was accepted by the high court, conflates two distinct rights – (a) the association's claim for payment of the amounts due to it by the Van der Walts, which is a personal contractual right ranking as a mere concurrent claim in the insolvent estate; and (b) the association's right of veto in terms of the embargo which restricts the owner's *ius disponendi*. As pointed out above, the latter is the right in contention here and it is a real right for the reasons set out above. As stated, the right diminishes ownership in the property by entitling the association to withhold a clearance certificate thus preventing the transfer of the property until the Van der Walts' outstanding debt has been paid. In that case, the embargo remains binding on the trustees in whom the insolvent estate now vests in terms of s 20 of the Act.[19]

[24] The effect of the embargo is akin to that of the embargos contained in s 118 of the Local Government: Municipal Systems Act 32 of 2000

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[19] The section reads in relevant part:
(1) 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;
…
(1) For the purposes of subsection (1) the estate of an insolvent shall include–
(*a*) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment.'

(the Municipal Systems Act)[20] and s 15B(3)(*a*)(i)(*aa*) of the Sectional Titles Act 95 of 1986.[21] These provisions respectively prohibit the Registrar from registering the transfer of immovable property except on production of a certificate issued by the municipality or a conveyancer confirming that all moneys due to the municipality or a body corporate have been fully paid.

[25] It is accepted that these statutory embargoes serve a vital and legitimate purpose as effective security for debt recovery in respect of municipal service fees and contributions to bodies corporate for water, electricity, rates and taxes etc. Thus, they ensure the continued supply of such services and the economic viability and sustainability of municipalities and bodies corporate in the interest of all the inhabitants in the country.[22] And this is particularly so in the circumstances of insolvency, when an effective legal remedy against an insolvent is most needed.[23]

[26] These objects are precisely what the embargo in this case seeks to achieve. Nothing in the law impedes this type of security. Neither is there anything 'insensible or unbusinesslike' that undermines the apparent

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[20] The section reads:
(1) A registrar of deeds or other registration officer of immovable property may not register the transfer of property except on production to that registration officer of a prescribed certificate–
(a) issued by the municipality in which that property is situated; and
(b) which certifies that all amounts 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.
(2) In the case of the transfer of immovable property by a trustee of an insolvent estate, the provisions of this section are subject to s 89 of the Insolvency Act 24 of 1936.

[21] The section provides:
'(3) The registrar shall not register a transfer of a unit or of an 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 moneys 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'.

[22] *Geyser* fn 14 at 37.

[23] *Barnard NO v Regspersoon van Aminie en 'n ander* fn 7 para 15.

purpose of the title condition in the interpretation contended for by the association.[24] In one of the cases postulated by trustees, where there may be insufficient funds to meet the debt, there is no indication in the association's Articles of Association and rules that the association cannot waive its veto right and issue the clearance certificate to ensure the sale of the property. The Act provides its own safeguards to address possible prejudice to creditors. For a start, a sequestration may not be ordered unless it is shown that it will be to the advantage of creditors to do so. And provision is made in a careful scheme for the disposition of an insolvent estate including cases where there are insufficient assets to meet the creditors' claims.

[27] It must be borne in mind that homeowners associations are obliged to provide services to all of their members. And so, similarly to municipalities and bodies corporate which enjoy the statutory protection afforded by the embargoes, they extend credit to all the homeowners in their estates without the benefit of requiring security therefor. As was contended by the amici curiae, there is no material difference between homeowners associations and bodies corporate in terms of their objects, activities and status. There is simply no basis to deprive the association of the protection afforded by the embargo which has an identical purpose and effect to that provided to bodies corporate (and municipalities) by a law of general application.

[28] It bears mention that the embargo confers no preference on the association's claim which indeed remains a concurrent claim as

[24] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

contended by the trustees.[25] Its effect is merely to secure payment of the claim. And, in insolvency, this is done only in so far as it is not incompatible with the rights of other creditors. It is settled in the context of statutory embargoes that an amount paid in order to enable property sold by a trustee or liquidator to be transferred to the buyer is included in the cost 'of maintaining, conserving and realising' property to which reference is made in s 89(1) of the Act.[26] Likewise, to discharge their duty to sell the property, the trustees in this case must pay the outstanding levies and penalties as part of 'the cost of … realising any property' within the meaning of s 89(1), out of the proceeds of the property, in the manner contemplated in s 118(2) of the Municipal Systems Act.

[29] To hold otherwise would deprive the association of an effective tool for ensuring the collection of levies. This would impose enormous costs on it (and on other homeowners associations across the country, whose services infrastructure installed in residential estates is valued at more than R10 billion, particularly having regard to the evidence that just 35 members of NAMA are owed fees in excess of R28 million in respect of members whose properties were subjected to forced sales) with dire consequences on its ability to run the estate. One obvious example of such consequences is that the credit standing and ability of homeowners associations to secure finance would be adversely affected because of their inability to collect debts owed to them.

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[25] As mentioned above, it confers an 'effective preference' in respect of the claim in that amounts due form part of the costs of administration. See fn 7.

[26] *Rabie NO v Rand Townships Registrar* 1926 TPD 286; *Nel NO v Body Corporate of the Seaways Building & another* 1996 (1) SA 131(A) at 139D-140G; *Eastern Metropolitan Substructure of Greater Johannesburg Transitional Council v Venter NO* 2001 (1) SA 360 (SCA) paras 32 -34; *Barnard NO* fn 19 paras 9-18. *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 (3) SA 362 (SCA) paras 21-27; *BOE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) SA 336 (SCA) para 7; *City of Johannesburg v Even Grand 6 CC* 2009 (2) SA 111 (SCA) para 14.

[30] A further consideration is that the Registrar has seen fit to register this condition against the title deeds of the properties in the township. Whilst this is, of course, not decisive, it is important to bear in mind the approach of this court to actions taken by the Registrar. In *Registrar of Deeds* (*Transvaal*) v *The Ferreira Deep Ltd*,[27] De Villiers CJ said:

'In *Hollins* v. *Registrar of Deeds, supra,* INNES, C.J., expressed the opinion that the Court should be very careful in dealing with the Registry of Deeds. With that view I entirely agree, and it is for that reason the more that it is satisfactory to be able to arrive at this conclusion. It would be no light matter for the Court to declare of no value rights which have been registered against title, which have been looked upon by the public as valid, and upon the faith of which numerous transactions have been entered into.'[28]

[31] As to the constitutional point raised by the amici curiae, which may well have merit, it was properly conceded on their behalf that a finding that the embargo constitutes a real right and is therefore enforceable against the trustees as well would dispense with the need to address it. Thus, nothing more need be said in that regard.

[32] For all these reasons, the appeal must succeed with costs to follow the result in the ordinary course. There is, of course, no need to make any costs award in respect of the amici curiae.[29]

[33] The following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

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[27] *Registrar of Deeds* (*Transvaal*) v *The Ferreira Deep Ltd* 1930 AD 169 at 181.
[28] *Hollins* v. *Registrar of Deeds* 1904 TS 603.
[29] *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) para 43; *Mohunram and another v National Director of Public Prosecutions and another (Law Review Project as Amicus Curiae)* 2007 (1) SA 222 (CC) para 105.

‘The application is dismissed with costs including the costs of two counsel.’

MML MAYA

JUDGE OF APPEAL

APPEARANCES:

For 1St Appellant:	W Trengrove SC (N Ferreira) Instructed by: N Van der Walt Inc, Pretoria Symington & De Kok, Bloemfontein
For 1St to 3rd Respondents:	MM Oosthuizen SC (L Meintjies) Instructed by: Rorich, Wolmarans Luderitz Inc, Pretoria Kamer Weihman & Joubert Attorneys, Bloemfontein
For Amicus Curiae:	S Budlender Instructed by: Adams & Adams Attorneys, Pretoria Honey Inc, Bloemfontein