



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Willow Waters Homeowners Association (Pty) Ltd v Koka
(768/13) [2014] ZASCA 220 (12 December 2014)

Media Statement

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Today the Supreme Court of Appeal (SCA) delivered judgment upholding the appeal against an order of the North Gauteng High Court, Pretoria. The SCA set aside the order of the court below and replaced it with an order dismissing the application.

The issue in this appeal was 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 constituted a real or a personal right

The appellant's (the association) membership comprised of registered owners of property in the township. These owners automatically assumed that status and were bound by the association's Articles of Association and Rules until such ownership ceased.

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 couple caused a mortgage bond to be registered over it 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. In June 2006, the association had caused them 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 immovable 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. The Van der Walts failed to complete the renovations within the prescribed period and also fell behind with the payment of their levies and penalty imposed by the association. Subsequently, Mrs Van der Walt was sequestered on 13 March 2009 and her husband shortly thereafter, on 1 April 2009. The Bank then valued the property for a forced a sale.

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. 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 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.

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 Insolvency Act 24 of 1936 and that the Registrar could therefore pass transfer of the property without the association's consent.

The SCA held that it was accepted that statutory embargoes served 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 and that therefore there was simply no basis to deprive the association of the protection afforded by the embargo.

The SCA held further 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

The SCA found therefore that 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 subtracted from the *dominium* of the land against which it was registered and was consequently a real right.

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