

REAL ESTATE

LIQUIDATORS VS HOME OWNERS ASSOCIATIONS: TITLE DEED CONDITIONS ARE BINDING ON LIQUIDATORS

PROPERTY DEVELOPERS: HAVE YOU REGISTERED AS A HOME BUILDER?

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In two recent cases decided in the Supreme Court of Appeal (SCA), namely, *Willow Waters Homeowners Association (Pty) Limited v KOKA NO and others* [2015] JOL 32760 (SCA) and *Cowin NO v Kyalami Estate Homeowners Association* (499/2013) [2014] ZASCA 221, the SCA was asked to consider:

- whether registered title conditions which prohibit the transfer of residential property without a clearance certificate or consent from the relevant home owners' association (HOA) amount to real rights (ie enforceable against all third parties) or personal rights (ie enforceable against only the landowner); and
- whether such title deed conditions are binding on liquidators.

In both cases the landowners (one being a company, the other being a private individual) failed to make the regular levies payments charged by the HOA and were later declared insolvent. In both instances, the landowners had bonded their properties to financial institutions, which financial institutions had in turn obtained judgments against the insolvents and sought to limit their losses through sales in execution of the properties. Upon conclusion of the individual sale of property agreements with third parties, the liquidators approached the respective HOAs for a clearance certificate, for purposes of giving effect to transfer. The HOAs refused to provide such certificates until such time as the arrear levies were settled.

In arriving at its conclusion, the SCA considered the two questions posed above and held that ownership consists of a bundle of rights and competencies which includes the right to use and dispose of the property. The restrictive title deed conditions however took away from the owner's dominium by restricting the right to dispose of the property freely, thus subtracting from the dominium of the land. Furthermore, the court held that, given that the ownership of the property was subject to landowners agreeing to the HOA rules, and the creation of the restrictive title deed conditions, there was a clear intent for the restrictive conditions to be binding on all.

The court further dismissed the argument proposed by the liquidators that the stance adopted by the HOA to not issue a clearance certificate prejudiced the balance of the creditors, particularly the rights of the bondholders, who were secured creditors. The SCA reasoned that sequestration may not be ordered unless it is shown to be advantageous to the creditors. Given that the role of the HOA is similar to those of municipalities in terms of the Local Government: Municipal Systems Act, No 32 of 2000 or a body corporate in terms of section 15B(3)(a)(i)(aa) of the Sectional Titles Act, No 95 of 1986, the court held that there is 'no basis' to deprive the HOA from the protection afforded to municipalities and body corporates.

Apart from providing certainty in respect of the rights of the HOA, the above cases have wide reaching consequences which are noteworthy, namely:

- HOAs now enjoy the same level of protection afforded to municipalities and body corporates in respect of outstanding debts and may withhold clearance certificates until such time that the arrear levies have been paid;
- Liquidators are bound by the restrictive conditions imposed for the benefit of HOAs and will have to factor in these costs when negotiating the sale of immovable property in an insolvent estate; and
- Bondholders should be mindful of the rights of HOAs when seeking an order for the sale in execution of properties.

Tricia Tsoeu is a candidate attorney. The article was verified by Nayna Parbhoo, Partner.

PROPERTY DEVELOPERS: HAVE YOU REGISTERED AS A HOME BUILDER?

Property developers should not be lulled into a false sense of security when subcontracting with construction companies that are registered as home builders in terms of the Housing Consumers Protection Measures Act, No. 95 of 1998 (Housing Protection Act). As clarified in the Constitutional Court's recent finding in the case of *Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC)* (*Cool Ideas v Hubbard*), both property developers and the construction companies with whom they subcontract, have to be duly registered as home builders in terms of the Housing Protection Act, prior to the commencement of construction.

In the case of *Cool Ideas v Hubbard*, a property developer entered into a building contract with a housing consumer and subcontracted the services of a building contractor to undertake the construction of the housing consumer's home. The housing consumer took issue with the quality of the work and refused to make final payment in terms of the agreement. Following this refusal, the housing consumer instituted arbitration proceedings, claiming the costs of remedial works; and the property developer counter-claimed for the balance of the contract price. It transpired that although the building contractor was registered as a home builder in terms of the Housing Protection Act, the property developer was not registered as such at the time of entering into the building contract nor at the commencement of construction. The question consequently arose as to whether s10(1) of the Housing Protection Act required a property developer to register as a home builder prior to the commencement of construction or whether registration before payment was sought would suffice.

Section 10(1) of the Housing Protection Act provides that:

"No person shall –

- (a) carry on the business of a home builder; or
- (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home, unless that person is a registered home builder."

The Constitutional Court held that a purposive reading of the Housing Protection Act, which is aimed at protecting housing consumers, requires both the property developer and the building contractor to be registered as home builders before commencing building works. The statute does not permit the

registration of a home builder after-the-fact. Failure to register as a home builder prior to the commencement of building results in the property developer being ineligible to claim consideration for work done in terms of a building contract.

The property developer argued that the prohibition on the receipt of consideration due, in terms of the building contract, amounted to an unconstitutional deprivation of the property developer's property. The Constitutional Court, however, held that the deprivation of the property developer's property did not violate s25 of the Constitution. Section 10(1)(b) is aimed at achieving a legitimate and important statutory purpose with a rational connection between the statutory prohibition and its purpose. There is accordingly no arbitrariness in the deprivation and thus no violation of s25 of the Constitution.

The Constitutional Court also confirmed that the prohibitions set out in s10(1) and (2) of the Housing Protection Act are not directed at the validity of building contracts, but at the unregistered home builder who is barred from receiving any consideration for the work done in terms of that agreement. The building contract is thus not invalidated by the breach of the statutory prohibition contained in s10 of the Housing Protection Act.

In light of the above, it is essential that property developers register as home builders prior to the commencement of construction, even if they have subcontracted to a building contractor that is duly registered. Failure to do so will result in the property developer being barred from claiming consideration for the services rendered in terms of the building contract.

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