



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 149/2022

In the matter between:

THE BODY CORPORATE OF MARSH ROSE
(SECTIONAL TITLE SCHEME NO: SS269/2012)

APPELLANT

and

ARNO STEINMULLER

FIRST RESPONDENT

THE STANDARD BANK OF
SOUTH AFRICA LIMITED

SECOND RESPONDENT

THE SHERIFF OF HALFWAY HOUSE

THIRD RESPONDENT

HAASBROEK & BOEZAART
INCORPORATED

FOURTH RESPONDENT

Neutral citation: *The Body Corporate of Marsh Rose v Steinmuller and Others*
(149/2022) [2023] ZASCA 143 (2 November 2023)

Coram: DAMBUZA AP, ZONDI, MOLEMELA, GOOSEN and MOLEFE
JJA

Heard: 15 March 2023

Delivered: 2 November 2023

Summary: Property law – Sectional Titles Act 95 of 1986 – reliance on transfer registration embargo established in terms of s 15B(3)(a)(i)(aa) of the Sectional Titles Act – whether purchaser at a sale in execution is entitled to challenge the amount payable to a body corporate and to compel issue of clearance certificate.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Matojane J with Nichols AJ concurring and Adams J dissenting, sitting as court of appeal):

1 The National Association of Managing Agents NPC is granted leave to intervene in the appeal as co-appellant.

2 The costs occasioned by the opposition to the application to intervene are to be paid by the first respondent.

3 The appeal is upheld with costs, including the costs of two counsel where so employed.

4 The order of the full court is set aside and replaced with the following order:

‘1. The appeal is upheld with costs, including the costs of two counsel where so employed.

2. The order of the high court is set aside and replaced with an order dismissing the application with costs, including the costs of two counsel where so employed.’

JUDGMENT

Molefe and Goosen JJA (Dambuza AP, Zondi and Molemela JJA concurring):

Introduction

[1] This appeal concerns the interpretation of s 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986¹ (the Act) (hereinafter the ‘embargo provision’)

¹ Section 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986 provides that:

‘(3) The registrar [of deeds] 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 –

in the context of a sale in execution. For a property in a sectional title scheme to be transferred into the name of a purchaser, the body corporate must issue a clearance certificate. The embargo provision, however, entitles a body corporate to refuse to issue such certificate until all moneys owed to it in respect of the property have been paid, or provision has been made, to the satisfaction of the body corporate, for the payment thereof.

[2] The appeal is against the decision of the Full Court of the Gauteng Division of the High Court, Johannesburg (the full court), which ordered the appellant, a sectional title body corporate, to issue a clearance certificate in respect of a property sold in execution, against the security of an amount paid into the purchaser's (the first respondent) attorneys' trust account, pending the outcome of proceedings to be instituted by the appellant for the recovery of amounts owing in respect of the property. The appeal is with the special leave of this Court.

The facts

[3] On 30 January 2018, the first respondent, Mr Steinmuller, purchased unit 24 of the sectional title scheme Marsh Rose (the property) at a sale in execution conducted by the third respondent, the Sheriff of Halfway House (the Sheriff). The property had been attached and sold in execution at the instance of the second respondent, the Standard Bank of South Africa Limited (Standard Bank). Prior to the sale in execution, the appellant, the Body Corporate of Marsh Rose (the body corporate), had also taken judgment against the previous owner of the property in an amount of R43 380.09. The judgment debt was still outstanding when Mr Steinmuller bought the property at the sale in execution.

(i)(aa) if a body corporate is deemed to be established in terms of section 2(1) of the Sectional Titles Schemes Management Act, 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.'

[4] During February 2018, the body corporate provided Mr Steinmuller with an amount that it alleged was due to it in respect of the property in the sum of R312 903.21 (the clearance figures) to be paid before it would issue the clearance certificate. On 19 February 2018, Mr Steinmuller's attorneys requested the body corporate to provide documents upon which the aforesaid amount was based, together with all the resolutions authorising the levying of the charges reflected in the clearance figures. On 17 April 2018, the body corporate provided Mr Steinmuller's attorneys with a reconciled account in the amount of R295 044.81, which included charges for levies, water consumption and sewerage services, an arrear cost liability, interest charges and legal fees.

[5] Mr Steinmuller, was, in terms of clause 4.4 of the conditions of sale in execution, obliged to pay all levies due to the body corporate in terms of the Act, or amounts due to a homeowners' association or other association which rendered services to the property. He refused to pay any amount other than the levies due to the body corporate and demanded that he be furnished with the ledgers detailing the amounts claimed in respect of levies for the relevant period, as well as resolutions by the body corporate trustees in respect of the interest charged thereon.

The litigation

[6] The body corporate refused to supply the information requested on the basis that Mr Steinmuller was not the owner of the property and was thus not entitled to the information. This led to Mr Steinmuller launching an application in the Gauteng Division of the High Court, Johannesburg (the high court) for an order that the body corporate sign all papers, and take all the steps necessary to facilitate the transfer of the property into his name, and that an amount of R150 000 be paid by him into his attorney's trust account as security in relation to the levies due to the body corporate.

[7] The high court, per Wanless AJ, granted the order. It increased the tendered amount of R150 000 and ordered him to pay R250 000 into his attorney's trust account as security to be held for any claim that the body corporate might have in respect of the property. The R250 000 was calculated by specifically excluding the judgment debt amount of R43 380.09 which had been obtained by the body corporate against the previous owner of the property. The high court held that a judgment debt is not a debt owed to the property. The order further provided that the body corporate was to institute an action or refer to arbitration its claim against Mr Steinmuller and any other party in respect of the property, within ten days of the granting of the order.

[8] On appeal by the body corporate, the full court held that under the embargo provision a transferee could make provision for payment of a debt owed to the body corporate as at date of registration, instead of making the actual payment, provided that such arrangement is to the satisfaction of the body corporate. The full court found further that the high court was entitled to assess whether the security in the form tendered by Mr Steinmuller was sufficient to oblige the body corporate to issue the clearance certificate. The full court accordingly dismissed the appeal with costs.

Intervention application

[9] At the hearing of the appeal before this Court, the National Association of Managing Agents NPC (NAMA), a registered non-profit company comprising of approximately 400 members, sought leave to intervene as co-appellant. Its intervention application was premised on its status as a representative of property managing agents, regional and national service providers, and community scheme members. NAMA's contention was that: (a) the judgment debt owed by the previous owner retains the character of the underlying *causa* as an amount due in

respect of the property; (b) the security put up by Mr Steinmuller does not satisfy the requirements of the embargo provision; and (c) it would be impossible for the body corporate to produce the clearance certificate so that transfer can take place.

[10] Mr Steinmuller opposed NAMA's intervention application on the basis that, firstly, NAMA does not have a direct and substantial interest in the subject matter of the appeal, other than a purely financial interest. And secondly, that NAMA wished to re-litigate the same issues that were ventilated in the high court, and that would prejudice him by delaying the prosecution of the appeal.

[11] The law regarding leave to intervene requires the applicant to show that it has some right which is affected by the order issued. This was articulated by the Constitutional Court as follows:

'It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court.'²

[12] It is recognised in our law that associations that exist to promote the interests of their members have the power to intervene in litigation that affects those interests.³ NAMA submitted that it brings this application to assert and protect the rights of its members who may be prejudiced by the judgment of this Court, especially the rights encapsulated in the embargo provision.

[13] The full court found that the debt for arrear levies owing by the erstwhile owner is 'converted' into a simple judgment debt payable by the erstwhile owner, which does not impede the transferability of the property to Mr Steinmuller. In

² *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* [2017] ZACC 4; 2017 (5) SA 1 (CC); 2017 (8) BCLR 1053 (CC) paras 9-10.

³ *Johannesburg Society of Advocates and Another v Nthai and Others* [2020] ZASCA 171; 2021 (2) SA 343 (SCA); [2021] 2 All SA 37 (SCA) para 33.

this Court, NAMA argued that this finding has the effect of watering down the security offered to body corporates in terms of the embargo provision, in that legal costs no longer attach to the property and judicial novation has taken place. It was contended that bodies corporate may then be left in the invidious position that they cannot recover amounts due by an erstwhile owner who has no property to satisfy the judgment debt. The findings of this Court, NAMA argued, will influence the issuing of clearance certificates, and in turn the transfer of properties by the Registrar of Deeds, and this will, in turn, adversely affect the property industry in the country.

[14] Mr Steinmuller's contention that NAMA may not intervene because it only intends to 're-litigate' the application, has no merit. It is not a requirement of an application to intervene that the intervening party may only refer to an issue that has not been raised by the parties to the litigation, and/or that it is limited to the introduction of new perspectives to the court or arguments not advanced by any other parties.⁴ The issue of the contractual undertaking will only raise a new angle for consideration in determining Mr Steinmuller's liability (if any) to pay the body corporate. NAMA's intervention will also not prejudice Mr Steinmuller, as there will not be any delay in the prosecution of the appeal. The hearing of the intervention application was heard on the same day as the appeal.

[15] The legal interest advanced by NAMA on behalf of its members satisfies the requirements set out by the Constitutional Court. We are therefore satisfied that NAMA made out a proper case to intervene in this appeal as co-appellant and is accordingly admitted. There was, in our view, no proper basis to resist the intervention application. The costs occasioned by the opposition, if any, ought to be paid by Mr Steinmuller.

⁴ *Nash and Others v Cadac Pension Fund (In Curatorship) and Others* [2021] ZASCA 144 (SCA) para 18.

The issues on appeal

[16] The appeal turns upon a narrow compass. The primary question concerns the status of the parties and, by extension, whether the body corporate's reliance upon the statutory embargo is open to challenge at the instance of Mr Steinmuller. A secondary question concerns the terms of the order of the high court which, as we shall demonstrate, cannot stand irrespective of the interpretation given to the embargo provision.

[17] The statutory embargo provided by s 15B(3)(a)(i)(aa) of the Act is, in form, similar to that provided by s 118(2) of the Municipal Systems Act. It serves broadly similar purposes. Its operation and effect, however, provides protection for a particular class of property owners who hold units of property as individual owners within a sectional title scheme and as co-owners of common property in such scheme. A body corporate, established or deemed to be established in terms of the Act, is not an owner of property. It manages the common property on behalf of the common owners.

[18] The purpose of the embargo provision is to assist bodies corporate in recovering amounts owed by the owners of the units in the scheme, without the necessity of resorting to expensive and time-consuming litigation. In *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others (Willow Waters)*,⁵ this Court was concerned with an embargo provision similar to the one in s 15B(3)(a)(i)(aa) of the Act, which was incorporated in a title deed. It examined similar embargo provisions in s 89(1) of the Insolvency Act 24 of 1926 (the Insolvency Act), and s 118 of the Local Government: Municipal Systems Act

⁵ *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* [2014] ZASCA 220; 2015 (5) SA 304 (SCA); [2015] 1 All SA 562 (SCA).

32 of 2000 (the MSA).⁶ In terms of s 118 of the MSA, the registrar may only register the transfer of an immovable property upon the production of a certificate issued by the municipality confirming that all moneys due to the municipality have been paid. This Court held that:

‘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.’⁷

[19] Mr Steinmuller purchased a unit in a sectional title scheme at a sale in execution in 2018. The sale was authorised by a court order obtained at the instance of Standard Bank against the registered owner of the unit. The sale was subject to published conditions of sale⁸ which provided that the purchaser was liable to pay the purchase price, amounts due to the municipality, transfer costs and commission, and:

‘4.4.2 All levies due to a Body Corporate in terms of the Sectional Titles Act, 1986 (Act No. 95 of 1986) or amounts due to a Home Owner’s or other association which renders services to the property.’

[20] When property is sold in execution, a contract comes into existence between the sheriff who gives effect to the court order and the purchaser whose bid is accepted. The execution creditor (in this case Standard Bank) is not a party to the contract. The obligation to pay the purchase price and other stipulated monies and to comply with the conditions of sale rests upon the purchaser.⁹ This is a contractual obligation.

⁶ Ibid para 24.

⁷ Ibid para 25.

⁸ Published in terms of Rule 46(8).

⁹ Cf Rule 46(11) which provides for summary cancellation of the sale by a judge upon a report of the sheriff, should the purchaser not comply with their obligations.

[21] In *Mpakathi v Kgotso Development CC and Others*¹⁰, this Court stated that: ‘The purpose of execution is the enforcement of the court’s judgment; to which end the proceedings are driven throughout by the judgment creditor for its exclusive benefit (subject to the rights of preferent creditors), through the Sheriff acting in his or her executive capacity.’

[22] Rule 46 (13) provides that the sheriff shall give transfer of the property against payment of the purchase price and upon performance of the conditions of sale. The sheriff is empowered to do everything necessary to effect registration of transfer and anything so done is as effective as if the sheriff was the owner of the property. In *Ivorl Properties (Pty) Ltd v Sheriff, Cape Town, and Others*,¹¹ it was held:

‘A Sheriff may not sell immovable property attached pursuant to duly executed writ of execution otherwise than by way of a public auction and his authority is created and circumscribed by the provisions of Uniform Rule 46 (see *Schoerie NO v Syfrets Bank Ltd and Others* 1997 (1) SA 764 (D) at 771G; 773J-774A). When a Sheriff disposes of property in pursuance of a sale in execution he acts as an ‘executive of the law’ and not as an agent of any person. When a Sheriff, as part of the execution process, commits himself to the terms of the conditions of sale, he, by virtue of his statutory authority, does so in his own name and may also enforce it on his own (see *Sedibe and Another v United Building Society and Another* 1993 (3) SA 671 (T) at 676A-C). A sale in execution of immovable property entails two distinct transactions namely, the sale itself and the passing of transfer pursuant thereto (see *Schoerie NO v Syfrets Bank Ltd (supra)* at 778A-B). Although Uniform Rule 46 does not specifically empower a Sheriff to institute proceedings in order to enforce the contract embodied in the conditions of sale, such power is implicit in the duty to see that transfer is passed and the provisions of Uniform Rule 46(13) which impose an obligation upon him to do anything necessary to effect registration of transfer. If that were not so the Sheriff’s only remedy, in the event of a purchaser failing to carry out any of his or her obligations under the conditions of sale, would be to approach a Judge in Chambers for the cancellation thereof in terms of Uniform Rule 46(11) and would allow recalcitrant purchasers at sales in execution to avoid their obligations almost with impunity.’

¹⁰ *Mpakathi v Kgotso Development CC and Others* [2006] 3 All SA 518 (SCA); 2005 (3) SA 343 (SCA) para 13.

¹¹ *Ivorl Properties (Pty) Ltd v Sheriff, Cape Town, and Others* 2005 (6) SA 96 (C) para 66. Cf *Menqa v Markom* [2008] 2 All SA 235 (SCA) para 27 fn 17.

[23] If a purchaser does not fulfil a condition of sale, the sheriff may either seek cancellation of the sale in terms of rule 46 (11) or enforce the terms of the sale agreement. Rule 46(14) regulates the process of distribution of the proceeds of the sale which are collected by the sheriff. It requires payment of the proceeds into an account administered by the sheriff and the production of a plan of distribution in accordance with the scheme of preference applicable to writs of attachment filed with the sheriff. Unlike the embargo provision created by s 118 of the Municipal Systems Act, the embargo in this case does not establish a preferent claim except in relation to its effect in insolvency.¹² This does not detract from the vital purpose served by the embargo provision.¹³

[24] In this case the conditions of sale provided for recovery, by the sheriff, of levies payable to the body corporate as a component of the consideration payable by the purchaser. It is against this backdrop that the issues raised in the appeal must be decided. Following the sale in execution, the body corporate provided an account of the monies payable to it. Mr Steinmuller, however, raised queries about the amount due and after further details were furnished regarding the calculation of the amount, he objected to payment of that which the body corporate said was payable. He sought information, including resolutions adopted by the body corporate to raise interest upon outstanding levies and similar records. When the body corporate refused to provide this information, he launched the application before the high court.

¹² *Nel NO v Body Corporate of the Seaways Building and another (Nel)* 1996 (1) SA 131 (A); *First Rand Bank Limited v Body Corporate: Geovy Villa (Geovy Villa)* [2004] 1 All SA 259 (SCA) para 22, 27.

¹³ Cf. *Nel* and *Geovy Villa* fn 12 above. See also *Willow Waters* fn 5 above.

[25] Mr Steinmuller's right to take transfer of the property arises from contract. He only acquires an enforceable right upon fulfilment of the conditions of sale. His right operates against the sheriff and not the body corporate. It is the sheriff who must determine whether Mr Steinmuller has fulfilled his obligations. And if he has not fulfilled his obligations, then it is for the sheriff to enforce the contractual obligations or cancel the sale.

[26] The body corporate is not a party to the agreement of sale. The fact that clause 4.4.2 of the conditions of sale refers to 'levies' and not, as in the language of s 15B(3)(a)(i)(aa), to 'all monies' due to the body corporate, can have no legal bearing upon the rights of the body corporate. The embargo confers upon the body corporate a statutory right to resist transfer of a unit in the scheme until all monies due to it have been paid or it is satisfied that arrangements for their payment have been made.

[27] In *Barnard NO v Regspersoon van Aminie en 'n ander*,¹⁴ the question arose whether the embargo covered not only arrear levies and interest, but legal costs incurred by a body corporate in seeking to recover amounts due to it by the owner of a unit. This Court held that the legislature intended to give to a body corporate effective protection. It reasoned that a body corporate was merely a collective of owners of units who shared expenses. If one owner fails to meet their obligations, the burden fell on others, hence the need for an effective remedy. This Court concluded that legal costs incurred in recovery of amounts due to the body corporate fell within the ambit of the protection afforded by s 15B(3)(a) of the Act.¹⁵

¹⁴ *Barnard NO v Regspersoon van Aminie en 'n ander* [2001] 3 All SA 433 (A).

¹⁵ *Ibid* para 15 – 18.

[28] Assuming, therefore, that the conditions of sale limit what Mr Steinmuller is contractually bound to pay (as was contended by him in disputing the account of the body corporate), his payment of that limited amount might entitle him to demand that the sheriff give transfer. He cannot, however, demand that the *body corporate* should accept his limited payment and therefore provide a clearance certificate upon which transfer could occur. That is so, for the simple reason that unless the contract of sale binds the body corporate, its statutory right remains unaltered. Mr Steinmuller's contractual right to transfer cannot limit the body corporate's statutory right to refuse to issue a clearance certificate until all monies due to it are paid.

[29] To give transfer, the sheriff must obtain a conveyancer's certificate that all monies due to the body corporate have been paid. The body corporate would, as a matter of law, remain entitled to refuse to provide the certificate until the conditions of the embargo are met. There could be no suggestion that it was acting unreasonably or unlawfully. The only question that could then arise, is whether the conditions of sale stipulated by Standard Bank and published prior to the sale in execution binds the body corporate. That was not, however, what this case was about. The effect is that whatever dispute there may notionally be regarding what is due to the body corporate, it is not a dispute to which Mr Steinmuller is a party. He has no legal interest in that dispute.

[30] His right to compel transfer of the property lay against the sheriff. To obtain it he was required to establish that he had met the conditions stipulated by the contracting party. Mr Steinmuller, however, sought no relief against the sheriff. This brings us to the orders which were granted by the high court.

[31] Paragraph 1 of the high court order provides that:

‘The [the body corporate] is to sign any and all papers and take any steps necessary, for the transfer of the property known as Section 24 of the Sectional Scheme Marsh Rose, SS269/2012, Country View Extension 1 Township (‘the property’), to [Mr Steinmuller], subject to paragraph 2 hereof.’

[32] One is immediately struck by the fact that the order requires the body corporate to give transfer of the property. Yet, the body corporate is not the registered owner of the property and cannot give transfer as ordered. Furthermore, the property is the subject of attachment at the instance of Standard Bank and has been sold at a sale in execution. The provisions of rule 46, discussed above, plainly confer upon the sheriff the functions of an executive of the law who is authorised, for the purposes of transfer, to act as if the sheriff is the registered owner of the property.

[33] Paragraph 1 of the order is, in this context, not a competent order and cannot stand. Notionally, what the order seeks to achieve is that the body corporate must consent to a conveyancer’s certificate being issued in terms of the embargo provision. For the reasons already explained, that relief is not available to Mr Steinmuller.

[34] Paragraphs 2, 3, 4, 5 and 6 deal with the provision of security for the payment of a claim which the body corporate is required to institute against Mr Steinmuller ‘and any other party’. This aspect of the case elicited considerable debate about the meaning of that phrase which contemplates provision being made to the satisfaction of a body corporate, for the payment of the amount due to it. The debate concerned whether it encompassed the provision of security, as may be regulated by a court, for payment of a disputed amount claimed by a body corporate.

[35] In our view we do not reach that question because, as we have found, Mr Steinmuller has no legal interest in the determination of the amount claimed by the body corporate, nor whether it was due and payable. There are, in any event, inherent difficulties with the orders granted by the high court which are dispositive.

[36] The order stipulates an amount to be provided for security against a claim to be instituted by the body corporate. The body corporate, however, has no claim against Mr Steinmuller, nor any person other than the registered owner of the unit. Its claim relates to charges and levies against the property which were raised in terms of the Act. Such claim cannot lie against Mr Steinmuller, nor against Standard Bank or the sheriff. Section 15B does not create a statutory claim against a purchaser to whom transfer must be given. It is an embargo provision which provides security for the payment of amounts due by the owner of the unit. It serves to compel payment of those amounts by preventing the owner from giving transfer to a purchaser until the debt to the body corporate has been paid. The operation of the embargo is not altered because the sale occurs by way of execution or as part of the liquidation of an insolvent estate. As was observed by this Court in *Geovy Villa*¹⁶, in the context of insolvency:

‘The practical effect of the statute is that, assuming the availability of funds, a body corporate will be paid before transfer of immovable property is effected. A reasonable mortgagee and body corporate might arrive at an accommodation where there are insufficient funds available to cover the total of the debts owing to both parties – but neither is obliged in law to do so.’

[37] The order requiring institution of action by the body corporate against Mr Steinmuller cannot, as a matter of law, be carried into effect. It follows that the appeal must succeed. Insofar as costs are concerned those should follow the result and include the costs of two counsel where employed.

¹⁶ *Geovy Villa* fn 12 above para 26.

[38] We make the following order:

1 The National Association of Managing Agents NPC is granted leave to intervene in the appeal as co-appellant.

2 The costs occasioned by the opposition to the application to intervene are to be paid by the first respondent.

3 The appeal is upheld with costs, including the costs of two counsel where so employed.

4 The order of the full court is set aside and replaced with the following order:

‘1. The appeal is upheld with costs, including the costs of two counsel where so employed.

2. The order of the high court is set aside and replaced with an order dismissing the application with costs, including the costs of two counsel where so employed.’

D S MOLEFE
JUDGE OF APPEAL

G GOOSEN
JUDGE OF APPEAL

Appearances

For the appellant: K Lavine and A Naidoo
Instructed by Alan Levy Attorneys Inc, Johannesburg
Matsepes Attorneys, Bloemfontein

For the first respondent: C van der Merwe
Instructed by: Vermaak Marshall WellBeloved Inc, Johannesburg
Phatshoane Henney Attorneys, Bloemfontein

For the intervening party: J P Daniels SC and A Kohler
Instructed by: Schuler Heerschop Pienaar Attorneys, Johannesburg
Lovius Block Inc, Bloemfontein