LEVIES OWING TO HOA: PRESCRIPTION ALERT

Lukhele v Fernbrook Estate Homeowners Association (61719/13)[2015] ZAGPPHC (17 February 2015)

This judgment alerts property practitioners and HOAs to the good practice requirement that, at all times, tabs must be kept on outstanding levies. The right to disallow an execution sale purchaser to take transfer of a property unless outstanding amounts are paid, does not cover debts that have already become prescribed, as the present matter illustrates.

FACTS

Molefe was the registered owner of a property in Maroeladal which formed part of the Fernbrook Estate Homeowner's Association (the HOA). The property was bonded in favour of Standard Bank and, following on Molefe's failure to service the bond, default judgment was obtained against him and the property sold to Lukhele at a sale in execution on 14 June 2011.

When Lukhele sought to achieve transfer of the property into his name, the HOA refused to issue a clearance certificate in respect of outstanding monies owing to it in respect of rates, levies and other services until amounts had been paid. The HOA contended that it had a real right by virtue of the condition registered in the title deed of the property allowing it to prohibit transfer until moneys outstanding to it have been paid. In addition, the auction conditions of sale provided that the purchaser would pay rates, taxes and other charges necessary to effect transfer.

The HOA insisted that it was entitled to payment of an amount of R339,104.44 which included levies, penalties and seemingly untaxed legal fees, which amount goes further back than three years from the time the figures were provided to Lukhele. Lukhele argued that debts older than three years had become prescribed. The HOA however maintained that the defence of prescription was not available to Lukhele as he was not a debtor of the HOA.

HELD:

Did the normal prescription period of three years apply to the charges levied by the HOA?

- The HOA's defence that Lukhele could not rely on prescription as he was not a debtor of the HOA could not succeed. The refusal to issue a clearance certificate for the purpose of effecting transfer, arose as a result of the indebtedness of the judgment debtor (Molefe), the present owner, to the HOA. Therefore, if in law Molefe would have been entitled to raise prescription as a defence against the HOA's claim, so should Lukhele (as purchaser in the execution sale).

- All the items listed by the HOA requiring payment, constituted ordinary debts which prescribe within three years.

- Lukhele's undertaking in the conditions of sale to pay "rates, taxes and other charges necessary to effect transfer" did not constitute a waiver by him of the right to raise whatever defence is sustainable in law. It cannot be that by concluding the sale agreement in execution, Lukhele revived claims that may have become prescribed.

Lukhele was accordingly ordered to pay to the HOA such amounts not exceeding three years' indebtedness after which the HOA was ordered to issue a clearance certificate.

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