

INSOLVENCY AFTER SELLING PROPERTY

The persistently challenging economic climate has led to a number of insolvencies, both that of high profile and man-in-the-street property owners, developers and occupiers. In property sale transactions, this is especially challenging where the seller is declared insolvent after the agreement was entered into but before transfer, the more so where the purchaser has paid part of the purchase price. This is because at common law, where a seller is declared insolvent after the sale of a property, but before transfer thereof, the property vests in the liquidator of the insolvent estate and the purchaser becomes a concurrent creditor of the insolvent estate.

The recent judgment in [Relebipi Properties CC v De Wet N.O. and Others \(36209/2012\) \[2014\] ZAGPPHC 87 \(17 January 2014\)](#) explains how the rules of insolvency law works in such a scenario.

Meltin Properties 59 CC ('Meltin Properties') sold two sectional title units to Relebipi Properties CC ('Relebipi').

After concluding the sale, Relebipi paid the full purchase price (R3,790,000) to the conveyancing attorneys ('the conveyancers') appointed in the agreement, to hold in trust pending registration of transfer.

Subsequently thereto, another agreement was reached between the parties, brokered by a different attorney acting on behalf of Meltin Properties ('the seller's attorneys'). In terms of this agreement, Relebipi, as purchaser, authorised the conveyancers to release a portion of the purchase price (some R3,400,000 of the money held in trust by the conveyancers) to Meltin Properties, represented by Dr Lawrence (the sole member), to be utilised towards the finalisation of other parts of the sectional title development. In exchange for the release of the funds, Relebipi was granted a discount of R150,000 on each respective unit it bought and immediate occupation of the two units purchased.

Sometime later and before the property was transferred to Relebipi, Meltin Properties was liquidated. Relebipi was thereafter advised by the liquidators that the transfer of the property could not take place as the funds for the purchase price had been used by Lawrence, with Relebipi's consent, for other purposes.

Relebipi then brought an application to the North Gauteng High Court for an order obliging the liquidators to transfer the property into its name. The liquidators opposed the application, denying any liability to transfer the property, specifically as the purchase price was not paid. They argued that despite Relebipi paying moneys to the conveyancers, the funds were then used by Lawrence for other purposes and not for purposes of payment

of the purchase price. The liquidators also raised prescription issues.

Was Relebipi entitled to the transfer of the property?

Under common law:

1. Should the estate of the seller of an immovable property be sequestrated before transfer of the property is passed to the purchaser of that property, the property vests in the liquidator/trustee of the seller's insolvent estate.
2. In so far as the purchaser may have fully or partially performed in terms of the agreement of sale concluded prior to the insolvency, by payment of the whole or portion of the purchase price, the purchaser is in a position of a creditor with a concurrent claim against the insolvent estate.
3. The liquidator may choose to proceed with the agreement, in which event the agreement remains in full force and both parties (the liquidator and purchaser) must perform in full as determined in the agreement. (In exercising this choice the executor is, of course, responsible to the body of creditors for his choice.)

In the present matter, the evidence showed that the liquidators opted to proceed with the transaction. This was apparent from the fact that (i) it was indicated in a letter sent by the seller's attorneys to Relebipi, that the liquidators have instructed attorneys to attend to the transfer of the property; (ii) in another letter, Relebipi was informed that the conveyancers received a copy of the deed of sale and were awaiting the appointment letter and approval from the liquidators to enable them to proceed; and (iii) in a further letter Relebipi was informed that the liquidators were anxious to deal with the property on behalf of the creditors but were unable to proceed with the transfer of the property to Relebipi without payment of the purchase price (which, according to them, was not paid). It was thus obvious that the liquidators intended to transfer the property to Relebipi but could not proceed due to their averments that the purchase price had not been paid.

Was the purchase price paid?

Relebipi's intention was clearly declared at the time of releasing the funds: In terms of the sale agreement, the payment of the funds was intended to pay the purchase price.

With regards to the subsequent agreement, the parties indicated that :

"AND WHEREAS the PURCHASER has made payments towards the purchase price;

*AND WHEREAS the SELLER requires funds to finalise the development;
NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:
The PURCHASER hereby authorises Snyman de Jager Inc to release an amount
of R3 400 000,00 (Three Million Four Hundred Thousand rand) from the amount
currently held in a special deposit account to the SELLER ...”*

The agreements show that the funds were initially intended for the payment of the purchase price and remained so, even after a portion thereof was released to Meltin Properties subsequently. Whatever Meltin's use thereof, the funds remained a part payment by Relebipi for the property bought.

As such the liquidators could not contend that the purchase price was not paid.

Did the claim prescribe?

The liquidators also argued that Relebipi's claim had become prescribed, in that a period of more than three years had elapsed since the funds were paid over to Meltin Properties, and no demand had been made for refund thereof.

The claim in the present instance was not for the return of the funds released to Meltin Properties, but for the transfer of the property into its name. The first time that Relebipi became aware that there was a problem with the transfer was in November 2010, when he was advised that the liquidators could not pass transfer to him. The purpose of Relebipi's claim was to compel the liquidators to sign all the documents required to effect the transfer of the property to the applicant, to give effect to the purchase agreement. The application was launched in August 2012, which was three months before the claim for the transfer of the property could become prescribed. As such Relebipi's claim did not prescribe and therefore this argument also did not succeed.

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