

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

SELLER'S REGRET WITH A TWIST

Rampedi and Another v Njisane and Others (03876/2014) [2015] ZAGPJHC 184 (3 August 2015)

An acrimonious divorce and concerns regarding the splitting up of their joint estate, prompted divorcees to agree to the appointment of a liquidator in their divorce order to sell their home and account to them regarding the proceeds. However, after registration of transfer, they sought a retransfer, claiming they had prior to transfer changed their minds regarding the sale of the house to a third party, advised the liquidator thereof, and that hence there was no intention to transfer. Was the transfer valid?

The Judgment can be viewed [here](#).

FACTS

Mr and Mrs Njisane were married in community of property and an immovable property formed part of their joint estate. In December 2012, a decree of divorce was issued terminating their marriage. The settlement agreement was made an order of court and provided, amongst other things, that:

- a “receiver/liquidator” was appointed “to dispose of the immovable property (and ... to divide the net proceeds between the parties” after the deduction of various amounts such as the amount owing on existing bonds, the Njisane’s share of the rates and taxes, and so forth.
- both parties undertook, as soon as the property was sold, to co-operate with regard to signature of the documentation required to effect transfer.
- no variation, or abandonment or waiver of any rights or obligations would be binding unless they were reduced to writing and signed by both parties.

Mr and Mrs Rampedi bought the property at the subsequent auction sale held by the liquidator.

Just after the sale, the liquidator lodged an urgent application to compel Mrs Njisane to permit access to the property for purposes of obtaining a valuation (the first application). This was necessary as Mrs Njisane refused to grant access to the property for a valuator who had been appointed to value the property for purposes of the Rampedi’s bond application.

Mrs Njisane opposed this application, averring that she and Mr Njisane had decided that she would take over ownership of the property against payment to him for his half share, and that they no longer wanted to proceed with the sale of the property. She stated that

she and Mr Njisane had already prepared an addendum to the settlement agreement to this effect. She also stated that she had instructed her attorneys to lodge an application to challenge the sale of the property.

Mrs Njisane never produced a copy of the alleged agreement, nor was an application made to court to amend the divorce order in this respect. She also never instituted proceedings to set aside the sale agreement entered into by the liquidator. The court accordingly granted the liquidator's application in April 2013.

Mr Njisane was not a party to this application. He was however represented by attorneys and correspondence indicated that Mr Njisane's most pressing concerns were directed at enquiring when he would be required to vacate the property pursuant to the auction sale and what price the property had fetched. He made no mention of (i) the alleged agreement to amend the settlement agreement and divorce order or (ii) the allegation that the Njisanes no longer wanted to pursue the sale of the property to the Rampedis.

Hereafter the liquidator signed the relevant transfer documents, acting "in (his) capacity as Liquidator and Receiver" of the Njisanes, and as "duly appointed by virtue of a Court Order dated 5 December 2012".

By early December 2013, the transfer documents were lodged and registration of transfer was pending.

On 2 December 2013 the Njisanes purported to terminate the liquidator's mandate by advising him that they had decided to do so and requested that he urgently stop the transfer of the property. The liquidator's refusal to do so in the absence of a valid termination of his mandate, led to the Njisanes launching an urgent application (the urgent application). In this application they averred that they had "decided not to proceed with the sale or disposition of this aforesaid property using the services of the liquidator because they no longer had confidence in him and that they were "jointly abandoning" that part of the divorce order appointing the liquidator.

The urgent application was dismissed and on 13 December 2013 the transfer of the property to the Rampedis was registered.

The Njisanes never vacated the property and the Rampedis instituted action for the eviction of the Njisanes.

The Njisanes defended the matter and attacked the validity of the transfer of ownership to the Rampedis on the following grounds:

1. that the liquidator acted fraudulently in transferring the property to the Rampedis;
2. that the liquidator had no authority under the divorce order and settlement

- agreement to sign the necessary transfer documents on their behalf; and
3. that at the time of transfer, they had no intention to transfer the property to the Rampedis, i.e. that “real agreement” necessary for the transfer of ownership was absent at the time of registration of transfer.

HELD:***Liquidator acted fraudulently***

- On the facts, the court held that it was not proved that there was any fraud on the side of the liquidator.

Authority of liquidator

- The Njisanes contended that although the liquidator was authorised to act as their agent by virtue of the divorce order, he was not entitled to sign on their behalf.
- Reading the divorce order in its proper context and in light of the wording used, it was clear that the liquidator had the authority to sign on their behalf.
- The settlement agreement gave the liquidator the power “to dispose” of the property. The way in which immovable property is disposed of in our law is to effect a registration of transfer in the name of the new owner. The liquidator’s powers were intended to be wide enough to permit him to sign the transfer documents on behalf of the Njisanes.
- In the absence of a clear contrary intention, the power of disposal of immovable property must include the power to do all that is necessary to effect the transfer of the property, including signing the transfer documents.
- The purpose of the settlement agreement was also relevant. It was to ensure that the property would be disposed of and the proceeds divided between the parties, especially in light of the fact that the Njisanes’ divorce was acrimonious. Although they ultimately reached a settlement, they could not agree on the manner in which the property should be divided between them. It was for this reason that the liquidator was appointed specifically to deal with the disposal of the property.

No intention to transfer

- In terms of the abstract theory, the transfer of ownership is dependent on two elements, being (i) delivery, the objective element; and (ii) the real agreement (or “saaklike ooreenkoms”), being the subjective element.

- The real agreement requires an intention on the part of the transferor to give ownership, and a corresponding intention on the part of the transferee to receive ownership. This intention must exist at the time of transfer. If there is an absence of such intention, the purported transfer of ownership, even if registered, will be invalid.
- The Njisanes contended that at the time of transfer they had no intention of transferring the property to the Rampedis. They averred that it had long been their intention to rather transfer the property to Mrs Njisane.
- The evidence however did not support this argument. The addendum that Mrs Njisane alleged existed, was never made available to the court. The Alienation of Land Act requires a written and signed deed of alienation for the effective alienation of land and in the present matter, also the divorce order and settlement agreement required that any amendment to the settlement would not be effective unless reduced to writing. This led to the inescapable conclusion that the alleged agreement did not exist.
- The conclusion was also supported by the content of the correspondence addressed to the liquidator by Mr Njisane's attorney. It was evident that Mr Njisane had not agreed to the sale of the property to Mrs Njisane - had this been the arrangement between them, Mr Njisane's attorneys would have dealt with this in their communications with the liquidator.
- Indeed, in the urgent application they brought just when transfer was pending, the Njisanes never averred that they wanted to halt the transfer of the property so that Mrs Njisane could take ownership. Rather, they stated that they "have decided not to proceed with the sale or disposition of this aforesaid property using the services of the (liquidator)". This, they alleged, was because they no longer had confidence in him.
- Thus the Njisane's averment that they had agreed to transfer the property to Mrs Njisane, rather than to proceed with the sale to the Rampedis, had to be rejected and there was no defect in the real agreement on this basis.
- Neither did the Njisanes' attempt to revoke the liquidator's appointment when they launched the urgent application render the real agreement defective.
- A central feature of the present case was that the transfer of the property took place under the auspices of a court order. In concluding the settlement agreement and

incorporating it into the divorce order, the Njisanes bound themselves to the authority of that order. In the absence of a court-sanctioned amendment of the divorce order, the Njisane's had no authority to revoke the liquidator's appointment. Similarly, in the absence of appropriate relief from a court, they had no authority to override the liquidator's transfer of the property.

- Since the Njisanes did not succeed in obtaining the relief they sought from the court prior to the registration of the transfer, it followed that the liquidator had the necessary legal capacity, by virtue of the divorce order and settlement agreement, to dispose of the property by effecting the registration of transfer.
- The existence of an effective real agreement in this case depended on the intention of the liquidator, acting under the authority of the divorce order and settlement agreement, to give transfer of the property to the Rampedis.

The court proceeded to find that, in the circumstances, the Rampedis were entitled to an eviction order.

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