REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

17/1/2014.

CASE NO: 36209/2012

(1) REPORTABLE: ~~YES~~/ NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

17/01/2014 ..... DATE

..... SIGNATURE

In the matter between:

RELEBIPI PROPERTIES CC	APPLICANT
and	
CHRISTIAAN FREDERIK DE WET N.O.	FIRST RESPONDENT
LEON NAUDE N.O.	SECOND RESPONDENT
ALLAN DAVID PELLOW N.O.	HIRD RESPONDENT
GAVIN CECIL GAINSFORD N.O.	FOURTH RESPONDENT
MARGARET EDWARDS N.O.	FIFTH RESPONDENT
SNYMAN DE JAGER ATTORNEYS	SIXTH RESPONDENT
HEUNIS STREAULI ATTORNEYS	SEVENTH RESPONDENT
THE REGISTRAR OF DEEDS	EIGHTH RESPONDENT
THE MASTER OF THE HIGH COURT	NINTH RESPONDENT
INVESTEC BANK	TENTH RESPONDENT

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] The purpose of the application before me is to compel the first, second, third, fourth and fifth respondents in their joint capacities as liquidators of Meltin Properties 59 CC (in liquidation) to sign all documents required for the seventh respondent (or any other properly appointed conveyancing attorneys) to effect transfer of Sectional Title Units 1 and 3 of SS Norma Jean Square, 124/2010 situated at Die Howes Ext 197, 705 also known as units 1 and 3 Norma Jean Square, 244 Jean Avenue, Centurion, to the applicant in effecting the purchase agreement entered into between the applicant and Meltin Properties 59 CC.

[2] The applicant, is also applying for an order authorising the sheriff of this court, in the event that the first, second third, fourth and fifth respondents in their joint capacities as liquidators of Meltin Properties 59 CC (in liquidation) fail to sign all documents required for the seventh respondent (or any other properly appointed conveyancing attorneys) to effect transfer of Sectional Title Units 1 and 3 of SS Norma Jean Square, 124/2010 situated at Die Howes Ext 197, 705 also known as units 1 and 3 Norma Jean Square, 244 Jean Avenue, Centurion, to the applicant in effecting the purchase agreement entered into between the applicant and Meltin Properties 59 CC.

[3] The sixth, eighth, ninth and tenth respondents are cited for their information and no relief is sought against them and as such they are not opposing the

application. The seventh respondent is not opposing the application, they wrote to the applicant's attorneys of record effectively indicating that in the event of no cost order being requested against them they will not take part in the application. The tenth respondent indicated its intention to oppose the application but did not file opposing papers. However, from the heads of argument filed it appears as if counsel for the first, second, third, fourth and fifth respondents, is acting for the tenth respondent as well. For the sake of convenience I shall refer to the first, second, third, fourth, fifth and tenth respondents collectively as the respondents.

[4] The factual matrix of this matter is that the applicant entered into an agreement of sale with Meltin Properties 59 CC (the seller) for the purchase of two units as described in paragraphs [1] and [2] of this judgment (the property). The seller was represented thereat by its sole member Dr Keith Lawrence (Lawrence) who was duly authorised thereto. The applicant paid the full purchase price of the property (R3 790 000) into the trust account of the seller's attorneys. In terms of this agreement the property was to be transferred from the seller to the purchaser on date of registration which was the date on which such transfer shall have been registered in the Deeds Office.

[5] Subsequently thereto, another agreement was reached between the applicant and the seller, brokered by the sixth respondent, attorneys acting on behalf of the seller – Snyman de Jager Inc. Herein also the seller was represented by

the said Lawrence and duly authorised thereto. In terms of this agreement, the applicant as the purchaser therein authorised the seller's attorneys – Snyman de Jager Inc to release a portion of the purchase price (R3 400 000) held in trust to the seller to be utilised towards the finalisation of the development. In exchange to the release the applicant was granted a discount of R150 000 on each respective unit and immediate occupation of the two units. All this happened before the property was transferred into the applicant's name.

[6] Sometime later and before the property could be transferred into the name of the applicant the seller went insolvent. The applicant received notice of the insolvency in October 2009. The first, second, third, fourth and fifth respondents were appointed as liquidators of the seller's insolvent estate. The applicant was thereafter in a letter dated 4 November 2010 from the attorneys acting on behalf of the liquidators, informed that transfer of the property could not take place as the funds for the purchase price had been used by Lawrence, with the applicant's consent, for other purposes.

In this application the applicant is thus demanding that the liquidators be ordered to transfer the property into its name.

IS THE APPLICANT ENTITLED TO THE TRANSFER

[7] The main issue, therefore, is whether the applicant is entitled to the transfer of the property.

[8] The law in regard to the status of an immovable property, where the agreement of sale in respect thereof was entered into before the seller went insolvent and the said property has not been transferred into the name of the purchaser, is well settled. According to the law as it stands, a purchaser who bought land under such conditions runs the risk of losing, both the land and any money he or she may have paid, in the event the estate of the registered owner is sequestrated as insolvent.

[9] There is no legislative provision (neither the Insolvency Act nor the Companies Act deals with sequestration/liquidation under such circumstances) providing for such a situation and as a result the common law principles are applicable. Under the common law, 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. And 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, he or she (the purchaser) is in a position of a creditor with a concurrent claim against the insolvent estate. See *Catherine Smith: The*

Law of Insolvency 2ed at 151; *Glen Anil Finance (Pty)Ltd v Joint Liquidators, Glen Anil Development Corporation (in liquidation* 1981 (1) SA 171 (A) at 182D – H and *Sarrahwitz v Maritz* Case No. (819/2012) [2013] ZAECGHC 10 (1 February 2013).

[10] This principle was succinctly enunciated as follows in *Bryant & Flanagan (Pty) Ltd v Muller & Another NNO* 1977 (1) SA 800 (N) at 804F – H:

> "Insolvency does not automatically terminate an executory or partly performed contract lying outside the categories specifically covered by the Act (The Alienation of Land Act 108 of 1986). Whether or not the contract continues to operate depends on the decision of the trustee, who is allowed and indeed required to choose which shall happen. He is, of course, responsible to the creditors for his choice. But as between himself and the other party to the contract, the decision is his alone. It must be made within a reasonable time. The results of the trustees' decision to bring the contract to a halt are that he may not insist on its further performance by the other party, and he is not himself expected to fulfil the insolvent's outstanding obligations under it. Like any other creditor owed an ordinary debt which the insolvent incurred before sequestration, the other party is left with nothing more than a concurrent claim against the estate, entitling him to share in the distribution of its free residue."

[11] It is common cause in this instance that the applicant entered into an agreement of sale in respect of the immovable property in issue. It is also common cause that the applicant paid a certain amount in respect of the purchase price of that property. The amount paid is in dispute – the applicant

alleges to have paid the full purchase price whilst the respondents' version is that the applicant paid a portion of the purchase price. It is also not in dispute that the immovable property in question is a subject of the deed of sale concluded between the parties and the property was not transferred to the applicant as the purchaser of the property, prior to the insolvency of the seller. The position therefore is that on the basis of the common law principles enunciated above the property now vests in the trustees/liquidators, the respondents in this instance, of the insolvent estate. The applicant has, as such, no right to insists upon the execution of the agreement by the respondents. Such execution is in the discretion of the respondents alone. And in so far as the applicant may have fully or partially performed in terms of that agreement of sale by payment of the whole or portion of the purchase price it is in a position of a creditor with a concurrent claim against the insolvent estate.

[12] The general rule is that the nature of the trustee's choice is either to stop the agreement or to persevere with it as a whole. Indication, in this instance, is that the respondents elected to perpetuate the agreement. This in my view is so because: firstly, in a letter dated 5 October 2009 written by Snyman de Jager attorneys to the applicant, a copy of which is attached to the applicant's founding affidavit as annexure "MSR8", the applicant was informed that the liquidators have instructed attorneys Heunis & Straueli to attend to the transfer of the property; secondly, in another letter dated 15 October 2009 written by Heunis & Straueli attorneys to the applicant, a copy of which is attached to the applicant's founding affidavit as annexure "MSR9", the

applicant was informed that they (the attorneys) received a copy of the Deed of Sale and are awaiting the appointment letter and approval from the liquidators to enable them to proceed; and a further letter dated 4 November 2010 from Faber Sabelo Edelstein attorneys to the applicant, a copy of which is attached to the applicant's founding affidavit as annexure "MSR10", the applicant 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 the applicant without payment of the purchase price the funds of which according to them were not paid to them or held in trust. It is thus obvious that the respondent intended to transfer the property to the applicant but could however not proceed due to their averments that the purchase price had not been paid.

[13] It is trite that once a trustee has chosen to perpetuate an agreement, such agreement remains in force and as a result the other party must continue to do everything the agreement has always required of him or her. The trustee is likewise bound to fulfil all the insolvent's undischarged obligations, including any which ought to have been carried out before the sequestration. The obligations must be performed in their entirety as *per* the agreement. Having accepted the benefits of the agreement a trustee cannot limit the other party to a concurrent claim against the free residue of the estate for anything reciprocally due under the agreement. See *Bryant & Flanagan (Pty) Ltd v Muller & Another NNO* above at 805A – C.

[14] This is not entirely the situation in this instance. The respondents in this instance are prepared to transfer the property to the applicant on payment of the purchase price which the applicant alleges it paid in full to the seller. A dispute as to whether or not the applicant paid the purchase price of the property arose in the papers. The applicant's contention is that it paid the full purchase price whilst the respondents' version is that the purchase price was not paid. The argument being that the applicant allowed the seller to use the money it (the applicant) had paid in the trust account of the seller's attorneys as the purchase price for other purposes other than as a purchase price for the said property. In argument before me the respondents' counsel conceded that a portion of the purchase price had indeed been paid. Although I was not required in terms of the relief claimed by the applicant to adjudicate this issue I find however that for me to be able to adjudicate the issue at hand I have to make a finding as to whether the applicant has paid the full purchase price or not.

[15] It is common cause that the applicant paid an amount of R3 740 000 into the trust account of the seller's attorneys. It is not in dispute that the applicant authorised the seller's attorney to release a portion of that amount, R3 400 000, and pay it over to the seller for the seller to finalise the development. The respondent's contention is that once the funds left the trust account they were no longer entrusted for the purpose of a purchase price. The funds were used to pay off expenses of the development. According to the respondents' counsel the applicant authorised the purported purchase price to be utilised for other purposes before the sale transaction was

finalised. In argument that the payment in this instance was intended to be used for a purpose other than to discharge the purchase price, the respondents' counsel referred me to the judgment in *Stiglingh v French* (1892) 9 SC 386 411 where De Villiers CJ stated as follows:

> "The debtor, and in failing him, the creditor, must declare his intention before or at the time of payment, in order that it may still be open to the creditor not to accept it upon the debtor's terms, and to the debtor not to make it upon the creditor's terms."

[16] I am in agreement with the respondents' counsel that the applicant's intention should have been declared at the time of payment. To my mind, the applicant's intention appears clear from both the agreements it entered into with the seller. To me, the intention was always to pay the amount as the purchase price. It is quite clear from the Deed of Sale that the amount was paid in as purchase price for the property. In the agreement in which the applicant authorised the release of the funds, to me, the intention remains that the amount was for the purchase price. This agreement is specific and provides that:

> "WHEREAS the parties entered into Offers to Purchase dated 6 March 2008 in respect of UNITS 1 and 3 in the scheme known as NORMA JEAN SQUARE;
>
> AND WHEREAS the PURCHASER has made payments towards the purchase price on each Unit into the bank account of Snyman de Jager Inc in the total amount of R3 790 000,00;

AND WHEREAS the SELLER requires funds to finilise the development;

NOW THEREFORE THE PARTIES AGREES [SIC!] AS FOLLOWS:

1. The PURCHASER hereby authorise 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; . . ."

[17] I have no doubt therefore that the funds were intended for the payment of the purchase price and remains even after they were released to the seller for the payment of the purchase price. I find the contention by the respondents' counsel that the funds were released for the personal use of Lawrence to be without substance. The seller is a close corporation and cannot act on its own. Its member(s) in this instance, Lawrence, must act on its behalf. Lawrence was the sole member of the seller and according to the agreement was duly authorised to act on behalf of the seller and it can therefore not be said that he (Lawrence) was acting in his personal capacity when he received the funds. What he used the funds for once released, in my view, is neither here nor there. What is clear is that the funds were meant for the purchase price of the property and were released to the seller for that purpose. Lawrence was duly authorised to represent the seller in both agreements in issue herein. I rule therefore that the applicant performed in full as *per* the agreement of sale. It paid the purchase price in full and having elected to pursue the agreement the respondents are bound to transfer the property into the name of the applicant.

POINTS *IN LIMINE*

[18] However, the respondents' counsel raised points *in limine* which according to him are fatal to the application. The points raised are the anticipated dispute of fact; prescription; non-joinder of the seller and impossibility of performance. I shall therefore deal with the points *in seriatim*.

ANTICIPATED DISPUTE OF FACT

[19] The respondents' counsel contends that the applicant opted for an application procedure even though there was an anticipated dispute of fact. According to counsel application by way of motion procedure is utilised where there are no disputes of facts. The applicant can therefore not succeed on motion. It knew in advance that it was not on good ground as the application was bound to be opposed. The applicant knew at the time when it requested the liquidators to transfer the property in its name that there were no funds in the trust account for the payment of the purchase price. It knew as such that the respondents would refuse to transfer the property into its name. According to the respondents' counsel the applicant could not ask the liquidators to transfer the property whilst it has consented to the seller to use the funds for other purposes. The applicant should have known that it was taking a risk because the seller disclosed that it did not have funds to complete the development and that once the funds left the trust account they were no longer entrusted for the purpose of a purchase price.

[20] It is argued on behalf of the applicant that there is no dispute of fact on the papers but a difference in interpretation. What requires to be determined by the court is whether the agreement is between the applicant and the seller or the applicant and Lawrence. The applicant's contention is that Lawrence is not part of the agreement and that the applicant did not authorise the funds to be released to him (Lawrence) but to the seller. There is thus no factual dispute as all the facts are contained in the agreement.

[21] The principal ways in which a dispute of fact arises have been succinctly enunciated in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (TPD) at 1163. The clearest instance is, of course,

a. when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produce or will produce, positive evidence by deponents or witnesses to the contrary. He or she may have witnesses who are not presently available or who, though averse to making an affidavit, would give evidence *viva voce* if subpoenaed.

b. The respondent may admit the applicant's affidavit evidence but allege other facts which the applicant disputes.

c. He or she may concede that he or she has no knowledge of the main facts stated by the applicant, but may deny them, putting applicant to the proof thereof and himself or herself giving or proposing to give evidence to show that the applicant and his or her deponents are biased and untruthful or otherwise unreliable, and that certain facts

upon which the applicant and his or her deponents rely to prove the main facts are untrue.

d. He or she may state that he or she can lead no evidence himself or herself or by others to dispute the truth of applicant's statements, which are peculiarly within applicant's knowledge, but he or she puts applicant to the proof thereof by oral evidence subject to cross-examination.

[22] The issue on this point is whether there is a dispute of fact in circumstances where the applicant contends that the funds were released to the seller whereas the respondents' submission is that the funds were released for the benefit of Lawrence.

[23] This issue arises from the facts contained in an agreement. The relevant terms of the said agreement are set out in paragraph [16] of this judgment.

[24] The general rule is that a document is conclusive as to the terms of the transaction which it was intended or required by law to embody. Where parties decide to embody their final agreement in written form, the execution of the document deprives all previous statements of their legal effect. The previous statements are irrelevant and evidence to prove them is inadmissible. The document becomes conclusive as to the terms of the transaction which it was intended to record. See *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47; *Venter v Birchholtz* 1972

(1) SA 276 (AD) at 282 and *National Board (Pretoria) (Pty) Ltd and another v Estate Swanepoel* 1975 (3) SA 16 (A) at 26A – H.

[25] If I find that there is indeed a dispute of fact, it means that the respondents should or will have to produce positive evidence by deponents or witnesses contrary to the applicant's evidence. In the light of the judgments referred to in paragraph [24] of this judgment, the respondents' evidence will be irrelevant and inadmissible in the circumstances of this case. I am thus satisfied that there is no dispute of fact and that what is in issue is the difference in interpretation. The extrinsic evidence the respondents seeks to rely on can be used for no other purpose but the interpretation of the agreement. This point is therefore unsustainable.

PRESCRIPTION

[26] It is argued on behalf of the respondents that the applicant's claim has become prescribed in terms of the provisions of the Prescription Act No.68 of 1969, as amended, in that a period of more than three years has elapsed since the funds were paid over to Lawrence and no demand has been made for the refund of such funds. The funds were released to Lawrence on 23 September 2008 which is more than three years before the applicant launched this application.

[27] In opposition to this point, the applicant's counsel submits that the applicant's claim in this instance is not for the return of the funds released to Lawrence but for the transfer of the property into its name. According to counsel, whether the funds released and the claim in respect thereof has prescribed, is irrelevant for purposes of this application. He contends that the first possible time the applicant got to know that there was a problem with the transfer is in November 2010 when it was informed about the attitude of the liquidators to the property. At all times before then the applicant had no knowledge that the property would not be transferred. Information at its disposal was that transfer would take place. The application was thus launched three (3) months before the claim prescribed.

[28] I am in agreement with the submission by the applicant's counsel. The purpose of this application is clearly set out in paragraph 13 of the applicant's founding affidavit. In essence the applicant seeks an order to compel the respondents to sign all the documents required to effect the transfer of the property to the applicant to give effect to the purchase agreement. It is common cause that the applicant only became aware that the liquidators were not going to transfer the property to it in November 2010. It is also not in dispute that this application was launched in August 2012 which was three months before the claim for the transfer of the property could become prescribed. To my mind, the applicant's claim has not, as suggested by the respondents' counsel, become prescribed. I am as a result compelled to reject this point.

NON JOINDER

[29] The respondents' contention is that the applicant should have joined Lawrence, who has been sequestrated, and/or the trustees to his estate as a party to the proceedings as he (Lawrence) has a material interest in these proceedings. The respondents' view is that Lawrence was involved in a substantial way in dissipating the applicant's funds.

[30] The argument by the applicant's counsel is that the relief sought by the applicant is against the liquidators now in charge of the insolvent estate of the seller and in their respective capacities as the trustees of the estate. His further argument is that the claim is against the trustees based on the agreement entered into by the applicant and the seller who is a close corporation. Lawrence as such is not involved and signed the agreement only as a duly authorised representative of the seller. There is no argument before this court that the corporate veil should be lifted to include Lawrence as the alter ego of the seller.

[31] My view is that on the findings I have already made, it was not necessary for the applicant to have joined Lawrence or the trustees of his estate to these proceedings. The claim in these proceedings, as I have already stated, is for transfer of the property and not for the return of the funds. The applicant is therefore correct, the claim is against the trustees/liquidators of the insolvent estate of the seller for the transfer of the property in the name of the applicant.

IMPOSSIBILITY OF PERFORMANCE

[32] The respondents' contention is that transfer as prayed for by the applicant cannot be given effect to as the funds intended for the purchase price of the property were dissipated by Lawrence and had been denuded from the estate of the seller with the consent of the applicant.

[33] This point should also be dismissed. I have already made a ruling that the funds were not released for the benefit of Lawrence but for the benefit of the seller.

[34] I rule therefore that the respondents' counsel having failed to sustain all the points he raised *in limine* the applicant should be granted the relief it seeks in its notice of motion.

COSTS

[35] The applicant having succeeded in its claim is entitled to costs of suit. In its notice of motion the applicant prays for a special cost order on an attorney and client scale. I am however of the view that the circumstances in this case do not entitle the applicant to a punitive cost order. To my mind, the respondent had a valid point of law which required to be adjudicated upon. I as a result grant a cost order against the respondents (the first, second, third,

fourth and fifth respondents) in their joint capacity as liquidators of the insolvent estate of the seller. Such costs to be on a party and party scale.

ORDER

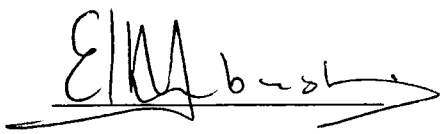
[36] In the circumstances I grant the following order:

a. The first, second, third, fourth and fifth respondents in their joint capacities as liquidators of Meltin Properties 59 CC (in liquidation) are ordered to sign within seven (7) days of being requested to do so, all documents required for the seventh respondent (or any other properly appointed conveyancing attorneys) to effect transfer of Sectional Title Units 1 and 3 of SS Norma Jean Square, 124/2010 situated at Die Howes Ext 197, 705, also known as units 1 & 3 Norma Jean Square, 244 Jean Avenue, Centurion, to the applicant in effecting the purchase agreement entered into between the applicant and Meltin Properties 59 CC on 6 March 2008, alternatively 6 November 2008.

b. In the event that the first, second, third, fourth and fifth respondents in their joint capacities as liquidators of Meltin Properties 59 CC (in liquidation) fail or refuse to sign within seven (7) days of being requested to do so all documents required for the seventh respondent (or any other properly appointed conveyancing attorneys) to effect transfer of Sectional Title Units 1 and 3 of SS Norma Jean Square,

124/2010 situated at Die Howes Ext 197, 705, also known as units 1 & 3 Norma Jean Square, 244 Jean Avenue, Centurion, to the applicant in effecting the purchase agreement entered into between the applicant and Meltin Properties 59 CC on 6 March 2008, alternatively 6 November 2008, the sheriff of this court is ordered to sign all documents required for the seventh respondent (or any other properly appointed conveyancing attorneys) to effect transfer of Sectional Title Units 1 and 3 of SS Norma Jean Square, 124/2010 situated at Die Howes Ext 197, 705, also known as units 1 & 3 Norma Jean Square, 244 Jean Avenue, Centurion, to the applicant in effecting the purchase agreement entered into between the applicant and Meltin Properties 59 CC on 6 March 2008, alternatively 6 November 2008.

c. The first, second, third, fourth and fifth respondents in their joint capacity as liquidators of Meltin Properties 59 CC (In Liquidation) are ordered to pay the costs of this application on a party and party scale jointly and severally, the one paying the other to be absolved.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearances:

HEARD ON THE	: 20 AUGUST 2013
DATE OF JUDGMENT	: 17 JANUARY 2014
APPLICANT'S COUNSEL	: ADV J.C. KLOPPER
APPLICANT'S ATTORNEY	: VAN GREUNEN & ASSOCIATES INC
RESPONDENTS' COUNSEL	: ADV A. FARBER
RESPONDENTS' ATTORNEY	: FARBER SEABELO EDELSTEIN