

THE SCARE OF DOUBLE SALES: WHO GETS THE PROPERTY?

Fulsome Properties (Pty) Ltd v Selepe and Others (14001/2021) [2021] ZAGPPHC 196 (6 April 2021)

It occurs more often than one would imagine that a property is sold by its owner to more than one person during the same period of time. If the purchasers are both in good faith, it causes great difficulty to find a fair way out of the conundrum. In the present matter, the later purchase was one in installments, and the agreement was recorded against the title deed of the land, a requirement for installment sale agreements of immovable property. How does that impact the rights of the first purchaser, who had in the meantime put tenants in the property after concluding the (first) sale agreement, which was not an installment sale agreement?

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

FACTS

Ms Selepe sold two units in a sectional title scheme to Fulsome Properties (Pty) Ltd ('Fulsome') in the first week of October 2020. Fulsome performed in terms of the agreement and paid the deposits on the due date. It was specifically agreed that Fulsome would be entitled to vacant occupation of the properties as from 31 October 2020, from which date Fulsome would be entitled to full beneficial use and enjoyment of the respective properties. Fulsome immediately put tenants into the properties.

The transaction however stalled and registration could not take place, as Ms Selepe failed to provide the FICA documentation to the conveyancing attorneys and also failed to sign the form for release of the bond cancellation figures (a requisite in the transfer process to cancel the existing bond). The conveyancers commenced with steps to compel her to perform in terms of the agreement.

It then became apparent that, 5 weeks after the sale to Fulsome, Ms Selepe had entered into a further agreement in respect of the same units. This subsequent sale agreement was an instalment sale agreement, the details of which were recorded against the title deed in terms of section 20 of the Alienation of Land Act, in February 2021.

In terms of the instalment sale agreement, possession, benefit and risk, profit and loss in respect of the units would be given to that purchaser, Lentse Investments (Pty) Ltd ('Lentse'), from date of registration of the recordal of the agreement at the deeds office.

Neither purchasers knew of each other, but all this came to the fore when Lentse interfered with the tenants that Fulsome had in the meantime placed in the apartments.

This resulted in Fulsome applying to court in the present matter for an interdict prohibiting Lentse from interfering with the tenants it had placed in the apartments, and prohibiting transfer to Lentse or anyone else, until the application in the main is decided upon by the Court.

HELD

- For a court to grant an interdict in favour of an applicant, it must be satisfied that there has been proper compliance with the prerequisites of an interdict, which are: (1) a clear right; (2) a well-grounded apprehension of irreparable harm if the interim relief is not granted; (3) that the balance of convenience favours the granting of an interim interdict; and (4) that the applicant has no other satisfactory remedy.

Prima facie right

- It is well known that the existence of a contract for the sale of a specific property does not affect the validity of a subsequent sale of the same property by the same seller to a different purchaser. In other words, the existence of an agreement for the sale of a specific thing does not prevent the creation of a competing personal right *ex-contractu* for the delivery or the transfer of the same movable or immovable thing. Consequently, ownership is generally not acquired by the purchaser whose contract was the earlier one, but by the purchaser who was the first to obtain delivery (by registration of transfer) without knowledge of the existence of the prior right of another.
- In the present matter, Fulsome was placed in possession of the premises as from 31 October 2020. At that stage, Lentse had not yet transacted with the seller, Ms Selepe, and accordingly Fulsome had acquired rights in respect to the property; there was no competing purchaser as yet.
- Where ownership has not yet passed to any one of competing purchasers, the personal right of the purchaser who is first in time is given preference by application of the *maxim qui prior est tempore potior est jure* ("he who is earlier in time is stronger in law").
- The accepted approach to successive sales and competing rights is that, as a point of departure, the possessor of the earlier right, in this case Fulsome, is entitled to specific performance, unless the later purchaser, Lentse, can show that the balance of fairness is in its favour.
- The *nemo plus iuris* rule must also be considered. It stipulates that no person may transfer more rights than they hold. The right to possession, use and enjoyment was first given to Fulsome by virtue of the sale agreement which entitled it to possession and occupation of the property from 31 October 2021. In line with the *nemo plus iuris* rule, because the right of possession had already been transferred to Fulsome, Ms Selepe was therefore incapable of passing the same right of possession to Lentse.

Irreparable harm

- In determining the reasonable apprehension or the continuation of the alleged irreparable harm, the test is an objective test. Lentse admitted that it attempted to gain vacant occupation of the property since November 2020 and that it attended the property in March 2021 to obtain the keys of the apartments in order to make a copy.
- It is clear that the irreparable harm to Fulsome will continue as Lentse stated it will continue to attempt to obtain access as it believes it has the right to do so.

Balance of convenience

- In determining the balance of convenience, a court must weigh the prejudice that an applicant will suffer if the interim relief is not granted against the prejudice a respondent will suffer if it is granted. Fulsome's right as the purchaser, who is first in time, is given preference by application of the *maxim qui prior est tempore potior est iure*. Fulsome had placed tenants in the units on the basis of the terms of the contract of sale entered into with Ms Selepe and was entitled to possession and occupation of the said property, as well as the rental income. The balance of convenience favoured Fulsome; should this interdict not be granted, Lentse will continue to attempt to gain access to the apartments.

No alternative remedy

- It was shown that Fulsome had attempted to make arrangements with Lentse, pending a court action to determine their respective rights. These were however unsuccessful. Hence Fulsome had no other option but to approach the Court and was entitled to the interdict being issued.

CONCLUSION

Fulsome's application succeeded.