RIGHTS OF PROPERTY PURCHASER PRIOR TO EXECUTION SALE

Mamogale and Others v Nedbank Ltd and Others (3112/15) [2015] ZAGPPHC 629 (3 September 2015)

What to do if you have been paying parts of a purchase price for a home you desire, only to come second when the bondholder executes against the seller and the property is sold to a third party in the execution sale. Is there a right of redemption in our law (i.e. a right to pay the unpaid debt after the sale of execution but before the property is transferred) up until the point of registration of transfer?

The Judgment can be viewed here.

FACTS

Mr and Mrs Mamogale were desirous to sell their home and buy a new property. They were directed to one J & I Morton Estates & Auctioneers who indicated that a certain property was to be auctioned in the near future. The Mamogales were interested in the property and hence entered into the necessary arrangements to purchase it for R815,000.00.

The offer to purchase was signed and accepted by the property owner, Gcanga, on 4 March 2013. The Mamogales made a payment of R500,000.00 on 20 March 2013 and the balance would be raised by the sale of their existing home. The finalisation of the latter sale however took longer than expected and the Mamogales made two further payments in the amounts of R144,000.00 and R21,000.00 in October 2013. The remaining amount of R150,000.00 was paid on 3 December 2013. The property was bonded at the time to Nedbank, but the bank was not informed of the sale nor consented thereto.

When the transferring attorneys were instructed to attend to the transfer, it came to light that the property was bonded. They thus communicated with the bank and bond cancellation attorneys were appointed by Nedbank to attend to the cancellation of the mortgage bond.

Payments of the due amounts were however not made as required and Nedbank subsequently obtained judgment against Gcanga in November 2013 and an order declaring the property executable was granted.

There were continued efforts to effect transfer of the property to the Mamogales (by arrangement with Nedbank, it appears, although the judgment is not clear on this). However, due to delays in settling the outstanding amounts owing under the mortgage bond, Nedbank eventually withdrew its consent to the transfer and arranged a sale in execution for 7 November 2014. The property was then sold to Mabena.

It was common cause between the parties that as at 7 November 2014, an amount of R 34,181.81 remained unpaid and the Mamogales only paid this amount on 3 December 2014, almost a month after the property was sold in execution.

The Mamogales then approached the court for an order setting aside the execution sale of the property to Mabena in November 2014. The basis for the submission was reliance on the (fateful) sale of the property by the auctioneers of Gcanga to them in March 2013, prior to the sale in execution. They argued that in terms of the common law, they held the right to redemption (i.e. the right to pay the unpaid debt after the sale of execution but before the property is transferred to the execution sale purchasers) until registration of transfer.

HELD:

- A warrant for the sale in execution of immovable property can only be set aside on limited grounds, one being that the underlying cause of the warrant in execution has fallen away such as full payment of the debt due under the judgment. In the present matter, this was not indicated

- Once the execution process had been completed, the sale in execution could not be set aside. The execution process is completed before registration of transfer takes place.

- The Mamogales again could not show that at the date of the sale in execution of the property, the underlying cause had fallen away as the amount of R34,181.81 remained unpaid on that date. There also were no grounds upon which the sale could be set aside;, the sale in execution was properly executed.

- There is thus no merit in the Mamogales' reliance on the March 2013 sale to them. They indeed acquired personal rights when that agreement was concluded, but these rights could not trump the rights of the purchaser at a sale in execution. The right to redemption in circumstances such as the present was not granted by the provisions of the National Credit Act nor is it granted under common law.

The Mamogales' application was dismissed.

CONTACT US

- CAPE TOWN Tel: 021 406 9100
- SOMERSET MALL Tel: 021 850 6400
- TYGER VALLEY Tel: 021 943 3800
- FOURWAYS Tel: 010 001 2632
- CLAREMONT Tel: 021 673 4700
- STELLENBOSCH Tel: 021 001 1170
- MENLYN Tel: 012 348 1682
- CENTURION Tel: 012 001 1546
- FISH HOEK Tel: 021 784 1580
- TABLE VIEW Tel: 021 521 4000
- ILLOVO Tel: 011 219 6200
- BEDFORDVIEW Tel: 011 453 0577