CAN ONE LOSE THE MONEY PAID FOR A LIFE RIGHT IN A RETIREMENT SCHEME?

Herold Gie and Broadhead Inc v Harris N O and Others (602/2023) [2024] ZASCA 125 (13 September 2024)

The Housing Development Schemes for Retired Persons Act goes a long way to protect purchasers of life rights in retirement schemes. Just how far the Act's provisions shield purchasers was investigated in the Supreme Court of Appeal recently. The main issue was whether, on insolvency of the scheme's developer, the purchasers could claim repayment of the purchase price from the developer's attorneys, who had received the funds on behalf of their client initially – this despite having paid the funds to the developer upon conclusion of the transactions.

The judgment can be viewed here.

FACTS

This matters relates to an action brought by six purchasers of life rights in the St Leger Retirement Hotel located in Muizenberg, Cape Town. The St Leger Trust ('**the developer**' or '**the trust**'), was the developer of the scheme and seller of the life rights.

The developer established the retirement hotel as a 'development scheme' as defined in the Housing Development Schemes for Retired Persons Act 65 of 1988 ('**the HDSA**').

In the period from 2009 to 2011, these purchasers had paid the purchase price and took occupation of their units. Each had paid the funds into the trust account of Herold Gie Broadhead ('**HGB**'), giving written authorisation to the latter to pay these funds to the developer. HGB released the funds to the developer accordingly.

In October 2014, the purchasers, acting through their attorney, cancelled their life rights agreements and each demanded a refund of the purchase price. They alleged that they had not been furnished with the certificates of compliance contemplated under section 6(1)(a) of the HDSA and section 14(1)(a) of the National Building Regulations Standards Act.

In March 2016, the developer was sequestrated. The purchasers duly lodged their claims for refund of the purchase price with the trustees of the insolvent developer's estate. They received concurrent dividends only, i.e., they formed part of the *concursus creditorum* and were not reckoned to hold preferential rights. ('*Concursus creditorum*' refers to the granting of preference to creditors as a group over any individual creditor's interests. The purpose hereof is to ensure that the insolvent's assets are collected and distributed amongst its creditors in the prescribed order of preference.)

In October 2017, they instituted proceedings against HGB, claiming a refund of the purchase prices which had initially been paid into HGB's trust account. The Western Cape High Court: Cape Town ('**the High Court**') found in their favour.

This matter deals with HGB's appeal against that finding to the Supreme Court of Appeal (the **SCA**').

The relevant provisions of the HDSA

Section 6(4) of the HDSA, on which the purchasers' claims are founded, must be interpreted within the context of the other provisions of section 6.

'6 **Restriction on receipt of consideration**

(1) Subject to subsection (3)…no developer may…receive any consideration…unless-

(a) An architect or a quantity surveyor has issued a certificate that the housing development scheme concerned has been erected substantially in accordance with any applicable officially approved building plans and town planning scheme and applicable local authority by-laws, and is sufficiently completed…;

(b) A copy of that certificate has been furnished to the purchaser concerned;

(c) …

(2) …

(3) Subsection (1) shall not apply to the receipt of any amount-

(a) which the purchaser by virtue of a contract entrusts to a practitioner or an estate agent in his capacity as such, to be kept, for the benefit of a developer, in the trust account of the practitioner or estate agent until the provisions of subsection (1) have been complied with; or

(b) which by virtue of a contract is paid to the developer if, before such payment, the purchaser was furnished with an irrevocable and unconditional guarantee by a banking institution…in terms of which the banking institution…undertakes to repay the said amount - to the purchaser, if the provisions of subsection (1) are not being complied with.

(4) If, in the circumstances contemplated in subsection (3), the developer becomes an insolvent before the provisions of subsection (1) have been complied with, any amount kept in a trust account in terms of paragraph (a) of subsection (3)…shall immediately become payable to the purchaser concerned by the practitioner, estate agent…concerned.' *(Our emphasis.)*

In summary:

- Section 6(1)(a) prohibits receipt by the developer of money paid as purchase price for life rights until two conditions had been met - being (i) to procure a certificate from an architect or land surveyor relating to the building work, and (ii) to furnish a copy thereof to a purchaser.
- Section 6(3) *excludes the restriction* on release of the purchase price to the developer - imposed in terms of s 6(1) - in circumstances where the purchase price is paid to a legal practitioner or an estate agent.
- Section s 6(4) entitles a purchaser of a life right to a refund of the purchase price held in a legal practitioner's trust account, where the developer of the scheme becomes insolvent.

Main contention before the SCA

The main issue is whether on insolvency of the developer, the purchasers had a claim in terms of section 6(4) of the HDSA for repayment of the purchase price by HGB, in circumstances where HGB, into whose trust account the purchase price for the life rights was paid, had disbursed the purchase price to the trust before it became insolvent. (No certificate in terms of section 6(1)(a) of the HDSA was ever furnished to the purchasers.) The high court determined this issue in favour of the purchasers.

In its appeal to the SCA, HGB argued, however, that section 6(4) finds no application in this case because by the time the trust became insolvent they had paid to the developer all the moneys that had been entrusted to them by the purchasers. There were therefore no moneys 'kept in trust' as specified in that section.

HELD

- In terms of the HDSA, section 6(1)(a) prohibits receipt by the developer of moneys paid as the purchase prices for the life rights, until two conditions had been met. First, certification had to be procured regarding compliance of the building works with applicable, approved building plans, the town planning scheme, and the like; and that the buildings were suitable for utilisation as housing interests. Secondly, a copy of the certificate had to be furnished to the purchaser.
- The exclusion under section 6(3) is premised on the purchase price being kept in a practitioner's account, for the benefit of the developer, until the provisions of subsection 1 have been complied with. It is not in dispute that in this case the purchasers entrusted the moneys to HGB on this basis.
- The meaning and purpose of section 6(4) within the context of section 6 as a whole, is clear. It is the protective measure provided to safeguard the interests of elderly purchasers in instances where a developer of a retirement home becomes insolvent before the guarantees on the suitability of the life right housing unit are in place, as provided for in section 6(1). Section 6(4) empowers the practitioner or estate agent to immediately release to the elderly purchaser, the purchase price that is kept in the trust account,

thus protecting the purchaser from having to compete in the *concursus creditorum*. Section 6(4) is triggered by the developer's insolvency, in circumstances where the purchase price, that was entrusted to the practitioner or an estate agent is 'kept…in the trust account of the practitioner…' as provided under s 6(3)(a).

- Section 6(4) is not an open-ended statutory foundation for claims of repayment to purchasers, of moneys entrusted to practitioners under the HDSA. It is confined to instances where (i) the developer becomes insolvent *while* (ii) there are moneys held in trust by a practitioner, for the developer's benefit.

  In this regard specifically, the high court's conclusion that the purchasers were HGB's trust creditors, is inconsistent with the language of s 6(3)(a). Under that section the purchase price is entrusted to the practitioner, 'to be kept for the benefit of the developer'. Consequently, under subsections 6(3) and (4), it is the developer rather than the purchaser, that is the practitioners' trust creditor. Ordinarily, on sequestration of the developer, the purchase price funds would become part of the developer's insolvent estate. Had this not been the case it would have been unnecessary to protect the purchasers from the *concursus creditorum* as provided in section 6(4).

- Accordingly, section 6(4) finds no application in this case because by the time the trust became insolvent, HGB had paid to the developer all the moneys that had been entrusted to them by the purchasers. There were therefore no moneys 'kept in trust' as specified in that section.

CONCLUSION

The appeal is upheld.