



moment OF TRUTH

Legal update 6 of 2021: Power of attorney for security of a debt irrevocable for as long as debt remains unpaid

Introduction

This update deals with a recent case decided by the Supreme Court of Appeal dealing with the question of whether an irrevocable power of attorney as security for the payment of a debt can be cancelled.

Below is a summary of the case and insight into how we deal with these issues on the Momentum Retirement Annuity Fund, the Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund. We also included more detail on the case.

Summary

Case: Smit & Others vs Origize 166 Strand Real Estate (Pty) Ltd & Others (Case no. 710/19) [2020] ZASCA 132 (19 October 2020)

Can an irrevocable power of attorney that was granted to sell a property, as security for a debt, be revoked by the grantor before the debt is paid?

- **The finding:** Given that a relationship of principal and agent exists between the parties once the power of attorney has been signed, the agent is required to act in the best interests of the principal. However, in this instance, the power of attorney was granted as security over a debt. Since the parties had a business relationship, having entered into a joint venture, the agent had the same vested interest as the principal in selling the property to make a profit. The power of attorney is irrevocable for as long as the debt remains unpaid.

- **How we deal with this:** This scenario would not affect a member's fund benefits in the Momentum Retirement Annuity Fund, Momentum Pension Preservation Fund and Momentum Provident Preservation Fund as section 37A of the Pension Funds Act protects fund benefits from being ceded, transferred, hypothecated, or being attached by order of Court.

Certain investment policies offered by Momentum Wealth may be affected by this decision as the policies are capable of being ceded as security for a debt. In those cases, Momentum requires that a cession agreement be completed by the parties and submitted for the cession to be noted on the system. A power of attorney would not suffice for the creditor or cessionary (one who receives security for the debt) to deal with the policy and receive the proceeds thereof without the cession agreement.

More detail of the case

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132 (19 October 2020)

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sell a property, as security for a debt, be revoked by the grantor before the debt is paid?

This matter was heard in the Western Cape High Court (High Court) and then went on appeal to the Supreme Court of Appeal (SCA).

Background

The First Respondent, Mr Jacobs, bought properties comprising of a number of units in a scheme (the units) from liquidators of the seller for about R4,1 million. He paid a deposit of R410 000 and needed to provide a guarantee for the remaining portion of the purchase price. He approached the First Applicant, Mr Smit, to join him in the venture as he had already secured a buyer who was willing to buy the units for about R9,5 million. The understanding was that they could sell the units and share the profit. Mr Smit paid R1 million to ward off the threat of Mr Jacobs losing the property as he had not provided the required guarantees to the liquidators. On 21 July 2016, Mr Smit was provided with a power of attorney in terms of which he was authorised, amongst other things, to:

- obtain finance for the remainder of the purchase price;
- register the property in the name of the purchaser;
- do any maintenance or improvements to the property to get it to a sellable condition, and
- any activities to market the units and transfer them to the new owners.

Mr Smit alleged that the power of attorney was provided to him as security for the non-refundable R1 million that he paid and for the remaining portion of the purchase price which he was required to obtain. Mr Smit proceeded to raise the outstanding balance of the purchase price. With the full purchase price secured, the transfer of the units to Origize was processed but the buyer that Mr Jacobs referred to did not buy the units as initially intended. Efforts to find a willing buyer at the same price of about R9,5 million were unsuccessful.

Mr Smit found a buyer willing to buy the units for R5,4 million but Mr Jacobs refused the offer. In the interim, the partially completed units were vandalized and the value of the property reduced. In their reduced market value, the best price they could get was R3,95 million. This too, Mr Jacobs did not accept. On 15 March 2018, Mr Jacobs passed a resolution to revoke the power of attorney granted to Mr Smit. This made Mr Smit apply to the High Court asking for the court to make a declaration on the enforcement and revocability of the power of attorney. The High Court held that a power of attorney authorising one to act on behalf of another can never, in law, be said to be irrevocable and dismissed Mr Smit's application. That led to the application to the SCA by Mr Smit.

The SCA

The SCA considered the common law and case law which took the position that a party granting a power of attorney can revoke the power of attorney at any point in time even if the power of attorney is specifically marked irrevocable. The SCA held that the reasoning of the High Court, that it would be wrong to permit Mr Smit (as agent) to accept any offer on the units without the approval of Mr Jacobs (as principal), did not do justice to the relationship between the parties. This is because the power of attorney had been granted as security for the debt owing to Mr Smit and the only way he could secure his interest would be by exercising the authority granted by the power of attorney since he had assumed a substantial amount of financial risk. The SCA held that the resolution of 21 July 2016, which resulted in the power of attorney being granted to Mr Smit, was irrevocable, at least until the debt was repaid, and the purported revocation thereof was invalid. The SCA made an order that Mr Smit was allowed to accept an offer on the units and to sign the documents necessary to give effect to the sale and transfer of the units.

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