

Immovable property is one of the biggest investments a person can make, however, in today's economic climate, only a few are able to venture out on their own. In order to split the risk and share the costs involved in the purchase and upkeep of a property, two or more people may enter into a partnership. However, it often occurs that one or more persons in the partnership (the "defaulting party"), for whatever reason, fails to pay or contribute their share of the expenses of the property. This can cause significant consequences (such as bad credit ratings and/or repossession of the property) not only for the defaulting party but the innocent party too.

In this article, we examine the relationship between the parties and the remedies available to the innocent party in the event that one or more of his/her partners default on mortgage repayments. It is not exhaustive on all aspects of the issue, but is rather a look at the main processes involved. For this article, all legal submissions made are made with reference to *Companies and other Business Structures in South Africa* by Judge Dennis Davis *et al*¹, and *The Law of Contract in South Africa* by D. Hutchison *et al*², and we will, for the purposes of this article, refer to the relationship that exists between the complying and defaulting party as a partnership or contractual agreement.

What is a partnership?

A partnership is defined as a legal relationship created by agreement between two or more individuals in terms of which they agree to make some contribution to the partnership carried on for the joint benefit of the individuals and with the object of making a profit³.

For a partnership to exist, there are four essential elements that must be met. The elements are:

1. that each partner needs to bring something into the partnership;
2. the partnership should be carried on for the joint benefit of the partners;
3. the object of the partnership should be to make a profit; and
4. the agreement should be a legitimate one⁴.

In terms of the profit requirement, it was decided in *Ally v Dinath*⁵ that this requirement does not necessarily entail a motive for pure monetary profit and, with reference to *Isaacs v Isaacs*⁶ that an object to provide for the livelihood and comfort of the parties was sufficient to satisfy this requirement.

Remedies available to an innocent party terminating a partnership by consent

In the event a defaulting party cannot and/or refuses to keep up with his/her share of the expenses involved with the property in the partnership, the defaulting party may be released from his/her rights and obligations with the written consent of the innocent party. This will have the effect that the innocent party will take on the mortgage by him/herself. The bank or financial institution must also be satisfied that the innocent party is competent and capable of keeping up with the necessary mortgage repayments him/herself.

The defaulting party may also be substituted with someone else (the “new party”), provided there is written consent from the innocent party and the bank and/or financial institution. As above, such substitution will not be effected if the person to be so substituted would not him/herself be competent in the bank’s eyes to keep up with the necessary bond repayments.

Once there is written approval from the innocent party and the relevant bank or financial institution to either remove or replace the defaulting party, the next step is to remove the defaulting party from the title deed of the property. The defaulting party may have to be compensated for his/her share of the property, if any (depending on the agreement between the parties), minus amounts the defaulting party lawfully owes in terms of the partnership agreement.

The transaction to substitute the parties would be subject to conveyancing fees and transfer duty and perhaps bond costs if there is assumption or substitution of the obligations under the mortgage bond. The parties would ordinarily agree who is paying the costs.

Terminating a partnership by court order

Another way to dissolve a partnership is by way of a court order on application by one or more of the partners – the innocent party/ies – for good cause shown. What is meant by “good cause” is a factual question which needs to be determined on a case by case basis. Examples of good cause, as determined by the courts, include the prolonged absence of a partner; continued incapacity of a partner by reason of illness affecting his/her ability to perform his/her duties in terms of the partnership agreement; an irretrievable breakdown in the relationship of the partners; and persistent negligence on the part of the defaulting party. The continuous missing of payments

constitutes a breakdown of the relationship and negligence on the part of the defaulting party which adversely affects the innocent party. The onus will be on the innocent party to prove on a balance of probabilities that one of the above situations have occurred which would enable the court to dissolve the partnership.

If and once the court order is granted, the property will have to be sold and the proceeds used to satisfy the remaining amount still owing and payable to the bank and/or other financial institution. Thereafter, a proper rendering of the account (in respect of the property) should be completed so amounts owed to the individual partners can be determined. Any residue of the sale will then be shared amongst the partners according to their pro rata share in the partnership, subject to anything else specified in the partnership agreement. If there is no residue and the sale price of the property was not sufficient to cover the outstanding mortgage amount, the parties need to cover these arrears with the bank or financial institution according to their pro rata share (again subject to the partnership agreement), failing which the bank or financial institution can hold the parties jointly and severally liable.

Claiming damages from the defaulting party

There are instances where the innocent party will pay both his/her share of the mortgage and property expenses, as well as the share of expenses of the defaulting party in order to avoid defaulting with the bank or financial institution and subsequently being blacklisted and having the property sold in execution. The innocent party will be able to claim this expenditure as damages from the defaulting party.

Contractual damages, as would be claimed against the defaulting party, seek to place the innocent party in the position he/she would have occupied but for the breach of the defaulting party. This entails an assessment of the position the innocent party finds him/herself in after the breach versus the hypothetical position he/she would have been in but for the breach. This will be measured by the complying party's positive/expectation interest which will encompass both wasted expenditure and expectation loss⁷. The assessment will allow the innocent party to claim the additional amount he/she had to pay in order to keep up with the defaulting party's share of the liabilities in respect of the property. The contractual damages claim will be subject to the proof of the requirements for such claim in the ordinary course by the innocent party; that is:

- the defaulting party must have defaulted, breaching the partnership agreement between him/herself and the innocent party;
- there must be financial loss; and
- there must be factual and legal causation of the loss suffered.

Contractual damages may be claimed from the defaulting party while the partnership is ongoing or upon the dissolution of the partnership as per the above.

Conclusion

In order to avoid unnecessary expenses and problems in the future, one must tread with caution when choosing to enter into a partnership agreement. Consideration should be given to the financial ability, accountability and reliability of the person you may be looking to enter into a partnership agreement with. One must ensure that the terms of the partnership agreement, be it oral or written, are clear, concise and specifically make provision for aspects such as breach and/or inability to keep up with mortgage repayments.

References

- 1Chapter 17- Partnerships, p367-383
- 2Chapter 12-3, Forms of Breach and Remedies.
- 3Davis, p 367
- 4Davis, p 371
- 51984 (2) SA 451 (T)
- 61949 (1) SA 952 (C)
- 7Hutchison, p331

Authors

Alec Veitch

Senior Associate at Schindlers Attorneys

Phone: +27 (0) 11 448 9609

veitch@schindlers.co.za

Musa Mathebula

Candidate Attorney at Schindlers Attorneys

Phone: +27 (0) 11 448 9646

mathebula@schindlers.co.za

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