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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case number: 2021/27858

Date of hearing: 14 November 2022

Date delivered: 17 November 2022

**REPORTABLE: NO
OF INTEREST TO OTHERS JUDGES: NO
REVISED**

In the matter between:

MAMOKETE LEBOGANG MATSITSE

Applicant

and

WILLIAM SELLO SEPOTOKELO

First Respondent

ANGELINAH KENEIWE SEPOTOKELO

Second Respondent

JUDGMENT

SWANEPOEL AJ:

[1] Applicant seeks an order for specific performance to enforce the terms of a sale of an immovable property. On 16 March 2021 the parties signed a written sale agreement in terms of which applicant purchased Erf [....], Helikon Park, Randfontein from respondents at a purchase price of R 1 230 000.00.

[2] The agreement was conditional on applicant obtaining approval for a loan of R 1 230 000.00, or any lesser amount that she would be prepared to accept. Applicant had to provide guarantees for the full purchase price within 21 days of the loan being approved.

[3] Applicant's loan was approved on 1 April 2021, and she accepted the quotation on 6 April 2021. The loan was only approved for the sum of R 1 168 500.00, leaving a shortfall of R 61 500.00. The guarantees were due by 27 April 2021. The conveyancing attorneys had, in the meantime applied for clearance figures from the municipal authorities. The municipal account amounted to R 129 000.00. On 7 May 2021 first respondent addressed a letter to the conveyancing attorneys in which he brought to their attention that respondents were unable to pay the municipal account, and that he was "withdrawing" the sale of the property.

[4] On 18 May 2021 applicant's attorney addressed a letter to respondents demanding that they should transfer the property. Respondents have not complied with the demand. First respondent is adamant that he cannot afford to pay the municipal charges, and that it is impossible for him to perform. Second Respondent does not oppose this application.

[5] First respondent has raised various defences. Firstly, first respondent says that the suspensive condition that applicant should obtain a loan for R 1 230 000.00 was not fulfilled, and that the agreement is therefore of no force and effect. Secondly, first respondent says that he is not able to pay the municipal account, and that performance is therefore impossible. He says that due to this supervening impossibility the contract is discharged.

[6] The first contention, that the suspensive condition was not fulfilled is, in my view, contrived. The agreement specifically provides that applicant may accept a loan for a lesser amount than the full purchase price. First respondent contends that it is only if applicant herself requested a lesser amount that the suspensive condition could be regarded as having been fulfilled. First respondent says that applicant did not state that she requested the lesser amount from the bank, and that she has not made out a case that the suspensive condition has been fulfilled. That is semantics.

The fact is that she accepted the loan for the lesser amount, which she was entitled to do, thereby fulfilling the suspensive condition.

[7] The contention that performance is impossible is also without merit. If a person undertakes to do something that he personally cannot do, but which can be done, performance is not impossible. Only if impossibility is absolute is the contract discharged. However, I am mindful of the fact that a court has a discretion not to order specific performance where the order would be impossible or unduly onerous to enforce. Due to the view I take hereunder, I do not have to make a finding on this aspect.

[8] A third aspect was raised by the first respondent which has more merit. First respondent says that when a party is seeking specific performance it must perform, or at least tender to perform its obligations. Applicant simply says that she has obtained a loan which she has accepted. Based on that averment, applicant says that she has fulfilled her obligations. That is, unfortunately, not the case. Applicant is obliged to pay R 1 230 000.00, not R 1 168 500.00. Applicant does not say that she is able to pay the balance, nor does she tender to do so. There is no evidence that applicant has ever provided guarantees for the purchase price. Applicant also does not say that the loan is still available to her.

[9] In my view, in the absence of performance, or a tender to perform, or even evidence that applicant is able to perform her obligations, applicant cannot succeed.¹

[10] In the premises, the application is dismissed with costs.

SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

¹ S.A. Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle 1955 (3) SA 541 (D&CLD)

COUNSEL FOR APPLICANT:

Adv. K Reddy

ATTORNEY FOR APPLICANT:

Swanepoel Van Zyl Attorneys

**COUNSEL FOR
FIRST RESPONDENT:**

Adv. J Le Roux

**ATTORNEYS FOR
FIRST RESPONDENT:**

Bhika Calitz

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