IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 26146/2020

REPORTABLE: NO
OF INTEREST TO OTHERS JUDGES: NO
REVISED
DATE: 21/5/21

In the matter between:

JOHANNES MATTHEUS DU PREEZ **Applicant**

and

ALPHA VALENCIA (PTY) LTD **Respondent**

JUDGMENT

FRANCIS-SUBBIAH, AJ

[1] The applicant seeks specific performance (payment and transfer) in terms of an agreement of sale of an immovable property that was entered into between the applicant and the respondent. The respondent pleads that specific performance would operate unreasonably hard on it and would be inequitable under the circumstances.

[2] The hearing of the matter commenced with the respondent's application for referral to mediation in terms of rule 41A of the uniform rules of court. The nub of the application to mediate is to re-negotiate a new residential price of the property in light of the prevailing uncertainty relating to the respondent's approval of the township development by the City of Tshwane. The application was opposed on the basis that mediation will not assist the parties any further. There is no point in further negotiation, especially since specific performance is being claimed due to the non-performance of the respondent. Furthermore there is concern that mediation will give rise to more litigation between the parties.

[3] As of 9 March 2020 a court may "direct the parties to consider referral of a dispute to mediation" in terms of rule 41A. Although mediation has been described as a voluntary process, the court may direct the parties to consider mediation as a dispute resolution mechanism when it is clearly evident that such a procedure will benefit the parties and move them closer to better resolving the dispute by such mechanisms. From the facts before this court I am of the view that it is counter- productive to force these parties into mediation on the basis that they have already been negotiating since the signing of their contract and have reached a stage of impasse. Therefore the application to refer the matter to mediation in terms of rule 41A is refused.

[4] It is trite that, in order for a party to succeed with a claim for specific performance, that party must allege and prove the terms of the contract; and

compliance with any antecedent or reciprocal obligation, or must tender compliance therewith. The Supreme Court of Appeal confirmed this principle in *Nkengana and another v Schnetler and another [*2011] 1 ALL SA 272 (SCA).

[5] In this matter the specific performance arises from a written agreement concluded between the parties on 12 July 2017 for the sale of applicant's immovable property,[…], […], Ext […] (the "*property*") to the respondent. The relevant terms of the Deed of Sale read as follows:

> *"3. PURCHASE PRICE*
>
> *The purchase price is the sum of R10 000 000.00 (TEN MILLION RAND), (VAT included if applicable), payable by the Purchaser as follows:*
>
> *3.1 A non-refundable deposit of R150 000.00 (ONE HUNDRED AND FIFTY THOUSAND RAND) is payable by 30 September 2018 after the fulfilment of suspensive conditions referred to in sub-paragraph 4.1 and 4.2 below.*
>
> *3.2 The balance of the purchase price to the amount of R9 850 000.00 (NINE MILLION EIGHT HUNDRED AND FIFTY THOUSAND RAND) is payable by 30 September 2018 with an approved Bank guarantee(s) in favour of the Seller or his nominee, payable free of Bank Exchange at Pretoria upon registration of transfer of the Property into the name of the Purchaser. Such guarantee(s) shall be delivered by the Purchaser to and in the form or manner as directed by the Conveyancer."*

[6] The agreement of sale was amended by two addendums.

The first addendum was included in the deed of sale on 14 February 2018 which included at paragraph 3.3 read as follows:

> *"The purchaser is granted until 31 August 2018 to obtain the approval for its application for township establishment. Should any objections be raised during the aforementioned period, not have been satisfactorily disposed of, the purchaser, subject to sub-paragraph 3.4 hereunder, may be granted extension to 31 March 2019 to furnish approved bank guarantees for the purchase price as contained in sub-paragraph 3.2."*

[7] It is evident from the surrounding circumstances that the respondent did not deliver the bank guarantees and the parties once again entered in a further agreement by way of the second addendum.

[8] The second addendum signed on 15 May 2019 read as follows:

> *"3.5 The Purchaser is granted a further extension of time and until 31 March 2020 to deliver the required guarantees as contained in clause 3.2 above.*
>
> *3.6 A further deposit in the amount of R500 000.00 (Five Hundred Thousand Rand) is payable upon signature of this agreement.*

3.7 The Purchaser shall in addition to the deposits already paid, pay to the Seller a monthly amount of R50,000.00 (Fifty Thousand Rand) from 1 June 2019 until date of delivery of the required guarantees.

3.8 The payments made in terms of clause 3.6 and 3.7 above to be deducted from the Purchase Price."

[9] It is not in dispute from the wording of the agreement and the addenda, that the parties accepted that guarantees had to be delivered after the township development application had been authorised and finalised, and that the parties had accepted at the time of the signing of the second addendum, that the time periods (June 2019 to 31 March 2020) laid down would be sufficiently long enough for that to occur.

[10] However this did not happen and the respondent failed to deliver the guarantees by 31 March 2020. Directly, the applicant sought delivery of the guarantees from the respondent. This is evident from the correspondence between the parties. Notwithstanding, the guarantees have not been delivered and the applicant proceeds to seek specific performance for the outstanding purchase amount and the transfer of the property be effected in the name of the respondent.

Specific performance

[11] A court must exercise its discretion as to whether specific performance should be granted or not judicially upon a consideration of all the relevant facts. It was held in *Haynes v King Williamstown Municipality* 1951 (2) SA 371 (A) at 378G that:

> "It is, however, equally settled law with us that although the Court will as far as possible give effect to a plaintiff's choice to claim specific performance it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quad* interest. The discretion which a Court enjoys although it must be exercised judicially is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances. As examples of the grounds on which the Courts have exercised their discretion in refusing to order specific performance, although performance was not impossible, may be mentioned: (a) where damages would adequately compensate the plaintiff; (b) where it would be difficult for the Court to enforce its decree; (c) where the thing claimed can readily be bought anywhere; (d) where specific performance entails the rendering of services of a personal nature…(e) where it would operate unreasonably hardly on the defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances."

[12] In considering an application for specific performance it was held in *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (AD) at 442 that the onus will rest on the respondent to allege and prove why the order for specific performance should not

be granted. In this regard the respondent raises principally the following four defences, namely the tacit term test, the approval of the township establishment defence, impossibility of performance defence and the undue hardship defence.

The tacit term defence

[13] A tacit term is an unexpressed provision of the contract and has been defined in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531 to 532 as follows:

> "An express provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term, the court, in truth, declares the whole contract entered into between the parties."

The court also referred to the common law test for determining whether a tacit term exists or not, as the "officious bystander" test.

[14] Accordingly, the tacit term test can only be implied if it is necessary in the business sense to give efficacy to the contract. The express terms of the contract must be considered as well as the surrounding circumstances and a full proper interpretation of the contract itself. Not only the surrounding circumstances, but it was held in *Starways Trading 21 CC (in liquidation) v Pearl Island Trading 714 (Pty) Ltd* 2019 (2) SA 650 (SCA), that the subsequent conduct of the parties must also be considered

whether the contract contains a tacit term. There must be an inference that the parties must have intended, the implied stipulation in question, with reference to the contract itself and the circumstances surrounding the contract.

[15] Reading in the tacit test clause, the respondent argues that the suspensive conditions in the clauses related to the obtaining of the approval of the township development, especially in light of objections that may be raised. This was amended in the first addendum whereby the purchaser was granted until 31 August 2018 to obtain approval for the township establishment, and if there were objections, extension could be given for the furnishing of guarantees to 31 March 2019. The second addendum also included a clause for the further extension of time and until 31 March 2020 to deliver the required guarantees. Therefore the parties clearly had in mind that a period of 7 months would be necessary for purposes of finalising a tribunal hearing, and that the provision of guarantees will only be required after the development has been approved at a tribunal hearing.

[16] On the contrary the applicants submit that it is for that very reason the Deed of Sale was expressly amended in the first addendum to delete any suspensive conditions. And the suspensive conditions were to the benefit of the respondent. When the respondent requested a further extension of time, the parties expressly agreed thereto and the Deed of Sale was again amended accordingly by the respective second addendum. If the respondent's performance was dependent on the approval of the

township establishment application, this would have been so stated and there would have been no need for the addendum.

[17] Herein lies the dispute between the parties. Respondent's argument is that the guarantees will only become due and deliverable upon approval of the township establishment at the tribunal hearing. Whereas the applicant says that the suspensive condition was removed by setting a fixed cut-off date for delivery of the guarantees to 31 March 2019, followed by a further indulgence by setting the cut-off date to 31 March 2020. As a result from that date onwards the concern for the approval of its application for township establishment rested solely within the hands of the respondent and placed no condition on the applicant.

[18] Applicant asserts that from the actions of Ms Sutton, from the respondent, she was well aware that the delivery of the guarantees was an independent obligation which was due by a specific date. This is why, when informed on 31 March 2020 that such guarantees were due, Ms Sutton replied: "*What? Ek het dit as einde Junie*?" and later undertook to provide the necessary guarantees by Friday, 3 April 2020.

[19] I am in agreement with the applicant that from a reading of the Deed of Sale with the addenda no such conditions are expressly stated, impliedly or tacitly expressed. Clause 17 of the Deed of Sale specifically provides that the contract of sale constitutes the entire agreement between the parties and that there are no other conditions,

stipulations, warranties or representations whatsoever made other than such as may be included herein and signed by the parties.

[20] From a plain and contextual reading of the original deed of sale inclusive of the addenda, it clarified the suspensive condition for providing the guarantees. It therefore was no longer dependent upon the approval for its application for township establishment by the City of Tshwane but set the cut- off date for delivery of the guarantees. Hence the delivery of the guarantees was an independent obligation which had to be compiled with by respondent on or before 31 March 2020. In my view this is an express term of the whole Deed of Sale and does not require reliance upon a tacit term in any manner whatsoever.

[21] The respondent further argues that since it pays the amount of R50 000.00 per month to the applicant long after the 31 March 2020 cut-off date, this is evident that the delivery of the guarantees are conditional upon the approval of the township establishment. Respondent submits that by not furnishing the guarantees on 31 March 2020, if it constituted a breach of contract, the applicant should not have accepted further monthly payments of R50 000.00. By accepting such payments, the applicant in fact has acted directly in accordance with the tacit term consideration. In addition the applicant waived his right to seek relief as a result of the alleged breach of contract because of the continued acceptance of R50 000.00 per month.

[22] I cannot find that this argument bears any merit on the basis that the R50 000.00 paid monthly is not an additional payment for the late delivery of the guarantees but a payment toward the purchase price. This is expressly set out in the Deed of Sale at clause 3.8 that *"The payments made in terms of clause 3.6 and 3.7 above to be deducted from the Purchase Price*." It therefore has no bearing on the delivery of the guarantees past the cut -off date of 31 March 2020.

Township establishment defence

[23] From the surrounding circumstances, the respondent alleges that the parties knew after signing of the second addendum that there were extreme difficulties in obtaining dates for a City Council tribunal hearing. Further that the respondent had done everything in its power to obtain the necessary permission for the township development and the cause of delay was solely attributable to the City Council even before 26 March 2020 when the national lockdown commenced due to COVID 19. By 31 March 2020 the City Council had not finalised the approval of the township development. The plight of securing a date for a tribunal hearing was exacerbated after the country wide lockdown. However it is currently a question of time before a tribunal hearing would be possible and that the time periods for guarantees be extended on that basis.

[24] The respondent contends that it has spent much money, time and effort on the development, and that the reason why the tribunal has not considered the application

yet, was purely and simply as a result of the recalcitrance of the City Council, the breach of their statutory and constitutional duties, and the countrywide lockdown. Respondent therefore submits that specific performance should not be granted under these circumstances as it was not possible for the respondent to perform.

Impossibility of performance

[25] The general principles of impossibility of performance were succinctly stated by Scott JA in *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA), as follows:

> *'As a general rule impossibility of performance brought about by vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case it is necessary to "look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied". The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant.'*

[26] Mere incapacity to perform does not render performance impossible. Respondent states that it is clear under the circumstances of this case that the impossibility to

perform by providing guarantees on the basis of approval of the township development was not self-created, and was made impossible as a result of the actions of the City Council and the delays caused in setting down hearings of the tribunal. The provision of guarantees was always linked to the permission for the township development, and it was objectively impossible to comply therewith before 31 March 2020, because the development had not been approved at that time. Therefore the respondent must be excused from such performance and the respondent cannot be said to have breached the agreement by not delivering guarantees on or before 31 March 2020.

[27] The applicant's contention that respondent's obligation to deliver the guarantees is independent of the respondent's township application approval and that any difficulties faced by the respondent with the City of Tshwane as a result of it failing to hold tribunals after the 31 March 2020 have no bearing on its failure to deliver the guarantees. I agree with the applicant's contention. The lockdown commenced a mere 5 days before the respondent's due date to deliver the guarantees on 31 March 2020. The respondent fails to allege any cogent reason why it ought to be excused from performing its obligations under the Deed of Sale as a result of COVID-19 and rendering the delivery of the guarantees absolutely impossible. Neither is there any indication that a tribunal date had already been set for hearing of the township application. I find that these 5 days is insufficient time to render the respondent's obligation to have become objectively impossible.

[28] In *Unibank Savings & Loan Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W) at 198D the court held that impossibility is not implicit in a change of financial strength or in commercial circumstances which cause the respondent's compliance with its contractual obligations to be difficult, expensive or unaffordable. Even so, the respondent does not allege that it cannot provide the guarantees for lack of financial affordability, difficulty in securing guarantees but merely that the providing of the guarantees is dependent upon its township application approval.

Undue hardship

[29] Both parties acknowledge that the respondent has invested a considerable amount of time and money in order to establish a township on the property. By all accounts, it appears that the respondent intends to proceed with its plan for the establishment of a township on the property, in spite of the City of Tshwane's recalcitrance. Should the applicant terminate the Deed of Sale as a result of the respondent's breach and claim damages then it is more likely that the respondent will suffer damages of its own in the form of the loss of its investment; and cause greater injustice to the respondent than an order for it to perform in terms of the Deed of Sale.

[30] The respondent does not allege or prove any facts which would render its performance unreasonably hard or which would produce injustice. Accordingly, there is no undue hardship which the respondent stands to suffer.

Conclusion

[31] Respondent has failed to allege or prove any fact which negates the applicant's claim and the relief it seeks. The respondent is currently in breach of the unambiguously, clear, express and unequivocal terms of the sale agreement which stipulates that respondent had to, by no later than 31 March 2020, deliver guarantees to applicant. As a result, the respondent has failed to discharge the onus that specific performance in terms of its agreement with the applicant is unfair; will operate unreasonably hard, will produce injustice or be inequitable under all circumstances.

[32] Accordingly, the applicant is entitled to an order as sought in the notice of motion.

As a result the following order is made:

1. It is declared that Respondent, at date of this order, owes Applicant the sum of R7 900 000.00 (Seven Million Nine Hundred Thousand Rand) plus interest thereon *a tempore morae* from date of demand, 6 April 2020 to date of payment, both days inclusive.

2. It is ordered that Respondent:

    2.1 within 7 (seven) days from date of this order pay the sum of R7 900 000.00 (Seven Million Nine Hundred Thousand Rand) into the trust account of Applicant's attorneys, Messrs DP Du Plessis Incorporated ("DPI") held at Nedbank Limited – Centurion, Account Number: […], Branch Code: 162-145 (Ref:P1057), the amount to be

kept in trust and made payable to Applicant upon the transfer of […], […] Extension […], Registration Division J.R. Province of Gauteng, Measuring 8565 Square metres ("the Property") into the name of Respondent.

2.2 within 7 (seven) days after being so requested in writing, sign all documentation and take all steps necessary in order to effect transfer of the Property into Respondent's name failing which the Sheriff of the High Court, Pretoria Central be authorised and directed to, on behalf of Respondent, take all such steps and sign all such documentation as may be necessary.

2.3 after registration of the property in its name and within 7 (seven) days after being so requested in writing, pay the mora interest referred to in paragraph 1 above into the trust account of DPI.

2.4 Pay the costs of the application.

R. FRANCIS-SUBBIAH

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Counsel for the Applicant: J G W Basson, SC

Counsel for the Respondent:	R Du Plessis, SC
Date of hearing:	18 May 2021
Date of judgment:	21 May 2021