



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

REPORTABLE

Case No: 18549/2015

In the matter between:

UNLOCKED PROPERTIES 4 (PTY) LIMITED

Applicant

and

A COMMERCIAL PROPERTIES CC

Respondent

Case Summary: Contract – Impossibility of performance – legal rules relating to impossibility of performance of obligations – requirement that impossibility must be absolute - contractual undertaking to transfer property – seller’s alleged impossibility to perform such obligation peculiar to itself and not absolute.

Specific Performance - seller failed to establish that an order of specific performance will be a mere *brutum fulmen* and Pyrrhic victory for the purchaser – order granted.

JUDGMENT

MEYER, J

[1] The applicant, Unlocked Properties 4 (Pty) Limited (the purchaser), claims specific performance by the respondent, A Commercial Properties CC (the seller), of

the obligation to transfer an immovable property to it, which obligation arose from a written agreement of sale that was concluded between them on 7 November 2014 (the contract). The immovable property is situated on the main road in Florida, Roodepoort (the property). It comprises 29 units; 22 flats and 7 small shops. The agreed purchase consideration is R 4,5 million.

[2] The contract was subject to two suspensive conditions; the one has been duly fulfilled and the other one waived. It is common cause that the purchaser has duly complied with all its obligations in terms of the contract, including the provision of a guarantee from a bank for payment of the full purchase price plus value added tax against transfer of the property into its name.

[3] A mortgage bond is registered over the property in favour of Albaraka Bank Limited (the bank), securing an indebtedness which the seller owes to the bank. At the time of deposing to its answering affidavit in these proceedings, the outstanding indebtedness was the sum of R4 920 016.07. There is thus a shortfall of R420 016.07 between the purchase price payable in terms of the contract and the seller's outstanding indebtedness to the bank (the shortfall amount). The sole member of the seller states in its answering affidavit that the seller 'does not have the financial means to provide a guarantee sufficient to make up the shortfall or to provide the said Albaraka Bank Limited with a guarantee sufficient to enable the cancellation of the bond and transfer of the property.'

[4] The seller informed the purchaser that the contract was accordingly cancelled. Once the seller had attempted to achieve a cancellation of the contract, the purchaser informed the seller's sole member that 'it might consider a loan to you to

fulfil your obligation to both the Bank and to the purchaser', to which he replied as follows:

'Thank you for your generous gesture, but I have to decline.

In order for me to deliver all the requested confirmations, and cover any and all other costs that would be attached to the sale of the said property, I have no option to revise the sale amount to R8.5 million.'

[5] The purchaser considered the seller's unilateral cancellation a repudiation, which it refused to accept, and it demanded specific performance from the seller of its obligation to transfer the property into its name. The seller did not heed the demand and hence the present application.

[6] The seller relies on the contractual defence of impossibility of performance. 'The legal rules relating to initial and supervening impossibility of performance, with their consequence, in certain circumstances, of the voidness of an agreement or the extinction of the obligations created by an agreement, relate to the initial or supervening impossibility of performance of *the obligations* purported to be created or created by the agreement.' (Per Cilliers AJ in *Rosebank Mall (Pty) Ltd and another v Cradock heights (Pty) Ltd* 2004 (2) SA 353 (W), para 64.) In *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA), para 28, Scott JA said the following about the defence:

'As a general rule impossibility of performance brought about by *vis major* or *casus fortuitous* 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 relationship 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 impossibility will lie upon the defendant.'

(Footnotes omitted.)

[7] The impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation. (See *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W), at 198B-C.)

[8] In *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA), para 22, Pillay JA, said this:

'The law does not regard mere personal incapability to perform as constituting impossibility. [WA Ramsden *Supervening Impossibility of Performance in the South African law of Contract* (1985) at 17.] The payment of the debt is not rendered impossible by the death of the deceased – as performance of a personal nature, like singing in an opera, would have been.'

[9] *LAWSA Vol 5(1) First Reissue* para 160 states:

'The contract is void on the ground of impossibility of performance only if the impossibility is absolute (objective). This means, in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract. [*D 45 1 137 5* and see *Frye's (Pty) Ltd v Ries* 1957 3 SA 575 (A)]'

[10] RH Christie *The Law of Contract in South Africa* 3rd Ed at 101 illustrates the principle that the impossibility must be absolute, thus:

'If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract. [D 45 1 137 5.]'

[11] In *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A), at 581A-C, Hoexter JA said the following:

'There can be no doubt that neither a sale nor a lease is void merely because the seller or lessor is not the owner of the property sold or leased. (See *Transvaal Mortgage, Loan and Finance Co. Ltd v Aronson*, 1904 T.S. 864 at p. 866 and *Tabha v Moodley*, 1957 (1) SA 659 at p. 660 (N)). Voet deals as follows with the sale of another's property in 18.1.14. (*Gane's* translation):

"Furthermore it matters little whether things are one's own or belong to others, insofar as the seller is put under obligation to buy up such property in the other person's hands and to make it good, unless he prefers to have judgment given against him for damages if he has knowingly sold the property of another . . . '

[12] One further example of mere relative or subjective impossibility is to be found in *Unibank Savings and Loans* (supra), at 198D-E). There Flemming DJP held:

'Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.'

[13] The fact that the property is burdened with a limited real right of security in favour of the bank, 'matters little'. Because of its accessory character, a mortgage is extinguished by discharge of the principal debt. The seller is under an obligation to discharge his debt owed to the bank in order for transfer of the property to pass to the purchaser free from the burden. The impossibility on which the seller relies is peculiar to itself because of its personal financial situation and incapability of securing payment of the full debt owed to the bank, and not absolute. Such obligation can, in general, be performed. The seller's personal incapability does not

render the contract void. The defence of impossibility of performance has not been established.

[14] In the alternative the seller argues that this is a fitting case to refuse specific performance. In *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343, at 350, Innes CJ, said the following:

'*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE, C.J., in *Thompson v Pullinger* (1 O.R., at p. 301), the right of the plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt. It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of *Storey (Equity Jurisprudence, Sec. 717(a))*, it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it. The election is rather with the injured party, subject to the discretion of the Court.'

[15] It is for the seller to prove facts upon which this court can exercise the discretion in its favour to refuse a decree of specific performance of its contractual obligation to transfer the property to the purchaser. (See *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A)). The impediment to specific performance on which the seller relies is its alleged financial inability to pay the shortfall amount to the bank. It would, according to the seller, be impossible for it to comply with an order of specific performance.

[16] The seller is a property holding entity. The property is the only immovable property it owns. Its only income is derived from letting the 29 units. The average monthly rental, according to the sole member of the seller, is 'around' R4 000 for a flat and 'about' R5 000 for a shop. He states further that the seller 'does not have finalised audit statements as yet' and that 'its finances are summarised in annexure "MAA2"' to the answering affidavit. The summary is terse and does not make a sufficient disclosure of the seller's assets and liabilities and income and expenditure to enable this court to make a proper assessment thereof in the exercise of its discretion whether or not to grant specific performance. It is trite that affidavits in motion proceedings constitute both pleadings and evidence. The answering affidavit lacks such facts as would be necessary for determining whether the seller would indeed not be able to give effect to an order of specific performance. Its allegation that it would not, is 'an inference, a "secondary fact", with the primary facts on which it depends omitted.' (See *Radebe and others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A), at 793C-F.)

[17] The seller has failed to establish that an order of specific performance will necessarily be ineffective or a mere *brutum fulmen* - an exercise in futility - (see *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others* 2012 (6) SA 294 (SCA), para 46; *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* 2009 (3) SA 447 (SCA), paras 19-20) and a Pyrrhic victory for the purchaser (see *Ncube v Department of Home Affairs and others* 2010 (6) SA 166 (ECG), at 169G-H).

[18] In the result the following order is made:

- (a) The respondent is directed to take all the necessary steps to pass transfer of the property, described as Erf 59 Florida City, Roodepoort, Johannesburg, SS Gafco Court Sections 1 – 29, Province of Gauteng collectively 1921 square

metres in extent and situated at Gafco Court, Goldman Road Florida, Roodepoort, to the applicant.

- (b) If the respondent fails within 14 days of this court's order to take the necessary steps, the sheriff is authorised to take such steps on its behalf.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	23 February 2016
Date of judgment:	29 July 2016
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