



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1021/2017

In the application between:

ANDRIANE TSANGARAKIS N.O.

1st Applicant

STAMATIOS TSANGARAKIS N.O.

2nd Applicant

[In their respective capacities as Trustees for the
time being of the Andriane Tsangarakis
Testamentary Trust, Number MT2527/2000]

and

KGATO PROJECT MANAGEMENT (PTY) LTD

1st Respondent

(Registration number: 2015/024842/07)

NITATRIM (PTY) LTD

2nd Respondent

(Registration number: 2013/125451/07)

CORAM: RAMDEYAL, AJ

HEARD ON: 1 JUNE 2017

JUDGMENT BY: RAMDEYAL, AJ

DELIVERED ON: 8 JUNE 2017

[1] It is common cause in this matter that a written agreement of sale was entered into between both the Applicant and the First Respondent in respect of immovable property; namely SS Namib immovable property; namely SS Namib Unit 1, 2, 3, 4, 5, 6, 7, 8 King Edward Road 1, Willows, Bloemfontein on 29 July 2016. The property is a building divided into Sectional Title Units in terms of The Section Title Act, as of 1986.

[2] The property was sold to the First Respondent on the 11th of July 2016 at an auction for an amount of (Two Million and Five Hundred Thousand Rands) R2 500 000.00.

[3] It is further common cause that the First Respondent is in breach of the agreement and the Applicant now seeks remedy in terms of clause 13.2 of the said agreement.

(attached in the papers as “FA2”).

[4] The First Respondent was also, liable to pay the Auctioneers Commission in the amount of R250 000.00; the application for payment was brought to court on a separate application and made an order of court.

[5] In terms of clause 13 of the said agreement [Breach];

“In the event of the Purchaser being in breach of any of the conditions hereof as at the due date thereof, the Seller or his/her/their agent will be entitled without prior notice to the Purchaser to:

- 13.1 Cancel the sale by written notice transmitted by fax to the Purchaser's fax number which appears on these conditions and all amounts paid by the Purchaser to date will be forfeited as “roukoop” and genuine pre-estimated damages and the Seller reserves his/their rights to claim any further damages from the Purchaser - or
- 13.2 Immediately claim the full purchase price and due compliance with the terms and conditions thereof,
- 13.3 The Purchaser hereby undertakes to pay all attorney and clients costs, tracing fees and collection charges incurred by the Seller and/or the auctioneer to obtain payment of the amounts due in terms of these conditions including interest at the maximum permissible rate from date of signature hereof to date of payment.”

[6] The Applicant now seeks remedy in terms of clause 13.2 in the form of specific performance for the First Respondent to provide the bank guarantee alternatively cash in the amount of R2,500 000.00

- [7] The First Respondent seeks a dismissal of the application of specific performance on the grounds that the bank; namely First National Bank has made unfruitful promises of delivery of the bank guarantee of R2,500 000.00 for the last 10 months and in endeavouring to secure the attendance of same have run into cash flow problems.
- [8] From the papers it is apparent that negotiations were entered into between both parties for an extension of the period of deliverance of the guarantee; indicative of the First Respondent wanting to comply with the contract to deliver payment.
- [9] It is not in dispute that the First Respondent indeed endeavoured to secure the bank guarantee from FNB; FNB having assured deliverance of same but to no avail. The First Respondent, it appears, was at the mercy of FNB to discharge its contractual obligation to provide the bank guarantee. Even the Applicant liaised with FNB and received the response of assurance of the deal.
- [10] The Applicant, however, disputes that the First Respondent has a cash flow problem on the basis that he has 23 registered properties on his name and basically a wealthy man that can provide cash himself in lieu of the bank guarantee.

- [11] To a large extent from the papers, it can be accepted that the First Respondent does have cash flow problems currently; the future of monies owing to the First Respondent is indefinite.

The earlier order of a court ordering the Respondent to pay the amount of R250 000.00 has also resulted in non-compliance by the First Respondent.

- [12] Counsel for the Applicant argued that a cash flow problem can never be equated to impossibility of performance and that should a contract be nullified on the basis of such then our law of contract would bring uncertainty and commercial instability. Hence such contention cannot be entertained as a matter of legal principal.

- [13] Counsel for the First Respondent contends that the First Respondent cannot perform now; should the court grant an order of specific performance the First Respondent will be unable to comply and will be in contempt of court.

- [14] This court must now decide whether to grant the order of specific performance together with the costs order as sought by the Applicant.

- [15] In Christies, The law of Contract in South Africa 6th Edition Page 544, Specific Performance is defined as “.... an order to perform a specified act – or to pay money in pursuance of a contractual obligation.”

In general, an aggrieved party has a right to an order of specific performance. Every party to a binding agreement who is ready to carry out its own obligation under it has a right to demand from the other party, as far as is possible, a performance of his undertaking in terms of the contract.

(See **Benson v SA Mutual Life Assurance Society** 1986 (1) SA 776 (A) at 782 H-J)

- [16] In **Farmers' Co-op Society (Reg) v Berry** 1912 AD 343 – 350 It was held:

“... that the right to a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt ... but courts exercise a discretion in determining whether or not decrees of specific performance will 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...”

In **Basson and others v Hanna** 2017 (3) SA 22 (SCA) page 22 It was also held that a claim for damages in lieu of specific performance, is still competent in circumstances.

- [17] Although a court will generally give effect to a plaintiff's choice to claim specific performance, it still maintains a discretion to refuse to decree specific performance in a fitting case.

See Haynes v King William's Town Municipality 1951 (2) SA 371 (A) at 378

Bensons v SA Mutual Life Assurance Society 1986 (1) SA 776 (A) 782 H-J

- [18] There are no rules that govern the exercise of the courts discretion to order specific performance but a court must tread carefully to prevent an injustice resulting; if such order may operate unduly harshly on the defendant or may not produce the desired effect as required by the Applicant.

- [19] In this case the papers do show that if such order of specific performance be made, it may operate unduly harshly on the First Respondent and may not produce the desired result required by the applicant.

In my view, this is a fitting case to refuse specific performance.

- [20] The contract ("FA2") Clause 13.3, however, holds the First Respondent liable to costs.

The First Respondent too admits liability to the costs of this application.

[21] Accordingly the following orders are made:

1. Prayers 1 and 2 are dismissed.
2. Prayer 4 is granted.

T. RAMDEYAL, AJ

On behalf of the Applicants:
Instructed by: Adv Zietsman
EG Cooper Majiedt Inc
BLOEMFONTEIN

On behalf of the 1st Respondent:
Instructed by: Adv Fischer
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