

What does the doctrine of fictional fulfilment mean for the purchaser who fails to obtain a bond?

Most contracts of sale have a clause with a suspensive conditions in terms whereof the transaction will only proceed if the purchaser obtains a loan from a financial institution. What is the legal position where the purchaser simply fails to apply for the loan or after applying fails to co-operate to have the application for the loan granted?

If there is such a condition the purchaser has a duty to take all reasonable steps to fulfil the suspensive conditions by obtaining the loan, irrespective of whether the agreement stipulates such an express duty. If he then fails to do so the doctrine of fictional fulfilment applies in terms of which the condition will then be deemed to have been fulfilled.

The doctrine applies when there has been bad faith and where there has been a deliberate intention no matter the motive, unless the terms of the contract and the surrounding circumstances indicate the contrary, to prevent a condition from being fulfilled.

This doctrine was also applied in the decision of *Du Plessis & Smith NNO v Goldco Motor & Cycle Supplies* 2008 SCA 372. The judgement, handed down by the Supreme Court of Appeal, dealt with a case where an attorney delayed the drafting of the documents for the exercise of an option to purchase by the tenant on instructions of the landlord to ensure that the option period lapses. The court found that the doctrine of fictional fulfilment should be applied with the consequence that the option was deemed to have been exercised.