IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

11/02/2011
DATE
SIGNATURE

11/02/2011

Case Number: 21071/2009

In the matter of:

TEMOSO TRADING CC (IN LIQUIDATION)	Applicant
and	
ANN CATHARINA AGENBACHT	First Respondent
MACHAUS (PTY) LTD	Second Respondent
YOLANDA MCINTYRE ATTORNEYS	Third Respondent

JUDGEMENT

MNGQIBISA-THUSI, J

[1] The applicant is seeking an order in the following terms:

1.1 declaring that the applicant was the effective cause of the sale agreement concluded between the first and second respondents and is entitled to payment of estate agents commission in the amount of R1 500 000.

1.2 declaring that the first respondent is liable to the applicant for payment of the commission in the amount of R1 500 000 plus interest on the said amount at the rate of 15.5% per annum from date of registration until payment as provided for in the commission agreement .

1.3 that the third respondent be ordered to release the amount of R1 500 000 currently held by it in trust and be authorised to pay the said amount to the applicant.

1.4 costs of the application.

[2] It appears that during 2005 the applicant, known before its liquidation as McComb Estates CC, trading as Realty 1 Elk, an estate agency, had mandated the applicant to sell her property, remaining extent of Portion 29 of the Farm Nietgedacht535, Gauteng Province ("the property).

[3] During October 2005 the applicant, through its agent Mr Delport, introduced the second respondent as a potential buyer of the property. As a result thereto the first respondent and the second respondent concluded an agreement of sale for the property termed "MEMORANDUM OF AGREEMENT" (the first sale agreement). The agreed purchase price was for the amount of R6 000 000.00.

[4] Clause 2 of this agreement of sale reads as follows:

"2.1 This agreement is subject to the suspensive condition that the Purchaser obtain financing from a financial institution in the amount of R 6 000 000 (SIX MILLION RAND) within 90 (ninety) days from the date of this Agreement. The Purchaser endeavours to submit the application timeously and will inform the Seller of the date such submission is made.

2.2 This agreement is subject to the suspensive condition that the

Purchaser obtains principle consent for the development of a Township on the property on or before **1st of June 2006**. The Purchaser undertakes on acceptance of this offer to immediately appoint a townplanner and obtain within 30 (thirty days) a letter from the townplanner indicating that in principle no objection to the granting of the consent for the establishment of the township is foreseen.

2.3 The suspensive condition contained in clauses 2.1 and 2.2 have been stipulated for the exclusive benefit of the Purchaser and may be waived by the Purchaser at any time prior to the dates stipulated in clauses 2.1 and 2.2."

[5] Furthermore, the agreement provided , inter alia, in paragraph 15.1 thereto that the seller, being the first respondent, would be liable to pay estate agents commission to the Applicant as provided for in the commission agreement concluded by the Applicant and the first respondent.

[6] On the same day that the first agreement of sale was entered into, the applicant and the first respondent had concluded a commission agreement. Clause 1 of the commission agreement reads as follows:

"1. THAT the Seller will pay the Agent an amount of R1 500 000,00 (ONE MILLION FIVE HUNDRED THOUSAND RAND)in Agent's commission;

2. THAT the Agent's commission will be deemed to have been earned on compliance with all the suspensive conditions contained in the Memorandum of Agreement, entered into for the sale of the Property.

3. THAT the Seller hereby undertakes to pay the agreed amount in commission to VAN DER MERWE & VAN DER MERWE ATTORNEYS on registration of the Property in the name of the Purchaser of such Property."

[7] In January 2006 when it became apparent to the second respondent that the 'principle consent for the development of a township on the property in compliance to clause 2.2 of the agreement would not be obtained within the time stipulated in the agreement, second respondent wrote to the applicant explaining this position. As a result on 6 February 2006 the first and second respondents signed an addendum to the agreement which reads inter alia, as follows:

"WHEREAS the Seller and the Purchaser has on the 31st of October 2005 entered into a sale agreement in respect of:

> **The remaining extent of Portion 29 of the farm Nietgedacht No. 535 Province of Gauteng, Registration Division: JQ**
> **Measuring: 25,9372 h (twenty five comma nine three seven two hectares)**
> **Held by Deed of Transfer: T 21211/1998)**

(Hereinafter referred to as "the Property)

AND WHEREAS it is evident that the consent for the establishment of a township on the property will not be obtained before the 1st of June 2006 due to the fact that the property currently falls outside the City Council of Johannesburg's Urban Edge development Zone;

AND WHEREAS the parties have agreed to extend the agreement;

NOW THEREFORE the parties agree to extend and amend the agreement on the following terms and conditions

1.1 Save as set out in this agreement the terms and conditions of the agreement entered into and between the parties on the 31st October 2005 remains unchanged.

1.2 Clause 2.1 is deleted and amended to read as follows:

"2.1 This Agreement is subject to the suspensive condition that the Purchaser obtain financing from a financial institution in the amount of R 6 000 000,00 (SIX MILLION RAND) within 30 (thirty) days after all the suspense conditions in terms of this agreement have been met."

1.3 Clause 2.2 is deleted and amended to read as follows:

"2.2 This agreement is subject to the suspensive condition that the Purchaser obtains principle consent for the development of a Township on the property. The purchase price of the property will escalate with the average consumer price index rate for the duration of the period exceeding 1 June 2008 until the date that the consent for the establishment of a township is obtained."

1.4 The Purchaser undertakes to pay the Seller a deposit of R 150 000 (one hundred and fifty thousand rand) within 14 days from the date of this agreement, which deposit will be deducted from the purchase price.

1.5 The Purchaser undertakes to continue negotiations with the relevant town planners in order to fulfil the suspensive conditions of this agreement."

[8] On 17 April 2007 the first respondent wrote a letter the second respondent putting it on terms with regard to the finalisation of the agreement of sale and indicating that if she does not receive confirmation by 20 April 2007 that the sale is finalised she would have no other option but to cancel the agreement and put the property back on the market.

[9] The second respondent responded by confirming that all the conditions to the agreement have been fulfilled and the sale finalised.

[10] The first and second respondents agreed to enter into a new sale agreement, substituting the first agreement of sale.

[11] In terms of this agreement ("the second agreement of sale") the parties agreed, inter alia, that:

11.1 the purchase price of the property will be R6 000 000.00 payable as follows:

11.1.1 the second respondent would pay a deposit of R1 500 000.00 on the date that the suspensive condition in terms of clause 2.1 is met;

11.1.2 the second respondent would furnish the first respondent as security with an approved bank guarantee.

11.2 The agreement is subject to a suspensive condition that the second respondent obtains financing in the amount of R4 500 000 from a financial institution within 45 days from the date of the agreement (clause 2.1);

11.3 Estate agent's commission will be payable by the first respondent.

[12] The total amount of the purchase price in terms of the second agreement of sale came to R6 276 440.04 which amount was deposited into the trust account of the third respondent, being the transferring attorney. The property was transferred on 14 April 2008 and the first respondent is now refusing to pay the commission agreed upon with the applicant in terms of the commission agreement and has instructed the third respondent not to make any payment to the applicant.

[13] It is the applicant's contention that since it had introduced the second respondent to the first respondent, leading to the signing of the first agreement of sale and the Commission Agreement, he was entitled to be paid by the first respondent the commission agreed upon for effectuating the sale of the first respondent's property to the second respondent. The applicant relies for its contention on clause 1 of the commission agreement. Further it was argued on behalf of the applicant that the conclusion of the second sale agreement does not affect the enforceability of the commission agreement particularly since this agreement also refers to the payment of agent's commission by the seller.

[14] It was submitted on behalf of the first respondent that the applicant was not entitled to any commission. It is the first respondent's contention

that the applicant had not fulfilled the condition relating to the establishment of a township on the property in terms of the stipulated time in the first agreement, being 01 June 2006. Further that the property was eventually sold on the basis of the second agreement concluded by the first and second respondent and that it could not be said that the applicant had facilitated the sale of the property. It was argued further on behalf of the first respondent that the applicant had caused her loss since during the period that the principle consent was awaited, property values in the area in which the property was situated had risen and she was not in a position to negotiate for a higher price as she was tied to the agreement already signed.

[15] The issue to be determined is whether the applicant is entitled to commission as per the Commission Agreement. Pivotal to this issue is whether the commission agreement remained valid after the first and second respondents had signed the second agreement of sale.

[16] The language used in the commission agreement is clear and simple. The applicant is entitled to be paid commission of R1 500 000 if it introduced a buyer to the first respondent and the property was sold for R6 000000.00. The addendum to the first agreement of sale provided that the terms and conditions of the agreement entered into and between the parties on the 31st October 2005 remains unchanged. Further, the second agreement, which in my view forms part of the transactional process of the sale of the property also provides that the seller, being the first respondent will pay estate agent's commission.

[17] I am of the view that the commission agreement remained valid even though the parties had signed a second agreement. Furthermore, was obliged to pay the respondent commision. It is a fact is that through the applicant introducing the second respondent to the first respondent, the first respondent and second respondents eventually entered into an agreement of sale of the property. Nothing turns on the first respondent's argument that the applicant did not cause for the suspensive condition in clause 2.2 of the first agreement of sale to be fulfilled by due date. In terms of this clause, the obligation was on the buyer to fulfil that condition. Even when it appeared that the condition would not be fulfilled by the stipulated date, the first respondent on being approached by the second respondent did enter into an arrangement with the second respondent extending the period of the contract.

[18] In view of the fact that the applicant facilitated the buying of the property, and in view of the fact that the first respondent had undertaken, in terms of the commission agreement to pay the applicant estate agent's commission in the amount of R1 500 000,00, I am of the view that the applicant is entitled to be paid the stipulated amount for commission due to it by the first respondent.

[19] Accordingly an order is made:

19.1 Declaring that the applicant was the effective cause of the sale agreement concluded between the first and second respondents for the sale of the property and is entitled to payment of commission of R1 500 000,00.

19.2 Declaring that the first respondent is liable to the applicant for payment of the commission in the amount of R1 500 000,00 plus interest on the said amount at the rate of 15.5% per annum from date of registration until payment as provided for in the commission agreement .

19.3 The third respondent is ordered to release the amount of R1 500 000,00 currently held by her in trust and is authorised to pay the said amount to the applicant.

19.4 The first respondent to pay the costs of this application.

MNGQIBISA-THUSI J

JUDGE OF THE NORTH GAUTENG HIGH COURT