

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

Case No.: 1432/2017

Date Heard: 13 June 2017

Date Delivered: 20 June 2017

In the matter between:

KAY BEATTIE

Plaintiff

and

LATJIESKLOOF BELEGGINGS (PTY) LIMITED

Defendant

JUDGMENT

EKSTEEN J:

[1] The plaintiff, an estate agent who was previously employed by the defendant, seeks summary judgment against the defendant for payment of certain commissions which she contends were earned during the period of her employment with the defendant.

[2] The plaintiff was employed in terms of the provisions of a written contract. The material portion of the written contract for purposes of the summary judgment proceedings provide:

"5. REMUNERATION

5.1 The Agent shall receive 50% (fifty percent) of the commission earned by her on all registered re-sales.

5.2 ...

- 5.4 No commission shall therefore be considered earned and payable until the commission has been collected by and become payable to the Company.
- 5.5 ...
- 5.7 In the event that the Company or another staff member or agent are required to finalise a sale because of the Agent's absence, for whatever reason, the commission payable on such a sale, shall be allocated in accordance with Company policy prevalent at the time, unless otherwise agreed upon."

[3] In the particulars of claim the plaintiff alleges that an amount of R98 975,46 is due to her in consequence of services rendered by her in concluding the sale of certain immovable property listed in the particulars of her claim. In addition she alleges that she is entitled to R62 034,38 in respect of "building commission" arising from services rendered by her in accordance with the contract of employment. She contends that the defendant has received the commissions due in respect of these transactions.

[4] In response to the application for summary judgment, one Germishuys has deposed to an affidavit on behalf of the defendant. A number of defences relating to breaches of numerous clauses of the contract of employment are alleged. Mr **van Rooyen**, who appeared on behalf of the defendant in the summary judgment proceedings, correctly, in my view, acknowledged that, save as set out below, the defendant has not disclosed fully the nature and the grounds relied upon for these defences nor the material facts. In these circumstances it is not necessary for present purposes to deal with these defences raised in the opposing affidavit.

[5] The amount claimed in respect of building commissions may be briefly dealt with. The defendant annexed to the opposing affidavit a schedule of the transactions in respect of which the plaintiff claims building commissions. The summons is silent as to the manner in which or when building commission was earned. Germishuys states, however:

'It is also noteworthy that the "building commissions" ... is in respect of work conducted after registration of the relevant transactions. In the Respondent's office the administration relating to the building commissions could, and did only take place after Applicant left Respondent's employ. Applicant therefore did not conduct any work that would justify the building commissions she attempts to claim in her Summons.'

[6] Germishuys annexed a schedule to his affidavit setting out the transactions relied upon by the plaintiff and reflecting the date of each transaction and the date of registration thereof. In each case, but one, the property was only registered after the resignation of the plaintiff. The effect hereof is that, on an acceptance of the averment of Germishuys, the work and administration in respect of "building commissions" only occurred after plaintiff had departed. In these circumstances Mr **Moorhouse**, on behalf of the plaintiff, acknowledged that the defendant has set out a *bona fide* defence in respect of the building commissions and that leave should be granted to the defendant to defend the action in respect of the building commissions.

[7] In respect of the sales commissions Germishuys declares that the plaintiff resigned from the employ of the defendant on 15 April 2016 and left immediately. As a result of her resignation and immediate departure he states that other agents and/or staff members of the defendant had to conclude the plaintiff's pending sales.

As set out earlier he annexed to his affidavit a schedule which reflects the dates of the sales and the dates of registration of the properties. Germishuys states that from the list it is important to note that only one transaction was concluded during the plaintiff's employ with the defendant. In the circumstances other staff members of the plaintiff had to conclude the work involved in finalising the transactions after the plaintiff's resignation. Germishuys relies on the provisions of clause 5.7 of the employment contract which is quoted earlier herein and declares accordingly that deductions were to be made from the commission which accrues to the plaintiff as a result of the said sales.

[8] It is evident from the schedule annexed to the opposing affidavit that all the sales relied upon by the plaintiff were in fact concluded prior to plaintiff's resignation and all but one were registered after her resignation. Whilst Germishuys declares that other staff members of the plaintiff had to conclude the work involved in finalising the transactions he does not take the court into his confidence in declaring what the prevailing policy envisaged in clause 5.7 was at the time. He does not explain what work remained to be done in respect of the registration of the property after the contracts of sale had been concluded nor what portion of the commission was to be allocated to such staff in terms of the prevailing policy.

[9] Mr **van Rooyen**, on behalf of the defendant, argues, however, that whilst it may be that the plaintiff is entitled to commission in respect of all those sales *bona fide* and valid defence has been raised to a portion of the claim, although it cannot be quantified on the information before me.

[10] Rule 32(3)(b) requires of a defendant opposing the grant of summary judgment to satisfy the court by affidavit (or evidence) that he has a *bona fide* defence to the action. In order to do so he is required to disclose fully the nature and the grounds of the defence and the material facts relied upon. Rule 32(6) provides that where a court at a hearing of summary judgment proceedings determines that the defendant is entitled to defend part of the claim the court shall give leave to the defendant to defend that part of the claim and enter judgment against him as to the balance of the claim, unless such balance has been paid to the plaintiff.

[11] In ***Joob Joob Investments (Pty) Ltd v Stocks Mvundla Zek Joint Venture*** 2009 (5) SA 1 (SCA) at 11H-12D the Supreme Court of Appeal set out the approach to summary judgment proceedings as follows:

“In the *Maharaj* case at 425G - 426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.”

[12] In considering an application for summary judgment the court is called upon to strike a balance. On the one hand it seeks to assist the plaintiff whose right to relief is being balked by the delaying tactics of a defendant who has no defence, while on the other hand it is reluctant to deprive a defendant of his normal right to defend, except in a clear case. (Compare ***Skead v Swanepoel*** 1949 (4) SA 763 (T) at 767;

Standard Bank of SA Limited v Naudé and Another 2009 (4) SA 669 (E) at 672C-676D and **Sekretaris van Landboukrediet en Grondbesit v Loots** 1973 (3) SA 296 (NC) at 298.) It has also been held that it is only where a court has no reasonable doubt that the plaintiff is entitled to judgment as prayed, or that the plaintiff has an unanswerable case, that summary judgment will be granted. (See **Edwards v Menezes** 1973 (1) SA 299 (NC) at 304-5.)

[13] Where, however, the rule requires of a defendant to “satisfy” the court the defendant is required to set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff’s claim or part thereof. (See **Breitenbach v Fait SA (Edms) Beperk** 1976 (2) SA 226 (T).) A defendant is therefore required to set out the facts and the particulars. Whilst a defendant is not required to set out his defence with the precision required of pleadings, nonetheless he must do so with a sufficient degree of clarity to enable the court to ascertain whether he has deposed to a defence which, if proved at the trial, would constitute a good defence to the action. Where the defence relied upon is set out in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides* (see for example **Breitenbach v Fait SA supra**; **Neuhoff v York Timbers Limited** 1981 (4) SA 666 (T); **Standard Merchant Bank v Rowe** 1982 (4) SA 671 (W) at 678).

[14] On a consideration of the affidavit of Germishuys measured against the principles set out above I consider that the defendant has failed to set out facts, which if proved at the trial, would constitute a valid defence in law. As set out earlier it is common cause that all the property sales relied upon by the plaintiff were in fact

concluded prior to her resignation. Germishuys makes the bald allegation that other members of staff were required to perform work in finalising the registration of the property. No facts are set out in the affidavit in respect of the nature of these functions which would enable the court to adjudicate on the extent of the work which was required to be performed or the *bona fides* of the defence. It is inherent in the defence raised and argued in the summary judgment proceedings that there is an acknowledgment that the plaintiff is entitled to the payment of certain amounts of commission, however, Germishuys has made no attempt to quantify either the plaintiff's entitlement or the value of the work performed by other agents and, as recorded earlier, the prevailing policy of the defendant is not disclosed.

[15] In all the circumstances I do not consider that the defendant has established a *bona fide* defence, as envisaged in rule 32(2) in a manner which accords with the authorities which I have set out above. In the result the plaintiff is entitled to judgment in the amount of R98 975,46 in respect of sales commission. The defendant, in line with the concession made by Mr **Moorhouse**, is entitled to leave to defend the claim in respect of building commissions.

[16] The only remaining issue to consider relates to the costs of the application for summary judgment. The plaintiff's claim as set out in the summons is in the total amount of R161 009,83. Before me counsel were agreed that the amount falls squarely within the jurisdiction of the magistrates' court. In these circumstances, in the absence of cogent considerations to the contrary, that the plaintiff's entitlement to costs should be limited to the appropriate magistrates' court scale.

[17] In the result, I make the following order:

1. The defendant is ordered to pay to the plaintiff the amount of R98 975,46 as and for erf commission.
2. The defendant is granted leave to defend the plaintiff's claim in respect of building commissions.
3. The defendant is ordered to pay the plaintiff's costs occasioned by the application for summary judgment on the appropriate magistrates' court scale.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv A Moorhouse instructed by Kaplan Blumberg Attorneys,
Port Elizabeth

For Defendant: Adv C van Rooyen instructed by Carlo Swanepoel Attorneys c/o
Wouter Minnie Attorneys, Port Elizabeth