FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 2557/2012

In matter between:

VAN DEN BLINK PROPERTIES CC Plaintiff

and

ABEL HENDRIK ERASMUS N.O 1st Defendant

ABEL HENDRIK ERASMUS JNR N.O 2nd Defendant

HEARD ON: 19 AND 20 AUGUST 2014

DELIVERED ON: 26 AUGUST 2014

JUDGMENT BY: MOTLOUNG AJ

Introduction

[1] The plaintiff is suing the defendant, a trust duly represented by the first and second defendant as its trustees, for an amount sounding in money for an estate agent's commission, together with ancillary relief.

Facts briefly

[2] The plaintiff averred in its particulars of claim, amongst others, that:

2.1. During or around February 2011 the parties concluded a verbal agreement in terms of which the following were express or alternatively implied terms:

2.1.1. The plaintiff was orally mandated to find the defendant a lessee for its building situate at Erf 22089, Mc Gregor Street, East End, Bloemfontein, also known as the Interstate Bus Lines Building.

2.1.2. The rental payable shall be at least R119 700.00 plus VAT per month.

2.1.3. The plaintiff accepted the said mandate.

2.1.4. During or around the 18 February 2011 the plaintiff, represented by its duly authorized agent, Mr Hercules Snyman (Snyman), introduced the South African Local Government Asoociation (SALGA), duly represented by its employee, to the building mentioned above.

2.1.5. During the above-mentioned period, and also on the 11 March 2011, Snyman introduced the defendant, duly represented by its employee, and SALGA to each other.

2.1.6. As a direct cause of the above-mentioned introduction to each other, SALGA rented the building of the defendant mentioned above and occupied it during April 2012.

2.1.7. The plaintiff was the effective cause of the said lease and consequently the plaintiff duly executed its mandate.

2.1.8. It was an express term or alternatively an implied term of the agreement that if the plaintiff duly executed its mandate, it would be paid a commission of R330 701.00 plus a VAT amount of R 46 298.14 (total of R376 999.14).

2.1.9. The plaintiff was represented in the said oral agreement by Snyman, a duly certified estate agent and its employee, whilst the defendant was represented therein by Mr Abel Hendrik Erasmus.

1.1.10. That the defendant was consequently indebted to the plaintiff in the amount of R376 999 14, but refuses and / or neglects to pay the said amount to the plaintiff notwithstanding due demand for payment.

[3] The defendant filed its plea in which it admitted the existence of the oral agreement, but averred that it was not indebted to the plaintiff as the plaintiff failed to execute its mandate, in that it failed to deliver or present a written lease contract between the Defendant and SALGA, duly accepted by the defendant, before the plaintiff could be entitled to payment of any commission. This was stated by the defendant to have been the most important term of the agreement, which the plaintiff failed to comply with and on the basis of which the plaintiff was thus not entitled to any commission, and that the unfinished mandate referred to above had to be completed by another agent.

Representation and submissions by the parties

[4] Mr Loubser represented the plaintiff whilst Mr Reinders represented the defendant during the trial of the matter.

[5] The plaintiff led the evidence of its sole member Ms Verna Louise Van Den Blink and its employee Snyman in support of its case and then handed in by agreement an expert report regarding the fairness and reasonableness of the amount claimed, then handed in a copy of a Fidelity Fund Certificate issued to Snyman, marked as exhibit A, and then closed its case, after which the defendant closed its case without leading any evidence.

[6] Both counsel then presented argument for their clients' respective cases. In short, Mr Loubser submitted that the plaintiff made out its case as shown by the history of the matter and the necessary paper trail. According to him, the plaintiff succeeded in proving that both the plaintiff and Snyman had been issued with the necessary Fidelity Fund certificates as required by section 26 of the Estate Agency Affairs Act 112 of 1976, as amended (the Act). He further submitted that the plaintiff proved all the necessary requirements for it to be entitled to the payment of the commission. Mr Reinders, on the other hand, submitted that the plaintiff failed to prove that both it and Snyman were duly issued with the necessary Fidelity Fund certificates in line with the provisions of section 26 read with section 34A of the Act, and thus the plaintiff's claim was unenforceable. He also argued that the plaintiff failed to prove that it was entitled to the payment of commission, as it failed to prove that it had completed its mandate, as Snyman clearly stated that the plaintiff would have been entitled to the payment of commission only once the parties had agreed on the lease agreement, which he did not achieve.

Summary of the evidence led

[7] Ms van den Blink testified that:

7.1. She is the sole member of the plaintiff that was duly incorporated and even produced the certificate of incorporation of the plaintiff, and has been registered with the Estate Agents Board since the year 1994 to date, and has at all material times been in possession of the relevant Fidelity Fund certificates, which get issued annually.

7.2. Snyman worked for her and the plaintiff and has also been in possession of the necessary Fidelity Fund certificates.

7.3. She referred to pgs 41 to 42 of the court bundle in which she personally addressed a letter to SALGA in which she stated a summary of the the history of the engagement or interactions betweem the parties since November / December 2010 and leading up to the 22 June 2011 (date of the letter), and concluded by asking SALGA to indicate if it was still interested in the deal.

7.4. The plaintiff did not finally produce the lease agreement because SALGA said it was no longer interested in the building.

7.5. The plaintiff is claiming the estate agents commission for all work done, as the reasonable amount based on certain SAPOA rates and formula being used in the estate agents sector.

7.6. Under cross-examination, she testified that:

7.6.1. To her knowledge, the plaintiff, as a close corporation, was never issued with a separate and distinct certificate in its own name since she entered the business of being an estate agent, and the Estate Agents Board has never queried hers or the close corporation's operations since then.

7.6.2. She knows that without the necessary certificates one is not entitled to commission, and Snyman had to be in possession of a Fidelity Fund certificate for her to employ him, but not as a principal, but as an agent, and she would not have employed Snyman had she not seen his certificate.

[8] Snyman testified that:

8.1. He worked for the plaintiff during 2011 and worked for it for a period of two years, during which period Fidelity Fund certificates were issued in his own name, although he was never in possession of the said certificates.

8.2. It was he, in the main, who dealt with the defendant and SALGA in respect of the building to be leased. SALGA was the first to contact him looking for office space measuring approximately **1500m.**

8.3. The defendant insisted that it would attend to the administrative side of things.

8.4. The amount of commission payable was never agreed upon or calculated and they never agreed as to when the commission was going to be paid, but it was never part of the agreement that commission would only be payable once a written lease agreement had been concluded.

8.5. He was involved in a whole lot of correspondence exchanged between the parties in order to execute the mandate (*to take the process forward*). In this respect he referred the court to a string of correspondence exchanged between himself and SALGA and the defendant, contained in the court bundle. In particular, he referred to pgs 43 to 52, 12, 52 to 53, 15 to 16, 18 to 19, 23 to 25, 28 to 29, 27 to 27, 30, 73 to 74, 98 and the lease agreement from pg 59. I do not deem it necessary to refer to the individual contents of each of the documents he referred me to. However, to the extent necessary, I will deal briefly with those contents I deem pertinenently relevant for purposes of my judgment. It is important to point out that no challenge was raised as regards the admissibility of all the documents referred to above, including the correctness or truthfulness of their contents. The said documents showed extensive engagement and correspondence between all the parties involved, over a long time, and that Snyman was the centre and catalyst in an endeavour by SALGA to obtain office space and the defendant to provide such office space to SALGA.

8.6. He could not agree on the amount of commission payable with the defendant as he was pushed off the deal by SALGA indicating in October 2011 that it was no longer interested in the office space.

8.7. His mandate was only to get a lessee for the building, and his mandate would have been met once he had succeeded in meeting the requirements of the lessee, and the lessee had agreed terms with the defendant.

8.8. The invoice for the commission payable was sent to the defendant on the 25 January 2012 for services rendered, and for him *services rendered* and *commission* meant the same thing. He also referred to another invoice sent to the defendant on the 29 September 2011.

8.9. After a lot of correspondence was exchanged between the parties, including visits to inspect the building with SALGA and addressing its requirements to the defendant, SALGA indicated in writing on the 18 October 2011 that it was no longer interested in the building and thus the deal was off.

8.10. It was subsequently discovered that the defendant had, for the first time, directly dealt with SALGA on the 12 October 2011 – which was six days before SALGA purported to cancel the deal – by writing to SALGA directly regarding the requirements of SALGA, in which correspondence the defendant concluded that:

"It is hereby stated and expected that final final approval of this offer shall be provided not later than 31 October 2011. Should there be any questions regarding the above, please contact me on 082 331 5459".

This was the first time that the defendant had dealt directly with SALGA, without facilitation by him (Snyman), and he was subsequently informed by SALGA that the defendant actually encouraged it to terminate or cancel the deal with the plaintiff.

8.11. It was subsequently discovered that the defendant actually concluded a lease agreement with SALGA on the 22 December 2011. An addendum thereto was subsequently concluded on the 7 Octber 2013.

8.12. According to him, he was the effective cause of the lease agreement between the defendant and SALGA although the sealing of the agreement was concluded by another agent not associated with the plaintiff.

[9] Thereafter the expert report of Mr Kenneth William Kahts regarding the reasonableness and fairness of the amount of commission charged by the plaintiff (filed per notice in terms of Rule 36(9)(b) was admitted as an exhibit by agreement between the parties.

The applicable legal principles

[10] Sections 26 and 34A of the Act govern the eligibility of an estate agent to claim and be entitled to commission. In short, the two sections read together provide that no one (including any entity) may have the right to claim and be entitled to the payment of commission as an estate agent unless such person was duly issued with a valid Fidelity Fund certicate by the Estate Agency Board.

[11] The SCA interpreted and applied the provisions of the two sections mentioned above in the decision of **Taljaard v TL Botha Properties 2008 (6) SA 207 (SCA)** and determined what the effect of non-compliance with sections 26 and 34A is. The court stated per Nugent JA the following at para [4]:

"Section 34A does not in terms invalidate the contract of mandate of an estate agent who acts in conflict with section 26 …I think it is clear that …the validity of a contract of mandate is unaffected by an act of the estate agent in breach of section 26".

The court went on to state that the only consequences of non-compliance with the said provisions was the threat of a criminal sanction and inability to enforce the payment of the commission if not already paid, and that if already paid pursuant to the fulfilment of the mandate, the commission cannot be claimed back.

[12] The requirements for eligibility to claim commission are trite by now, being:

12.1. The estate agent must have been given the mandate, and

12.2. The estate agent must have executed the mandate by introducing the parties that finally concluded the transaction to each other, and

12.3. The estate agent must have been the effective cause of the transaction that was finally concluded.

[13] It is also trite that where the parties did not agree on a specific amount of commission payable, it is an implied term of the mandate that an estate agent would be entitled to an amount of commission which is fair and reasonable.

[14] The question of whether an estate agent who introduces a purchaser to a property, where sale is concluded through another agent, is the effective cause of the sale and thus entitled to commission, was dealt with and determined by the SCA in the fairly recent decision of **Wakefields Real Estate v Attree 2012 (5) SA 246 SCA,** and I intend to be guided by this decision in deciding this matter as I am of the view that it is almost on all fours with the facts of this case.

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Applying the above legal principles to the facts of this case

[16] The plaintiff has led evidence of proof of its incorporation (pgs 38 to 39 of the court bundle), and that she and the plaintiff had been issued with the necessary and valid Fidelity Fund Certificates at the material times by the Estate Agency Affairs Board. As correctly pointed out by Mr Loubser, in my view, the Fidelity Fund Certificate appearing on pg 37 of the court bundle, does meet the requirements of proving that the sole member of the plaintiff and the plaintiff (a close corporation) were duly issued with a valid Fidelity Fund Certificate. The certificate clearly shows *ex facie* that:

16.1. It is issued to “VAN DEN BLIKK VERNA LOUISE”,

16.2. In her “capacity” as “Principal (Sole Proprietor at Firm), and

16.3. Of the “Close Corporation” called “VERNA VAN DEN BLINK PROPERTIES trading as Sotheby’s Lew Geffen International Realty Bloemfontein´.

[17] I find no merit in the submission that a separate and distinct certificate, only in the name of the plaintiff itself should have been issued. After all, the defendant has not led any evidence to that effect but merely sought to lead evidence (by argument from the bar) that such should be the position. I am satisfied that the certificate leaves no doubt about the fact that it has been issued to Ms van den Blink, in her capacity as the principal of the plaintiff specifically mentioned by name in the said certificate.

Therefore, as testified by Ms van den Blink, that is how the plaintiff has always operated for years and the Board has never queried its qualification to act as an estate agent, having issued similar certificates to it before. Furthermore, the said certificate was valid for the period in issue (2011).

[18] Similarly, Snyman was issued with a valid certificate with effect from the 29 May 2011. At the time of concluding the oral mandate agreement with the defendant, around February 2011, Snyman did nor possess a valid Fidelity Fund Certificate and thus he and the plaintiff on whose behalf he acted then, did not meet the requirements of section 26 of the Act as at the time of obtaining the mandate.

[19] However, in line with the *Taljaard* decision mentioned above, the said non-compliance did not invalidate the concluded mandate agreement. Therefore, I find that a valid oral mandate agreement was indeed concluded between the plaintiff and the defendant.

[20] However, the commission payable could not be enforced by the plaintiff unless and Snyman had been issued with his certificate on the 29 May 2011, and unless and until the lease agreement had been cobcluded between SALGA and the defendant.

[21] On the facts of this case, and as shown by the evidence led, no specific time had been agreed upon for the payment of commission.

Therefore, the plaintiff (estate agent) would only have been entitled to the payment of commission once SALGA (as the lessee) and the defendant (as the lessor) had agreed on the lease agreement. Put differently, the plaintiff could not and would not be entitled to any commission unless and until a lease agreement was concluded between the parties.

[22] The facts of this case must be distinguished from those of **Venter Agentskappe (Edms) Bpk v De Sousa 1990 (3) SA 103 (A)**, where the written mandate contract stated that the commission earned would only be payable on some future date (upon date of transfer of the property). In that case the court found that the commission had been earned in full and only its date of payment had been postponed to a future date (being the date of transfer). In this case, the commission had not been earned in full unless and until the parties concluded the lease agreement.

[23] After being issued with the said certificate in May 2011, Snyman continued with the implementation of his mandate by continually engaging with both the defendant and SALGA in an endeavour to get them to finally agree terms, until SALGA, at the instance and instigation of the defendant, made it impossible for the plaintiff to conclude or finalize its mandate on the 18 October 2011, by stating that it was no longer prepared to consider the lease proposal.

By that date, Snyman was at an advanced stage of trying to get the defendant and SALGA to agree on the fact that the defendant was able to meet and satisfy the space and other requirements of SALGA, after which the defendant itself would have prepared to the preparation and signing of the lease agreement.

[24] Snyman, and by necessary implication the plaintiff (as the employer and real party to the mandate agreement), was therefore entitled to enforce payment of the commission for services rendered after being issued with a Fidelity Fund Certificate, being since the 29 May 2011. On the facts mentioned above, Snyman indeed performed a lot of work in trying to get the parties to conclude the lease agreement (as per his mandate), after which he would have been entitled to claim commission and enforce its payment.

[25] I find that the defendant had indeed undertaken to attend to the administrative side of things as testified by Snyman, which would have included the undertaking by the defendant itself to attend to the drawing of the lease agreement, as long as SALGA had issued the so-called letter of intent, which Snyman was clearly in the process of trying to obtain when the defendant rendered it irrelevant to the process on the 12 October 2011 by substituting itself for the plaintiff in dealings with SALGA. Pgs 12, 48 and 52 provide more than sufficient proof of the fact that the defendant had undertaken in writing to produce the written lease agreement itself, and that it is false to allege that it was a term of the mandate that Snyman must produce such written lease.

[26] Be that as it may, I find that this fact is irrelevant to the proper determination of this case. I also comment in passing that if it had become necessary to resort to and apply the doctrine of fictional fulfilment to this case, I would have had no hesitation in doing so. I would have found that the defendant deliberately conspired with SALGA with the intention to con the plaintiff out of its commission. The principles applicable to the doctrine of fictional fulfilment were discussed and applied by the SCA in the decision of **Lekup Prop Co. No 4 (Pty) Ltd v Wright 2012 SCA**. I would have similarly had little hesitation applying the principles stated in **EC Chena & Sons CC v Lame & Van Blerk 2006 (4) SA 574 (SCA)** to find that, to the extent that it was necessary to plead such fictional fulfilment in the plaintiff's particulars of claim and that the plaintiff had in fact not done so, a deviation from the rule to hold a party strictly to its pleadings would have been justified, as no prejudice (legitimate prejudice) would be caused to the defendant by doing so, and that the defendant should not be allowed to derive benefit from its own dishonest conduct. However, it is not necessary to resort to the said doctrine in this case, as the matter can be comfortably be decided along the principles stated in the *Wakefields* decision mentioned above.

[27] There is no doubt or question that Snyman, on behalf the plaintiff, introduced SALGA to the building that SALGA finally occupied after concluding a lease agreement through another unrelated agent. There is also no doubt that Snyman introduced SALGA and the defendant to each other.

[28] Furthermore, I find that the history of the matter and the accompanying paper trail show beyond any shadow of doubt (at the very least on the balance of probabilities) that Snyman was the effective cause of the lease agreement finally concluded between SALGA and the defendant.

[29] The facts in *Wakefields* were briefly as follows: An estate agent was given a mandate by a seller to find a purchaser of an immovable property. After the estate agent introduced a prospective purchaser to the immovable property, the prospective purchaser indicated at some point that it (purchaser) was no longer interested in purchasing the property. The estate agent accepted this eventuality, only to discover subsequently that the seller had subsequently (after the cancellation by the purchaser) sold the same immovable property to the same purchaser, using another estate agent. In deciding whether the initial estate agent was entitled to the commission on the sale finally concluded using another estate agent, the SCA had the following to say, amongst others:

"[14] It is notoriously difficult, when there are competing estate agents, to determine who is the effective cause of the sale that eventuates. It may be that more than one agent is entitled to commission. This was put trenchantly by Van den Heever JA in Webranchek v L K Jacobs & Co Ltd 1948 (4) SA 671 (A) at 678 where he said:

'Situations are conceivable in which it is impossible to distinguish between the efforts of one agent and another in terms of causality or degrees of causation. In such a situation it may well be (it is not necessary to decide the point) that the principal may owe commission to both agents and that he has only himself to blame for his predicament; for he should protect himself against that risk.'

Van den Heever JA continued (at 679):

'[A] judge who has to try the issue must needs decide the matter by applying the common sense standards and not according to the notions in regard to the operation of causation which "might satisfy the metaphysician" . . . . The distinction between the concepts causa sine qua non and causa causans is not as crisp and clear as the frequent use of these phrases would suggest; they are relative concepts. . . . It stands to reason, therefore, that the cumulative importance of a number of causes attributable to one agent may be such that, although each in itself might have been described as a causa sine qua non, the sum of efforts of that agent may be said to have been the effective cause of the sale.'

[17] The high court relied on Basil Elk Estates (Pty) Ltd v Curzon 1990 (2) SA 1 (T) in concluding that the first introduction by the estate agent had been outweighed by intervening factors. Various personal factors had stopped the prospective purchaser in that case from concluding a sale. But nine months later circumstances had changed and the purchaser bought the property through another estate agent. The court held that the intervening factors were such as to make the initial introduction relatively unimportant.

[18] In my view Aida Real Estate Ltd v Lipschitz 1971 (3) SA 871 (W) is more instructive. Although Nicholson J quoted from it extensively, he did not apply the principles cited.

In that case an estate agent had introduced a purchaser who ultimately negotiated directly with the seller in concluding a sale. The agent was nonetheless held to be the effective cause of the sale and entitled to commission. Marais J said (at 875E-H) that protracted negotiations about finances are often attendant on transactions brought about by an estate agent. In that case it was the purchaser who had concluded the deal, but it was the estate agent's 'wisdom and business acumen' that brought together the eager seller and the purchaser who was able to overcome financial obstacles. Marais J said that '[i]n such a case the agent would be entitled to remuneration, no matter whether he selected the potential purchaser by chance or by foresight. A commission agent is paid by results and not by good intentions or even hard work.'

[19] This matter is little different from Aida. But for Walker's introduction of the house to Howard, the latter would not have been aware of the existence of the property. It was Walker's 'wisdom and business acumen' that made her take Howard to Monteith Place in Durban North. Howard was not looking in that area at the time, and preferred to buy a house in the area where she and her family then lived. She claimed to have been frustrated that Walker took her to see houses in Durban North that were out of their price range, but she nevertheless did view them. And when Walker took Howard to Monteith Place Howard 'loved' the house, and returned with her husband the following day, accompanied by Walker. Howard conceded that she and her husband were very interested in the house but said that, given financial constraints (that later fell away), they could not afford it.

Walker gave up trying to negotiate a sale with Howard only when told that she had stopped looking for a house to buy and that she and her husband were going to renovate their existing home.
[20] If Howard had herself approached the Attrees, and persuaded them to sell Monteith Place to her at a lower price (that is, assuming there was no intervention at all by De Marigny) Wakefields would undoubtedly have been entitled to commission, as was the agent in Aida. So too, had the Attrees approached Howard directly and offered to sell to her at a lower price, Wakefields would likewise have been entitled to commission: Walker was the effective cause of the sale".

[30] Applying the same approach to the facts of this case, I find that the plaintiff has succeeded in proving on the balance of probabilities, at the very least, all the requirements for it to claim the commission. I find that the plaintiff has successfully proved that it had a valid mandate from the defendant to find a lessee (SALGA) for the rental of its building, and that, acting in accordance with the said mandate, the plaintiff went about executing it even after the 29 May 2011 until the 18 October 2011 (when it was pushed off the deal), and that the plaintiff was the effective cause of the lease agreement ultimately concluded between the defendant and SALGA, and that the plaintiff is thus entitled to claim its fair and reasonable commission, and finally that such commission is due, payable and enforceable, as Snyman, the plaintiff and Ms van den Blink were each issued with a valid certificate in compliance with the provisions of sections 26 and 34A of the Act. Therefore, the plaintiff must succeed in its claim.

[31] There is no reason why the ordinary rule of the costs following the result should not apply.

[32] Consequently, I hereby make the following order:

32.1. The defendant is ordered to:

32.1.1. Pay a sum of R376 999.14 to the plaintiff.

32.1.2. Pay interest on the amount of R376 999.14 at the rate of 15.5 % per annum with effect from the 1 May 2012 to the date of payment in full.

32.1.3. Costs of the action.

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I. MOTLOUNG AJ

For applicant: Adv PJ Loubser
Instructed by: Eugene Holtzhausen Attorneys
Bloemfontein

For Respondent: Adv SJ Reinders
Instructed by: WJJ Spangenberg Attorneys
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