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BARNEY HAROLD GETZ and

MONA GETZ

Carrying on business in
co-partnership under the style of

PERFECTO BUSINESS BROKERS

and

CHRISTOS PETROU SPYRIDES

MILLER, JA :-

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BARNEY HAROLD GETZ and

MONA GETZ Appellants

carrying on business in
co-partnership under the style of

PERFECTO BUSINESS BROKERS

and

CHRISTOS PETROU SPYRIDES Respondent

CORAM: MILLER, CILLIÉ, JJA, et HOWARD, AJA.

HEARD: 20 MARCH 1984

DELIVERED: 29 MARCH 1984

J U D G M E N T

MILLER, JA :-

The appellants (husband and wife), who carry on business in partnership under the name of

Perfecto Business Brokers, sued the respondent for payment of the sum of R1 750, with interest thereon. The amount claimed was said to represent the agreed commission payable in respect of the sale of the respondent's steakhouse business, known as "Steers of Edenvale", for the sum of R35 000-00. The cause of action alleged was that the appellants, having been given a mandate by the respondent to find a buyer for the said business, duly performed such mandate and were the effective cause of the sale. The respondent denied the essential allegations in the appellants' particulars of claim. After hearing the evidence of Mr Getz (one of the partners), the respondent and two of the three persons who purchased the business, and the respondent having closed his case, the Court a quo (GOLDSTONE, J,) absolved the respondent from the instance, with costs. The appeal is against the whole of that order.

The Court a quo found

(a) that the respondent had indeed discussed the sale of his business with Getz and given him a mandate to find a buyer,

(b) that Getz had referred the purchasers to the respondent and had been the effective cause of the sale and

(c) that the quantum of the commission payable to the agent upon successful performance of the mandate had by agreement been fixed at 5% of the purchase price.

The reason / ....

The reason why, despite these findings in the appellants' favour, the learned trial Judge did not enter judgment for the appellants may be gathered from the following extract from his judgment:-

> " ..... the question which has caused me much anxious consideration is whether the plaintiff has discharged the onus of proving that it received the mandate, i.e., not Getz but Perfecto Business Brokers. For that is the plaintiff's case. If the plaintiff does not prove that the partnership, namely Perfecto Business Brokers, received the mandate, it cannot succeed on the basis on which it approached the Court."

The learned Judge, later in the judgment, concluded that there was "substantial doubt" on the question whether Getz "canvassed the mandate on behalf

of the / ....

of the plaintiff partnership" and that therefore the onus resting on the appellants had not been discharged. Hence the decree of absolution from the instance.

Counsel for the respondent was in certain respects critical of the trial Court's findings (a), (b) and (c) above. It was contended that the evidence of Getz was suspect and that it was even open to doubt whether the appellants discharged the onus of proving certain elements of their cause of action other than the element relating to the capacity in which Getz canvassed the mandate. The learned Judge's findings under (a), (b) and (c) were made largely on acceptance

of Getz's / ....

Getz's evidence. It is clear from the judgment that GOLDSTONE, J, although he had "certain reservations" about the demeanour of Getz and criticised certain aspects of his evidence, regarded him as a "far more impressive" witness than the respondent. On several matters in which the evidence of Getz was in direct conflict with that of respondent, the learned Judge preferred Getz's evidence. I am unable to say that he was wrong in such assessment or that he was not justified in making findings (a), (b) and (c) above. The sole issue in this case, then, is whether it was established on a balance of probabilities that the mandate given to Getz by the respondent was accepted by him on behalf of the partnership carrying on business as Perfecto Business Brokers, as alleged in the pleadings. Because of the conclusion to which I have come on the facts relative to that issue, it is not necessary to consider whether, if the mandate were given to and accepted by Getz without any mention of the partnership trading as Perfecto Business Brokers, the action brought by such partnership, consisting of Getz and his wife, would necessarily fail.

The gist of Getz's evidence is this. He and his wife began to carry on business under the name Perfecto Business Brokers ("Perfecto") on 1 October

1979 / ....

1979. He had previously worked for a company called Hillrand Business Brokers (Pty) Ltd ("Hillrand") and had been accustomed to carrying, and using for the canvassing of business for his principals, that company's business card. During October, business cards for Perfecto were printed and he used such cards for purposes similar to those for which he had previously used the Hillrand cards. During October he visited the Steers of Edenvale steakhouse. He there met the respondent who appeared to be keen on selling that business. They discussed the business and he was given details by respondent about turnover, profit, rental and other relevant matters. Respondent told him that his

asking / ....

asking price for the business was R45 000, but that terms could be arranged. The commission payable in the event of a sale eventuating would be 5%. Getz said that he there and then noted the details given to him on a mandate form (Exh "A"). That form was produced in evidence. It is headed "Perfecto Business Brokers", is dated "11/10/1979", it refers to "Steers Steakhouse", and numerous details concerning the business are noted in the appropriate places on the form. Getz said that he invited the respondent to sign the form but the respondent refused, saying that "his word was his honour" and adding that if a purchaser were found he would pay the commission of 5% - or "even more" than that. According to Getz, he left with the respondent the printed business card of "Perfecto", which bore the full name of the partnership firm and the names "B Getz/Mona", the last name being that of Getz's wife. It is not necessary to detail the further activities of Getz relative to the finding of a buyer, because of the unassailable conclusion of the Court a quo that he was in fact the effective cause of the sale. It is relevant to observe, however, that his diary reveals an entry dated 27 March 1980 which refers to a conversation with the respondent and contains a note "spoke to Spyrides if Steers is still for sale". The explanation given by Getz was

that / ....

that as some months had gone by since obtaining the mandate, he telephoned the respondent to ask if the business was still for sale. And on 17 June 1980 he wrote to respondent under Perfecto's letterhead in these terms:-

> "Dear Mr Spyrides
>
> RE : STEERS OF EDENVALE
>
> Perfecto Business Brokers, have introduced Mr Malcolm David Kuehn of Parkhurst and Miss Jackie Arndt, to your business 'Steers of Edenvale'. They are busy negotiating with you.
>
> Please give them your best attention and keep us informed. Our commission is 5% of the purchase price.
>
> Thanking you
>
> Yours faithfully
>
> PERFECTO BUSINESS BROKERS"

No reply / ....

No reply, whether written or verbal, was received to this letter. On one of Perfecto's office files there is a note "spoke to Spyrides and said they are taking over 1/8/80 and he will pay us commission". This note is dated 23/7/80 - the words "taking over 1/8/80" clearly refer to the purchasers of the respondent's business. Getz explained that this note was made after he had had a conversation with respondent on the telephone. He said that he introduced himself at the commencement of the conversation as "Getz from Perfecto Business Brokers" and that thereafter, following upon his request for payment of the commission, the respondent said that the purchasers were taking over

on / ....

on 1 August and he assured him that he would get his commission. On the following day, 24 July, 1980, appellants' attorney sent the following letter to respondent:-

> "We act for Messrs Perfecto Business Brokers and have been instructed to communicate with you relative to the sale of your business.
>
> With reference to the above matter clients desire us to confirm your advice to them to the effect that you are handing over the business to the purchaser on the 1st proximo and that you would then effect payment of the commission due to our clients. Our clients look forward to receiving payment of such commission in due course."

This letter elicited the following reply, dated 6 August, 1980:-

"I am / ....

"I am in receipt of your letter of the 24 of July concerning Perfecto business brokers and I have to put on record the following. Not only I have never heard of Perfecto B B, but neither have I at any time given authority verbal or written, nor have I appointed the same as my agents to sell my business.

My business was advertised in the Star on five consecutive dates from Thursday the 13th June to the 19th June through which certain people approached me for negotiations. Needless to say that your clients are not entitled to any commission, if and when a sale is concluded."

When he gave evidence at the trial the respondent repeated that he had never had any dealings with nor even heard of Perfecto. He remembered that Getz came to the Steakhouse on one occasion in

connection / ....

connection with the possible sale of his business, but he denied that that occasion was in October 1979 and insisted that it was during March, 1980. He denied giving Getz any mandate and also denied that Getz wrote down on Exh "A", or at all, any details concerning the business. He said that he never saw Exh "A" at all. He admitted that Getz left with him a business card with his name on it but denied that that card bore the name of Perfecto. He gave a description of the card left with him and said it was the card of some other concern, the name of which had something like "land" in it. The name "Perfecto", he said, was never mentioned. Although saying that at the time of Getz's visit he had not yet decided to sell, and adding that he did not take a liking to Getz, he admitted giving him detailed information concerning his business. When the figures and other data recorded by Getz on Exh "A" were put to him, the respondent admitted that they were correct and that Getz must have got them from him. He persisted in saying, however, that Getz made no notes and that he never saw Exh "A" at all.

When questioned about the letter dated 17 June 1980 and his failure to reply to it he appeared to suggest that he did not receive that letter, which had been sent by registered post. Later he said that

he might / ....

he might have received it and added the remarkable comment that if he did receive it, it was not a letter which called for a reply. He was also in considerable difficulty when answering questions concerning his reply to the letter dated 24 July from Getz's attorney and more particularly concerning his failure to deny therein the assertion made by the attorney that respondent had assured Getz over the telephone that the commission would be paid. The learned Judge described the respondent as a witness who tended to give "glib answers" which he later had difficulty in justifying. Reference was also made in the judgment to the respondent's "disingenuous attempt" to suggest that his own advertisements had attracted the purchasers. His equivocal evidence concerning the receipt of the letter of 17 June left the learned Judge without any real doubt that that letter was received by respondent. Some of the respondent's evidence in regard thereto was described by the learned Judge as "ridiculous". I need merely add that in regard to several aspects of his evidence the Court a quo observed that respondent's "discomfort was patent".

I turn now to the evidence which, it is very clear, induced the learned Judge, despite the generally unfavourable view he took of respondent's evidence, to find that it had not been satisfactorily established

that / ....

that the mandate given to Getz was accepted by him for Perfecto. It appears from the record of the proceedings that upon closure of respondent's case towards the end of the day, the Court intimated that argument would commence on the following day. When the hearing was resumed next morning, respondent's Counsel asked leave, which was granted, to re-open the respondent's case for the purpose of placing further evidence before the Court. The new evidence was in the form of a business card, Exh "O", which respondent said he had found during the adjournment, after diligently searching amongst his papers. He said that this was the card that Getz had left with him on the occasion of his visit to the Steers of Edenvale;

the card which respondent had mentioned and roughly described in his evidence on the previous day. Exh "O" is not the business card of Perfecto, but of Hillrand. Although the name, B Getz, appears on it, the telephone numbers on the card were not those of Getz and Perfecto but of Hillrand, for whom Getz had worked before commencing the partnership business of Perfecto. The respondent explained the late production of the card by saying that he had not realized how important it might be until after the first day's hearing. He had, for that reason, not searched for the card prior to the trial. He was adamant that Exh "O" was the very card left for him by Getz on the occasion of the latter's only visit to the Steers of Edenvale. He resisted suggestions that he might have obtained the card from a source other than Getz. Appellants' Counsel was given leave to recall Getz - he denied that Exh "O" was the card he had left with respondent when he visited him in October 1979 and firmly adhered to his previous evidence that the card he had given respondent was a Perfecto business card. The Court a quo, accepting as genuine that respondent discovered the card amongst his papers during the adjournment prior to argument, found that in those circumstances the probability that the card had been given to him by Getz on the occasion of their only meeting was "overwhelming". The judgment then proceeds as follows:

> "That finding appears to me to be fatal to the plaintiff's case. It is quite inconsistent with Getz having obtained the mandate on behalf of the plaintiff."

We were invited by the appellant's Counsel, in his heads of argument, to find that respondent's evidence about the late discovery of the card was suspect and was not of such quality as would justify acceptance that Exh "O" had been given to him in 1979 or 1980 by Getz. Some of the criticism of respondent's evidence in that connection is valid, but it is not sufficient to justify rejection of the trial Court's finding and I shall therefore accept for purposes of this judgment that Exh "O" was given to respondent by Getz on the occasion of their meeting. I am unable to agree, however, that such finding was "fatal to the plaintiff's case". Nor am I able to share the view that the finding was "inconsistent with Getz having obtained the mandate on behalf of plaintiff". The production by respondent of Exh "O" was, of course, an important factor in the inquiry but its weight had necessarily to be assessed in the light of several other factors, including the overall probabilities.

The / ....

The Court *a quo* correctly, I think, considered the real question to be whether Getz accepted the mandate on behalf of Perfecto. There is nothing to suggest that when giving Getz the mandate to find a buyer, the respondent was concerned with the capacity in which Getz was acting. There was clearly no thought of a *delectus personae* so far as the respondent was concerned. When the pruchasers approached him, saying that they had been sent by Perfecto, he replied that he did not know Perfecto in the context of the sale of the business, but that he knew Getz in that context. He did not say that he recognized Hillrand in that connection;

he / ....

he mentioned only Getz. The conclusion is irresistible that he gave the mandate to Getz, regardless of whom Getz was representing. The answer to the question whether the action was correctly brought in the name of the Perfecto partnership depends, therefore, upon whether Getz accepted the mandate on its behalf.

It appears to me that that question ought to have been answered in the appellants' favour. Getz's evidence that at the time of his visit to the respondent's Steakhouse in October he had already left the employ of Hillrand and that the Perfecto partnership was already carrying on business, was not contradicted

by any / ....

by any direct evidence. It is, moreover, strongly supported by Exh "A", a mandate form which, as I have earlier mentioned, bore Perfecto's name and upon which were recorded the necessary details concerning the respondent's business. There is nothing to suggest that Exh "A" was dishonestly completed and produced for purposes of the case. The respondent's evidence that Getz did not record the details about the business on the day of his visit not only reads very unconvincingly but is extremely unlikely.

The learned Judge's observation that there was a "distinct probability" that Getz was on the day of his visit still canvassing for Hillrand and that the

Perfecto / ....

Perfecto partnership was only started thereafter, is not compatible with Exh "A". The learned Judge appears not to have given due weight to Exh "A". It was referred to by him in the course of summarizing the evidence but no further reference to it is to be found in the judgment. There was, in addition, unrefuted evidence that Perfecto business cards were printed in October, which accords very well with Getz's evidence that the Perfecto partnership started carrying on business on 1 October. It will be remembered that respondent said that the meeting with Getz took place in March 1980. If that were true it would be even less likely that when canvassing the mandate, Getz did so for

Hillrand, not Perfecto. There is no reason, however, for doubting Getz's evidence that the meeting took place on the date stated in Exh "A".

If it is accepted, (as I think it must be) that on 11 October 1979 Getz and his wife had already started carrying on the Perfecto partnership business, there can be no justification for finding that Getz knowingly handed Exh "O" to the respondent with the object and intention of accepting the mandate for the benefit of Hillrand. And if Getz had not yet left Hillrand, and Perfecto was not yet in business, the use of Exh "A" and the deliberate handing over of Exh "O" on the same occasion would be wholly inexplicable.

Conciliation of these apparently irreconcilable features would readily result if Getz, who might well at that stage have had on his person both Hillrand and Perfecto cards, having only recently left Hillrand, mistakenly handed the wrong card to the respondent. This could very easily happen, especially if, as some of the evidence indicates, the card was handed over at the very end of the meeting. Of course, the onus being on the appellants, such a possibility would not of itself be sufficient for discharge of the onus; but neither would the mere handing over of Exh "O" to the respondent necessarily serve to negate or reduce the force of other facts and probabilities which

strongly / ....

strongly pointed to a conclusion that Getz acted on behalf of Perfecto. The effect that the handing over of Exh "O" might have on other strong indications in favour of the appellants would depend upon what inferences could fairly be drawn from the handing over of Exh "O". I do not think that the production of Exh "O" justifies, in all the circumstances, an inference (or even reasonable suspicion) that Exh "A" was a document concocted by Getz for purposes of the case; nor an inference that Getz, having knowingly handed Hillrand's card to respondent, thereafter dishonestly appropriated for his and his wife's benefit a mandate which he had obtained for Hillrand, or that such a course of conduct by Getz could reasonably be

suspected / ....

suspected. Dishonest appropriation of the mandate would, to his knowledge, be fraught with risk of detection by virtue of his having placed in the hands of respondent the identify and address of the party for whom he had obtained the mandate.

On the findings of the Court a quo, the respondent's liability for payment of commission was established. It appears to me that the rightful claimant sued for payment of that established debt and that judgment ought to have been for the appellant. The direct evidence of Getz that he accepted the mandate on behalf of the partnership, when considered in con= junction with Exh "A", the diary notes, the correspondence, and respondent's reactions to the letters addressed to him and the relatively favourable view which the Court took of Getz as a witness, in my judgment con= stitutes proof on the balance of probabilities, notwithstanding the production of Exh "O".

The appeal is allowed with costs. The order of the Court _a quo_ is set aside and there is substituted therefor the following order:

Judgment for the plaintiffs in the sum of R1 750, together with interest thereon at the rate of 11% per annum _a tempore morae_ to date of payment, with costs.

S MILLER
JUDGE OF APPEAL

CILLIé, JA)
) CONCUR
HOWARD, AJA)