In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 974/2006

In the matter between :

Peter Clayton	Plaintiff
and	
Auction Alliance	First Defendant
Dr Ashwin Valjee, Sheila Devi Valjee NNO (in their capacity as trustees of the Ashwin Valjee Family Trust Trust No IT303/950)	Second Defendants

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Judgment

Lopes J

[1] In this matter the plaintiff originally sought an order declaring an agreement of sale of immovable property to be cancelled, and for the return of a deposit paid by the plaintiff to the first defendant of R90 000.

[2] The history of the matter may be summarised as follows :

a) on the 27th October 2005 the plaintiff attended a public auction which was being conducted by the first defendant;

b) at the auction the plaintiff bid on an immovable property described as the sectional title unit 26 Davelain situated at 652 Ridge Road, Musgrave, Durban;

c) the immovable property in question was owned by a family trust represented by the second defendants;

d) the immovable property was sold at the auction to the plaintiff for his bid of R760 000;

e) the plaintiff paid a 'deposit' of R90 000;

f) the sale was thereafter cancelled;

g) the plaintiff alleged in his particulars of claim that he cancelled the sale as a result of misrepresentations by the first defendant, and in the circumstances is entitled to the return of the R90 000, which he paid as a 'deposit'.

[3] The action came to trial which commenced on the 6th December 2010 before the late Msimang JP. The evidence was not completed within the time allotted, and the matter was adjourned sine die. Unfortunately, and before the trial could resume, Msimang JP passed away.

[4] The matter then came before me on the 5th September 2012. No evidence was led and I heard argument on the matter. The parties were agreed that in reaching a conclusion I could have recourse to the record of proceedings

before the late Msimang JP and that the record handed to me was an accurate record of what was said at the trial.

[5] The original case brought by the plaintiff however, was overtaken by events. Those events were that a subsequent purchaser had been found for the property and an agreement was concluded with that purchaser, one Soni, on the 30th January 2006. The plaintiff, in the circumstances, no longer persisted with the allegations of a fraudulent representation entitling it to cancel the sale agreement. He merely relied upon the fact that the contract was cancelled entitling him, so he alleged, to repayment of the 'deposit'. As a result of the subsequent sale of the property the second defendants fell out of the picture and were not before me. The issue which arises is one solely between the plaintiff and the first defendant, to whom I shall hereinafter refer as the defendant.

[6] It follows from the aforegoing, that as the plaintiff no longer relies upon a fraudulent misrepresentation, and as the parties are agreed that the sale agreement was cancelled, it is no longer in dispute that the defendant properly exercised its functions as auctioneer in concluding the sale on behalf of the plaintiff.

[7] I have referred thus far to the 'deposit' paid by the plaintiff. I emphasised the word deposit because the payment made by the plaintiff is the main subject of the dispute between the parties. They are not agreed on what the payment

constituted, or in respect of what it was made.

[8] At the outset of the hearing the defendant was asked to admit the allegations in the amended sub-paragraphs 16.1, 16.2 and 16.3 of the plaintiff's amended particulars of claim. It is accordingly relevant to record the contents of the sub-paragraphs which were the subject of the request. They are as follows :

'During January 2006 :-

16.1 the Second Defendant expressly, alternatively tacitly, accepted the cancellation of the agreement, alternatively, unilaterally cancelled the agreement;

16.2 the aforesaid cancellation took place pursuant to a written communication between the First Defendant and the Second Defendant, a copy of which is annexed hereto, marked "**AA**" and was confirmed in writing by way of letter dated the 30 October 2009 from the Second Defendant's attorneys to the Plaintiff's attorneys, a copy of which is annexed hereto, marked "**BB**";

16.3 acting in accordance with the said cancellation of the agreement, the Second Defendant thereafter sold and transferred the property to a third party;'

[9] Those sub-paragraphs referred to the cancellation of the sale agreement. What the defendant recorded as its response to the request was the following :

'(a) It is admitted that the second defendant tacitly accepted that the agreement was cancelled.

(b) The allegations made in 16.1 contrary to the above admission, are not admitted.

(c) The allegations made in 16.2 and 16.3 are admitted.'

[10] The plaintiff's case was simply that the agreement having been cancelled, the deposit paid of R90 000 fell to be returned to it by the first defendant. In

support of this contention Mr *Phillips* who appeared for the plaintiff referred me to sub-paragraph 8(c) of the particulars of claim which read :

‘(c) Pursuant thereto the Plaintiff :

i) signed an agreement for the purchase of the said unit for R760 000;

(ii) paid to the First Defendant a deposit of R90 000.’

In its plea the defendant admitted the allegations in sub-paragraph 8(c).

[11] Mr *Phillips* referred me to the defendant’s plea which denied any liability to repay the deposit, and referred to Clause 3 and 5 of the written sale agreement, concluded at the auction sale between the plaintiff and the erstwhile second defendants represented by the defendant.

[12] Clause 3.1 and 3.2 of the agreement refer to the way in which the purchase price of the property is to be paid, including a deposit of 5% of the purchase price, which is to be paid to the auctioneer by the purchaser immediately on the fall of the hammer.

[13] Clause 5 provides :

‘5. <u>AUCTIONEER’S COMMISSION</u>

The PURCHASER shall be liable for and pay, in addition to the amounts payable in terms of Clauses 3.1 and 3.2, AUCTIONEER’S commission of 10% (ten percent) of the purchase price, plus VAT thereon, which commission shall be deemed to have been earned and is payable immediately upon the fall of the hammer.’

[14] Mr *Phillips* submits that these clauses entitle the defendant to no more than a contractual entitlement to claim commission. As there is no counter-claim for commission, the defendant is obliged to return the deposit in toto to the plaintiff. As support for the plaintiff's claim Mr *Phillips* also referred me to the trial bundle which formed Exhibit A at the hearing before the late Msimang JP. The relevant correspondence may be summarised as follows :

a) on the 22nd October 2009 the plaintiff's attorneys addressed the defendant's attorney regarding inter alia the following :

> "You have undertaken to confirm with your client that it currently holds the full R90 000 in a trust account, and to provide us with documentary proof of this. ...' ;

(b) the defendant's attorney eventually replied on the 29th October 2009 stating the following :

> 'Attached*hereto is a document evidencing that our client received the R90 000. Our client has advised us that it still holds such funds in trust to date. Please indicate whether or not you will require us to formally discover this document.'

(c) attached to the letter was an extract of the defendant's trust account reflecting two deposits by the plaintiff, one on the 27th October 2005 in the sum of R45 000 and the second on the 28th October 2005, also in the sum of R45 000.

[15] At the resumed Rule 37 conference held on the 31st July 2012, and in response to a request that the defendant confirm that it had re-instated into trust the funds referred to in the letter of the 29th October 2009, the defendant

recorded:

'The Mooney Ford letter of 29 October 2009 incorrectly states that the funds were then held in trust. The funds were transferred from the First Defendant's ABSA trust account to its KZN Nedbank business account on the 29th June 2006 and from that account to its KZN Nedbank call account on the 3rd July 2006 where it has been ring fenced (sic) and is being kept pending the finalisation of this action.'

Mr *Phillips* also referred me to the plaintiff's replication which dealt with the entitlement of the defendant to claim the auctioneer's commission referred to in paragraph 5 of the sale agreement. The replication was to the effect that no member of the defendant was in possession of a Fidelity Fund certificate as required by an estate agent, and accordingly could not claim the amount.

[16] Mr *Phillips* also referred me to a letter forming Annexure 'AA' to the plaintiff's particulars of claim which was addressed by the defendant to the seller's attorney, one Rabiah Motala, containing the following :

'... Kindly be advised that we will refund the purchaser all monies he has paid at the first sale. If we take legal action the property cannot be sold until it is resolved in the Court of Law.

Auction Alliance commission in this matter is R43 895 however we are willing to compromise and refund you R3 859 towards the electrical and borer certificate costs.'

[17] On the 30th October 2009 and as per Annexure 'BB' to the plaintiff's particulars of claim, Rabiah Motala replied on behalf of the erstwhile second defendant as follows :

'... Our client has no objection to any monies being held by Auction Alliance, being released to the Plaintiff, Peter Clayton.'

Mr *Phillips* also referred me to an affidavit deposed to by the defendant's director, one Hendrik Vorster Hattingh ('Hattingh') dated the 5th November 2009 which affidavit was deposed to in an application for leave to amend the defendant's plea. In paragraph 16 of that affidavit Hattingh sought to justify a basis for an amendment to the plea explaining the make-up of the R90 000 deposited by the plaintiff. I was informed that the defendant did not proceed with the application.

[18] During the argument, I asked Mr *Phillips* what the amount of R90 000 had been paid in respect of, because it did not appear to bear any resemblance to the amounts which became payable on the fall of the hammer, in respect of both the 5% deposit calculated on the purchase price and/or the 10% commission. The response of Mr *Phillips* was that in the absence of any evidence I was bound by the pleadings in the matter. With regard to the question of commission, Mr *Phillips* submitted that as the R90 000 had been allegedly appropriated by the defendant, it had to establish an entitlement to do so in terms of the Estate Agency Affairs Act, 1976, of which s 34(A) requires the existence of a valid fidelity fund certificate, which has been issued to the estate agent concerned, or if the estate agency is a company, to every director of the company.

[19] In addition to deciding whether the R90 000 constituted a deposit on the purchase price only, and accordingly whether the plaintiff was entitled to the return of that amount on the basis that the agreement of sale had been cancelled, Mr *Phillips* contended that I was required to answer two questions :

(a) whether the agreement, allegedly constituted by the letters exchanged between the defendant and Rabiah Motala, constituted an agreement of waiver or abandonment of the defendant's claim for commission; and

(b) even if there was evidence of an appropriation of the monies, if that was contrary to or in breach of the undertaking that the monies were held in trust and/or ringfenced, whether it is appropriate for the appropriation of the monies to be ignored and/or reversed by me.

[20] With regard to the onus of establishing the above, Mr *Phillips* contended that, but for the pleadings, the plaintiff would have borne the onus of establishing the contents of the deposit, but because the payment of the R90 000 had been admitted as a 'deposit' the onus was discharged.

[21] Mr *Troskie* SC who appeared for the defendant submitted that the explanation for the makeup of the R90 000 'deposit' is to be found in the evidence of the plaintiff which was given before the late Msimang JP. That evidence appears at pages 86 ff of the record (which I was only given and able to read, after the plaintiff's counsel had addressed me) and I summarise it as follows :

a) the plaintiff admitted that upon the fall of the hammer he had an obligation to pay a deposit towards the purchase price and the auctioneer's commission;

b) the auctioneer's commission was earned and became payable immediately upon the fall of the hammer;

c) immediately after the auction he was taken into an office and given an invoice;

d) the invoice, which was numbered 216, and which appeared at page 73 of the trial bundle recorded that the plaintiff was liable to pay the following :

	R	C
'5% Deposit	38 000	00
10% auctioneers comm	76 000	00
14% vat on auctioneers comm	10 640	00
Total payable	124 640	00'

At the top of the invoice the following was recorded in manuscript :

'27/10 – 45 000 – EFT

28/10 – 45 000 – EFT

29/10 – 31 640

124 640;

e) The plaintiff then left the venue in possession of the invoice knowing that he had to effect payment of the amounts reflected therein, and how these amounts were made up;

f) The lady with whom he had dealt had written out the three payments recorded at the top of the invoice in manuscript. The plaintiff confirmed that he had indicated to the defendant's representatives that he could pay no more than R45 000 on each day because he had a limit on withdrawals from his account;

g) the plaintiff clearly understood when he paid the two amounts of R45 000 that he was making payments in respect of the invoice. This was made clear from the 'Internet Banking Proof of Payment' documents produced under discovery by the plaintiff which stated the following

'Reference on beneficiary statement : **clayton – inv216**'

Despite the apparent desire of the plaintiff not to admit that these payments were made pursuant to the invoice, there can be absolutely no doubt that that was what he did;

(h) the plaintiff then declined to make what was the third and final payment of R34 640 and decided to cancel the sale agreement.

[22] Mr *Phillips* submitted that the defendant was bound by the pleadings. The plaintiff had alleged that it had paid a 'deposit' of R90 000, and that was admitted by the defendant. That was an end to it, and the defendant was not entitled to go beyond the pleadings. Mr *Phillips* may well be correct that if an allegation of fact is made in a particulars of claim and admitted by the defendant, that the defendant is not entitled, without the consent of the plaintiff, to lead evidence at variance with the admission. The defendant in those circumstances would be required to withdraw the admission prior to doing so. It may also be correct that the plaintiff, having made an allegation in the summons, is not entitled without the consent of the defendant, to lead evidence at variance with the allegations of fact in the particulars of claim, because that is where the plaintiff sets out its case which the defendant is required to meet.

[23] The present case, however, is different. Here the plaintiff made an allegation of fact and the defendant admitted it. When the evidence was led at the trial the plaintiff himself contradicted the allegation of fact which he had made regarding the 'deposit'. I say 'contradicted' because Mr *Phillips* contended for a technical definition of 'deposit' averring that it could only possibly refer to a portion of the purchase price paid. The problem with that submission is that the plaintiff himself made it absolutely clear in his evidence what he was paying and why he paid it. I mention here that the evidence included the fact that after the plaintiff had paid the first two amounts he refused to pay the last amount (the balance of the invoice) because of alleged misrepresentations by the defendant. Those misrepresentations did not form any part of the hearing before me and were not relied upon by the plaintiff.

[24] In the circumstances, and having led evidence contrary to an allegation of fact in the particulars of claim, without demur on the part of the defendant (who in fact encouraged and exploited that contradiction in cross-examination, as it was entitled to do), the plaintiff cannot now complain of prejudice when the defendant seeks to place reliance on the plaintiff's evidence. This evidence, after all, did not emanate from the defendant.

<u>See</u> : *E C Chenia & Sons CC v Lamé & van Blerk* 2006 (4) SA 574 (SCA), paragraphs 13 – 15.

[25] It would surely be unrealistic were I to ignore the evidence of the plaintiff as to what he did when his evidence was so clear, and so clearly contradicts the argument put forward that the word 'deposit' in the particulars of claim can only possibly refer to a portion of the purchase price. The evidence demonstrates that what he paid was part of the invoice, constituted of two parts, a 5% deposit of the purchase price and the 10% auctioneer's commission plus VAT, both of which became payable upon the fall of the hammer at the auction. Significantly, his payments gave no indication of the items in respect of which the R90 000 was paid. I accordingly find that there is no merit in the submission that the admission of sub-paragraph 8(c) of the particulars of claim bound the defendant as to what was actually paid by the plaintiff.

[26] As pointed out by Mr *Troskie* SC the defendant was entitled, in the absence of any stipulation by the plaintiff, to apportion the amount paid to it by the plaintiff as it saw fit. The evidence of Mr Hattingh at the hearing before the late Msimang JP was that although the R90 000 was originally deposited into the defendant's trust account, it was transferred to a Nedbank call account which was the defendant's business account. The money was transferred out of the defendant's trust account during July 2006, a fact established by Hattingh from the documents

<u>See</u> : *Durban City Council v Glenore Supermarket and Café* 1981 (1) SA 470 (D) at 480 A – D.

[27] Mr *Phillips* submitted that the evidence of Hattingh should not be accepted because it was hearsay. In addition, the cross-examination of Hattingh was not completed. I am inclined to accept the evidence of Hattingh. I say this because there was every available opportunity to the plaintiff to establish, by way of the discovery of the defendant's bank accounts, precisely what happened to the R90 000 and when it was transferred from the defendant's trust account. The right to do that persisted after the hearing before the late Msimang JP and if the plaintiff made no effort to establish the accuracy of what Hattingh said, then I am prepared to accept his evidence. In this regard I am not placing any onus whatsoever on the plaintiff. All I am saying is that there was evidence before the court of the transfer of the monies out of the trust account, and it has not been challenged by contrary evidence.

[28] Mr *Phillips* also submitted that the defendant was bound, by what he referred to as the undertakings contained in the letters which were annexures to the particulars of claim. In particular he refers to the letter from the defendant dated the 24th January 2006 addressed to Rabiah Motala, the attorney for the erstwhile second defendants. The statement that 'We will refund the purchaser all monies he has paid at the first sale' is not an undertaking which was given to the plaintiff. Nor does it appear to be an agreement binding upon the defendant which can be relied upon by the plaintiff. It was no more than a statement by the defendant to the sellers that it would repay to the purchaser all the monies due to it. The reaction of the sellers is simply that they have no objection to the monies

held by the defendant being paid over to the plaintiff.

[29] Mr *Phillips* further pointed to the fact that the defendant's attorneys advised the plaintiff's attorneys that the monies were held in trust as at the 29th October 2009 and indeed enclosed a copy of the trust account reflecting that fact. Mr *Phillips* also referred to the resumed pre-trial conference at which the defendant's attorneys recorded that the money had been 'ringfenced and is being kept pending the finalisation of this action.'

[30] I do not believe that the incorrect information given by the defendant's attorneys to the plaintiff's attorneys as to the whereabouts of the R90 000 can change the factual position. The factual position, as seems clear from the evidence, is that the money was appropriated by the defendant and transferred to the defendant's business account. The fact that it has been 'ringfenced' cannot assist the plaintiff unless I were to find that it is entitled to the return of the money.

[31] In view of the fact that the payment was made in accordance with the invoice and that the defendant was entitled to apportion it as it deemed fit, and as the defendant apportioned it firstly as to auctioneer's commission and then to a deposit, the plaintiff only has an entitlement to the monies to the extent that it exceeds the auctioneer's commission.

[32] With regard to the fact that the defendant is required to establish that its representatives held fidelity fund certificates in order to comply with the provisions of s 34 (A) of the Estate Agency Affairs Act 1976, as I have accepted the evidence that the defendant appropriated the money, the plaintiff has no cause of action to claim that money back.

<u>See</u> : *Taljaard v T L Botha Properties* 2008 (6) SA 207 (SCA) at 209 D – G.

[33] In all the circumstances I am satisfied that the plaintiff has only established a case for the return of R3 360 being that portion of the R90 000 which represented a payment of part of the deposit on the purchase price.

[34] With regard to the question of costs, and prior to the hearing before the late Msimang JP, the defendant made two tenders :

a) on the 1st October 2010 a tender of R90 000 was rejected by the plaintiff because it did not include interest and costs;

b) the defendant also tendered to pay the R3 360 together with interest and the plaintiff's costs on a Magistrates' Court scale.

Both those tenders were rejected. As both tenders were rejected by the plaintiff, with regard to the question of costs it only has itself to blame for continuing the litigation.

[35] In the circumstances I make the following order :

1. The defendant is directed to pay to the plaintiff the sum of

R3 360 together with interest thereon calculated at the rate of 15.5% per annum from the date of the service of the summons in the action to date of payment;

2. The plaintiff is to pay the defendant's costs of suit.

Date of hearing : 5th September 2012

Date of judgment : 19th September 2012

Counsel for the Plaintiff : D Phillips (instructed by Barkers Attorneys)

Counsel for the First Defendant : A J Troskie SC (instructed by Mooney Ford Attorneys)