



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

CASE NO.: 7118/2023

In the matter between:

**CITY AND ATLANTIC REAL ESTATE CC t/a
RE/MAX LIVING**

Applicant

And

MICHEAL IAN FRAIN SMITH

First Respondent

ALISON CAROL SMITH

Second Respondent

KAPSTADT INTERNATIONAL PROPERTIES CC

Third Respondent

Coram: Parker, AJ

Matter heard on: 6 November 2024

Judgment delivered electronically on: 13 December 2024

JUDGMENT

PARKER, AJ:

Introduction

[1] The stress of seeking relief for commission in property matters after months of negotiating a sale in the real estate industry cannot be an easy one. Estate agent's commission is usually paid to the agent on registration of transfer of an immovable property. Sometimes there are unique challenges. This determination pivots on who is the effective cause of a sale, and whether it is the Applicant or Third Respondent, both whom are Estate Agencies.

[2] Applicant (hereinafter referred to as RE/MAX Living) instituted motion proceedings against the First and Second Respondents (the Smiths) for the estate agent commission in the amount of R966 000.00 (vat inclusive) relating to the sale of the Smiths' immovable property.

[3] The Smiths do not oppose the relief sought in the application and have elected to abide by the decision of this court. They filed an affidavit in order to assist both parties and the court. The commission is currently held in an interest bearing trust account with their attorneys pending finalization of the dispute.

The Factual Matrix

[4] On 1 September 2021, Applicant, concluded a written joint mandate with the Smiths together with Third Respondent (hereinafter referred to as Kapstadt,) to market and find a purchaser for the property ("the joint mandate"). The joint mandate did not specify the selling price.

[5] The joint mandate stipulates that in the event of the property being sold by RE/MAX Living, or being sold to any other person introduced by it during the mandate period, RE/MAX Living, as the effective cause of the sale, would be entitled to the commission calculated at 3.5% plus VAT of the purchase price achieved. The joint mandate shall remain in force until 17h00 on 30 April 2022. Clause 3.2 of the joint mandate reads as follows:

“3. The RE/MAX sales associate shall be entitled to a commission based on 3.5% plus VAT of the sales price. The said commission shall become due to the sales associate and payable by the seller to RE/MAX Living:

...

3.2 If the property is sold by RE/MAX Living, the RE/MAX Living sales associate, the seller, or by any other person to any purchaser introduced by the RE/MAX Living sales associate or RE/MAX Living during the mandate period where after the common law principle of effective cause shall apply;”

[6] On 20 November 2021, RE/MAX Living approached Mr James Pears (“Pears”), an existing client of RE/MAX Living, to enquire whether he wished to view the property. Subsequently, on 23 November 2021, two associates of the Applicant, namely Karin Louise Aggourras (“Aggourras”) and Louise Killeen viewed the property for the first time. A second viewing ensued on 29 November 2021, with Pears and his advisor, Dave Linder as well as Aggouras and a certain Anna Maria Gelhaar (“Gehlaar”) during the period of the mandate. Sales and statistics were exchanged for the Camps Bay area.

[7] Pears' parents attended two additional viewings on December 7, 2021, and January 25, 2022. Amidst the viewings, there were negotiations between Gehlaar and Pears regarding his interest in the property and an offer to purchase was made by Pears. However, the price fell short of the asking price.

[8] On 1 March 2022 Gehlhaar, sent Pears a whatsapp message advising him that the Smiths had received a higher offer from an American purchaser. The Smiths accepted the offer for a purchase price of R24 million. Pears had returned to London by that time and informed the client that he would not be increasing his offer

[9] It subsequently transpired that this American purchaser was introduced to the Smiths by Kapstadt. This transaction was abandoned in February 2023 as the American purchaser was unable to fulfil the terms of the transaction due to an unforeseen change in his personal circumstances.

[10] During or about February 2023 the Smiths accepted an offer from Pears to purchase the property for a purchase consideration of R24 million. It is this occurrence that forms the basis of this application

[11] In a voice message, during March 2023, Mrs Smith informed Aggouras through a voicemail that an agent from Kapstadt, Ms Jean Lalonde ("Lalonde") had approached her to arrange for a client to view the property. Mrs Smith informed Aggouras that the client

in question was indeed Pears. Mrs. Smith advised Aggouras that she had informed Lalonde that Pears had been introduced to the property by RE/MAX Living.

Issues in dispute

[12] These two areas are:

- 12.1 the terms of the mandate provided by the sellers to the Applicant (and whether the Applicant performed in terms of this mandate); and
- 12.2 whether the applicant was the effective cause of the sale of the property to the purchaser.

Analysis

[13] Applicant submits that the background facts, (none of which are disputed by the Smiths, the persons against whom RE/MAX Living asserts its claim) demonstrate the following:

- 13.1 RE/MAX Living was mandated to sell the property in terms of the joint mandate;
- 13.2 The joint mandate expired on 30 April 2022;
- 13.3 Pears was introduced to the property, by RE/MAX Living, during November 2021, that is during the currency of the joint mandate;
- 13.4 Pears viewed the property on multiple occasions, accompanied by representatives of RE/MAX Living;
- 13.5 The property was eventually sold to Pears; and
- 13.6 Clause 3.2 of the joint mandate is on Applicant's view, clear.

[14] It is important to note that RE/MAX Living does not dispute that Kapstadt is not entitled to receive commission from the Smiths (if it is able to establish a lawful basis for the payment of such commission) and, hence, these are not competing claims for commission on the part of RE/MAX Living and Kapstadt. The Smiths are the subject of a claim by RE/MAX Living. If RE/MAX Living can establish that claim, as a matter of law, then it is entitled to receive payment of commission.

Dispute of Facts

[15] Additionally, Kapstadt argues that the property was sold to Pears in February 2023, more than 90 days after the mandate period had expired. Consequently, it has a direct financial and legal interest in the commission it claims is owed to it, a claim that the First and Second Respondents do not contest. Lalonde contends the property was no longer listed for sale on Applicant's website and was no longer being marketed by the Applicant at the time Kapstadt was negotiating with Pears. This assertion is disputed.

[16] The determination of the question of whether a real and genuine dispute of fact exists is a question of fact,¹ and is for the Court to decide.² The Court is tasked with determining if the factual dispute can be adequately resolved without the necessity of oral evidence.³ Kapstadt however, contends that RE/MAX Living should not have brought application proceedings, as it would or should have known that the interpretation of a

¹ The dispute must relate to facts and not merely to the law and the application of relevant legal principles: *Dorbyl Vehicle Trading & Finance Co (Pty) Ltd v Northern Cape Tour & Charter Service CC* (2001) 1 All SA 11 (NC) at 123-124.

² *Ismail v Durban City Council* 1973 (2) SA 362 (N) at 374.

³ *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428.

“clearly ambiguous contract” cannot be decided on affidavit. The argument posits that RE/MAX Living should have anticipated that disputes of fact would arise, and therefore it should have proceeded by way of action. In its failure to do so, Kapstadt has been unfairly deprived of the procedural advantages available to it in a trial (such as discovery, the right to cross-examine witnesses, etc.).

[17] The Smiths are acutely aware of the circumstances surrounding the sale of their property. It is trite that in the interpretation of a document, the inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision, and the background to the preparation and production of the document⁴. Whilst I acknowledge the importance of context, the interpretation of the text still bears relevance. There is no need to hear oral evidence from the Smiths, as the facts are not in dispute in so far as the number of times Pears viewed the property and which agent ultimately concluded the deed of sale. What is in dispute is who was the effective and primary catalyst for the sale.

[18] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*⁵ the SCA explained that:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 604 C-D

⁵ 2008 (3) SA 371 (SCA), at para [13].

denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him.”

[19] Upon examining the provisions of Clause 3.2, it becomes clear that the text is straightforward and unambiguous. In my view, the mandate to RE/MAX Living was unequivocal as I struggled to understand the reasoning behind the assertion by Kapstadt that a factual dispute exists regarding whether RE/MAX Living was the effective causa of the sale.

Indemnification

[20] The Smiths, in their dealings with Kapstadt, sought an indemnity by Kapstadt ensuring that in future dealings with Pears, the Smith's will be indemnified against any claim by RE/MAX Living for commission.

[21] In hindsight, the Smiths who safeguarded themselves against this risk associated with the commission, ought to have insisted that Pears engage with RE/MAX Living, rather than accepting the offer via Kapstadt, especially since they were fully aware of the prior involvement of RE/MAX Living. I reiterate the transcribed voice message, during March 2023, wherein Mrs Smith advised Aggouras through a voicemail. However it may be, the indemnity from Kapstadt alleviated the fears which the Smiths may have had.

Case law

[22] Turning to the burning question as to which party is the effective cause of the sale the estate agency must first prove on a balance of probabilities that they are the effective cause of the sale. The primary determinative issue of whether an estate agent is entitled to a commission for a successful sale of the property is whether the estate agent was the ‘effective cause’ of the sale, has come through a plethora of judgments from as far back as *Basil Elk Estates (Pty) Ltd v Curzon*,⁶ all the facts and circumstances must be weighed to determine which estate agent’s efforts were the *causa causans* of the sale. This exercise involves a factual determination of whether the estate agent introduced the purchaser to the property and whether or not the agent was mandated at the relevant time. In essence, the court clarified the effective cause requirement by stating that it is met when, first, the estate agent introduces the purchaser to the property, and, secondly, when the agent is mandated at the relevant time. Therefore, an estate agent, in order to claim commission, needs to prove that they introduced the purchaser to the property, and that they were mandated by the principal. In short the estate agent is required to prove that their efforts were the *causa causans* (effective cause) of the sale in order to successfully claim a commission.

[23] In a SCA decision, *Wakefields Real Estate (Pty) Ltd v Attree and Others*⁷ the principal had mandated an estate agent to secure a property for him but thereafter cancelled the mandate. Subsequently, the erstwhile principal mandated another estate agent to complete the deal or sale of the property. The court was faced with the same

⁶ 1990 (2) SA 1 (T)

⁷ 2011 (6) SA 557, the headnote at 557E.

determination as to whom, whether it was the former or latter estate agent who was responsible for introducing the purchaser to the property and whether that introduction was an effective cause of the sale. In its analysis the court used the 'but-for' test. Lewis JA held that if the first estate agent (Walker) had not shown the principal (Howards) the property first – the initial introduction – the property would not have been sold to the principal through the agency of the latter estate agent. In the result the court concluded that if it was not for the initial introduction by the former agent,⁸ the latter agent would not have had knowledge of the purchaser's intention to purchase a house and thus the introduction by the former agent qualifies as the effective cause.

[24] The reliance by Kapstadt that the negotiations may have been broken is not sufficient as ruled in *Mano et Mano Ltd v Nationwide Airlines (Pty) Ltd and Others*⁹:

“The fact that negotiations for the purchase of a property may have been broken off is not sufficient to prevent an agent from being the effective cause of a sale.”

[25] At paragraph [18] of the judgment, concretises Applicant's claim to the commission as the facts leans in favour of Applicant being the dominant cause of the sale:

“Often the intervening cause is alleged to be efforts of a second agent. Although every commission claim depends on its own facts, second agents seldom seem to succeed: the introduction of a purchaser by the first agent usually remains the effective, or as Van den Heever JA put it, 'the dominant' cause of the sale.”

⁸ Ibid at paragraph [22]

⁹ 2007 (2) SA 512 (SCA) at paragraph [15].

[26] In *Webranchek v L K Jacobs and Co*¹⁰ Ltd, the Appeal Court said the following:

“But, it is said, plaintiff did not bring about the sale. It was not contended that the mechanical conclusion of the deed of sale was fulfilment of the condition; nor was it contended (for it could not) that the last act in order of time to produce that effect, namely that which induced the signature of the document, was the proximate cause of the sale. Where is one to draw the line? If we weigh up the causative value of plaintiff’s efforts and those of Seef & Co. the former preponderate. If one may use a simile: plaintiff designed and built the ship ready for launching: Seef & Co. presided over the formalities at the celebrations and pressed the button at the slipway. Plaintiff says it is due to him that the vessel exists at all whereas defendant, for his own ends, praises Seef & Co. as the sole cause of its being afloat.”

[27] Kapstadt has a direct financial and legal interest in the commission which it claims is owed and due to it (and which claim the Smiths do not dispute). However, Kapstadt has indemnified the Smiths against any claim the Applicant may have against them. In my view therefore the issue of the Smiths receiving a double commission, does not bode well for Kapstadt.

[28] The argument that the subsequent conduct of the parties could also have influenced the interpretive exercise, is untenable. The inquiry regarding the effective cause of the sale pertains to a legal matter, and case law favours RE/MAX Living. In summary, the Smiths accepted an offer for the property from Pears, through Kapstadt,

¹⁰ 1948 (4) SA 671 (A) at 683.

knowing full well that RE/MAX Living had introduced Pears to the property on multiple occasions, and, it is submitted, with full knowledge that RE/MAX Living was involved. There are no reasons for me to exercise a discretion to refer this matter to trial or to hear oral evidence. In the premises, the facts in this matter demonstrate that the dominant cause of the sale was the efforts of RE/MAX Living, and not the efforts of Kapstadt. Kapstadt will have to seek a remedy elsewhere for a claim, though its indemnity poses a problem for itself. Lastly, it follows that the counterclaim against RE/MAX Living cannot be sustained.

Mediation

[29] In my view this dispute was more suited to alternate dispute resolution mechanisms. It is unfortunate process to litigation. I say so because the issue in dispute was specific and although the matter appeared not to be capable of settlement, an astute and skilled Mediator with the experience on property matters may have resolved the dispute earlier. There was no indication that mediation was attempted. Applicant instituted proceedings against the Smiths. If that process was allowed to flow through to mediation, the mediator would have been privy to the view by the Smiths. That may have been the end of the matter. Instead the Smiths chose to abide the decision of this court after Kapstadt delivered its counterclaim against Applicant.

Costs

[30] The award of costs are complex. First and Second Respondents abided the decision of the Court. Therefore any costs they will be liable for follows the result. Third

Respondent is also liable for costs as it chose to oppose the matter and file a counterclaim. The dispute was not between Applicant and Third Respondent. I see no reasons why costs occasioned by the Third Respondent should also not follow the result. Given the complexity of the matter, costs due by First and Second Respondents and Third Respondent, as articulated herein, are to be borne jointly by them on Scale B. The Smiths set out in the argument that they should not be held to punitive costs. However, First and Second Respondents cannot be held liable for the costs occasioned by the Third Respondent who opposed the matter and in its filing of the counterclaim, such costs are for the account of the Third Respondent.

Order

[31] After a consideration of the pleadings and the arguments made the following order is made:

- 31.1 That the First and Second Respondents, jointly, make payment to the Applicant in the amount of R966 000.00;
- 31.2 Interest on the amount of R966 000.00 at the legal rate, *a tempore morae*;
- 31.3 The Third Respondent's counterapplication is dismissed with costs on Scale B.
- 31.4 That the First, Second and Third Respondents, where appropriate, jointly, pay the Applicant's costs on Scale B

R K PARKER
ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for Applicant	: Adv. A Smalberger (SC)
Instructing Attorney	: Werksman Attorneys – Mr R Gootkin
Counsel for First and Second Respondents	: Adv. T Masvikwa
Instructing Attorney	: Cliffe Dekker Hofmeyr – Mr R Marcus c/o Bailey Haynes Incorporated – Mr Haynes (Cape Town)
Counsel for Third Respondent	: Adv RGL Stelzner (SC)
Instructing Attorney	: Macgregor Stanford Kruger Inc – Mr D Macgregor