



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

Case No: 7118/2023

In the matter between:

CITY AND ATLANTIC REAL ESTATE CC

t/a REMAX LIVING

Applicant

and

MICHAEL IAN FRAIN SMITH

First Respondent

ALISON CAROL SMITH

Second Respondent

KAPSTADT INTERNATIONAL PROPERTIES CC

Third Respondent

JUDGMENT - LEAVE TO APPEAL

PARKER AJ

Introduction

[1] This is an application for leave to appeal by the third respondent in terms of sections 17 (1)(a)(i) of the Superior Courts Act No.10 of 2013 (“the Act”) against the whole of the judgment and order delivered on 13 December 2024 including that of costs, the essence of which is that the third respondent would have reasonable prospects of success on appeal.

[2] The parties shall be referred to as applicant and respondents as cited in the main application. The grounds of appeal are, pertinent to;

2.1 The factual disputes

2.2 The applicant's mandate

2.3 Effective cause of the sale

2.4 The Smiths

The factual disputes

[3] The factual disputes are to a certain degree interlinked with the effective cause of sale. The argument advanced by the third respondent is that since the applicant sought final relief in motion proceedings the onus was on the applicant to prove on a balance of probabilities the terms of the mandate and that it was the effective cause of the sale. The submissions made by the third respondent is that the third respondent raised disputes of fact, which factual disputes arise in circumstances where the applicant seeks final relief the relief should be granted in favour of the applicant only if the facts alleged by the respondent in their answering affidavit read with the facts it has admitted to justify the order prayed for as the test adopted in *Plascon Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd*¹, the court can only reject the version of the respondent if the absence of bona fides is abundantly clear and manifest and substantially beyond question.

¹ 1984 (3) SA 620 . See also *Islam v Kabir* (C280/2010)[2011] ZAECHC 9 (11 April 2011)

[4] Furthermore the third respondent argues the court erred in elevating the fact that the applicant had introduced the ultimate purchaser (“Mr. Pears”) to the property almost a year before the sale and failed to consider the lapse of time which had occurred since the said introduction and in not concluding that the third the respondent was the ultimate proximate and effective cause for the sale.

[5] In this regard the judgment was clear that Mr. Pears was introduced by the applicant for reasons canvassed in the judgment arriving at the decision that the applicant was the effective cause of the sale.

[6] In arriving at the conclusion that the applicant was the effective cause of the sale, the onus was discharged, albeit that the onus was not expressed in the words “onus” in the judgment.

The terms of the mandate

[7] The third respondent raised the same arguments it had done at the hearing of the main application. In this regard paragraph 19 of the judgment, after examining the provisions of clause 3.2, found the text to be straightforward and unambiguous. As such I disagreed with the third respondent that a factual dispute exists regarding whether applicant was the effective cause of the sale and therefore did not deem it appropriate to refer the matter to oral argument or trial.

[8] What the third respondent now seeks to do on the appeal is to rely on the use of a word “*where after*” as opposed to “*whereafter*” and accordingly accords a different interpretation to the words. However, the third respondent in the attempt to giving effect

to the construction of the words and the interpretation, does not alter decision arrived at in the judgment. Accordingly, I am not persuaded that any other interpretation prevails.

Effective cause

[9] Again, this aspect together with the previous grounds are intertwined. In respect of this ground of appeal the third respondent contends there is a conflation in respect of two separate issues namely that of the interpretation of the contract with the effective cause of the sale. This pursuit on this application for leave to appeal together with the material dispute of facts, were argued at the hearing of the main application. The findings arrived at in the judgment found that the purchaser was introduced to the property during the mandate period as the main, if not sole, determinative effect. I am not persuaded that a factual and legal dispute as contended by the third respondent exists giving rise to a green light to be granted for leave to appeal to either the Full Bench of this Honorable Court or alternatively to the Supreme Court of Appeal.

[10] Where the judgment referred to the Smiths as possibly being held liable to the third respondent for commission, it must be borne in mind, the Smiths did not oppose the application and the dispute regarding commission would be between them and third respondent. This was also raised in the judgment. In any event the applicant's application is against the Smiths, and not one as between applicant and third respondent. Any persuasions by the third respondent that the disputes point to there being two effective causes cannot be sustained.

[11] On any construction, which the respondent on appeal against the judgment that the applicant did not discharge the onus which was on it proving in that it was the effective

cause, due to the purported time delay between the original introduction of the purchaser to the ultimate sale concluded by the 3rd respondent, and other factors such as the role the third respondent played in causing and concluding the ultimate sale through numerous and effective steps I cannot find compelling reasons why the appeal should be granted in favour of the applicants who contend that another court may find other reasons and arrive at a another conclusion. Even third respondent's attempt to rely on a *nova acta interveniens* which broke the causal change between the original introduction by the applicant and the ultimate sale by the third respondent does not prevail.

The Smiths

[12] For reasons stated above, I had already articulated that the Smiths do not dispute the applicant's claim, in this regard see paragraph 27 of the judgment. What the third respondent drives is the view that the Smiths oppose the applicant's claim and therefore the payment of the commission held in trust for the disputed commission was made pending the outcome of the main application. This cannot be further than the truth. If the Smiths were opposing the applicant in its application, then it begs the question why they did not do so. It is clear that the Smiths acknowledge that commission is due, however, because there was a dispute between applicant and the third respondent, they paid the commission into a trust account until the dispute was resolved.

The test

[13] There is nothing new in the arguments in this leave to appeal. In short, all that it leaves me is to do is apply the test in terms of section 17 to assess whether the grounds of appeal have met the threshold for the leave to appeal.

[14] In terms of Section 17(1), the threshold required for granting leave to appeal has become more stringent. In *Caratco (Pty) Limited v Independent Advisory (Pty) Ltd*², an applicant for leave must satisfy the court considering the appeal, whether the applicant would have a reasonable prospect of success or that there are some other compelling reasons why the appeal should be heard;

“If the court is unpersuaded of the prospects of success, it must still inquire whether there is a compelling reason to entertain the appeal. A compelling reason includes any important question of law or a discrete issue of public importance that will influence future disputes. But here too, the merits remain vitally important and are often decisive”

[15] An applicant must convince the court that there truly is a reasonable prospect of success *“a mere possibility of success, an arguable case or one that is hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”*³

[16] *Caratco* was also followed in *Ramakatsa and others v African National Congress and another*,⁴ with the interests of justice is now paramount in deciding whether orders including interlocutory orders are applicable however as to what is in the interest of justice it requires a careful weighing up of all Germaine circumstances before a flexible approach could be adopted.

² (982) [2020] ZASCA 17; 2020 (5) SA 35 (SCA) (25 March 2020) para [2]

³ *MEC for health, Eastern Cape v Mkitha and Another* [2016] ZASCA 176 (25 November 2016) paragraphs [16]- [18]

⁴ [2021] JOL 49993 (SCA). Also, *MV Smart Men's Metals Logistics Zijiang Co Ltd V owners and underwriters of MB Smart and another* 20251 SA 392 SCA

[17] The other compelling reasons why the appeal should be heard as raised by the third respondent in its application for leave to appeal, related to that of public interest, however it takes the matter no further as a ground sufficiently for a leave to appeal be granted.

Costs

[18] The third respondent argued that given that the Smiths abided the outcome of the Court, there could be no grounds for costs to be paid jointly and severally against all the respondents. In this regard the Smiths filed an affidavit and to abide the court's decision. However as argued by the applicant, the Smiths are liable to pay it the commission and the dispute is one as between applicant and the Smiths and not the third respondent.

One cannot escape that the applicant incurred costs to bring this application including applicant having to consider the Smiths affidavit. There are no reasons why the Smiths should also not have to pay the costs of this application, "*jointly*" and as worded in the judgment at paragraph 31.4 of the order, "*where appropriate.*" Importantly, the Smiths have not taken the costs order on appeal and therefore the costs occasioned by this application for leave to appeal, cannot be raised against the Smiths.

Conclusion

[19] A long lapse of time does not necessarily deprive an estate agent of his/her commission, although it is one of the factors that a court may take into account in ascertaining whether the chain of causation between the introduction and the sale has been ruptured.⁵ I was not convinced that the rupture of time and that a rupture,

⁵ *Mano et Mano Ltd v Nationwide Airlines (Pty) Ltd and Others* 2007 (2) SA 512 (SCA) para [20]

sufficiently excluded the applicant and on that basis found that the exertions of the applicant was the effective cause of action.

[20] Having duly considered the submissions made by the third respondent and the applicable legal principles, it is my view that the threshold for section 17(1) has not been met and accordingly the leave to appeal is not granted.

[21] Accordingly it is ordered:

- a) The appeal is dismissed.
- b) The third respondent shall bear the costs of the application including the costs of counsel where so employed on scale B



PARKER AJ

Acting Judge of the High Court

Appearances

Counsel for the Applicants:

Adv A Smalberger SC

Instructed by:

Werksman Attorneys
Mr. R Gootkin

For the First & Second Respondents:

Cliffe Dekker Hofmeyr
Mr. R Marcus

Counsel for the Third Respondent: Adv R Stelzner SC

Instructed by: MacGregor Stanford Kruger Inc.
Mr. D MacGregor

This judgment was handed down electronically by circulation to the parties' representatives by email.