IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **34810/2016**

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE: NO	
(2)	OF INTEREST TO OTHER JUDGES: NO	
(3)	REVISED: YES	
	DATE:	[redacted]
	SIGNATURE: **JANSE VAN NIEUWENHUIZEN J**	

In the matter between:

VAN'S AUCTIONEERS GAUTENG CC Plaintiff

and

LAMBERTES NICOLAAS THERON N.O. First Defendant

V & K TRUST DIENSTE CC Second Defendant
(Represented by HERMAN VENTER N.O.
(in their capacity as the Trustees of the Theron Boerdery Trust)

and

LAMBERTUS NICOLAAS THERON Third party

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Introduction

[1] The plaintiff, an auctioneering company, claims commission from the defendant, the Theron Boerdery Trust ("the Trust) in terms of an exclusive written mandate concluded between the parties for the sale of three immovable properties owned by the Trust at public auction. In the *alternative* to the relief claimed against the Trust the plaintiff has a claim based on estoppel against the third party, Lambertus Nicolaas Theron ("Theron").

[2] The plaintiff called two witnesses and upon closure of its case, the defendants and the third party brought an application for absolution from the instance.

[3] Prior to considering the merits of the application it is apposite to have regard to the legal principle guiding applicants of this nature.

Legal principle

[4] In *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA), the Supreme Court of Appeal summarised the test applicable to an application for absolution as follows:

" [2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G - H in these terms:

> *'. . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T).)'*

This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G - 38A; Schmidt Bewysreg 4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (Gascoyne (loc cit)) - a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice."[1]

Plaintiff's claims against the Trust

[3] Both of the plaintiff's claims against the Trust is based on a written agreement granting an exclusive mandate ("the mandate") to the plaintiff to auction three immovable properties of the Trust. The properties were referred to by Mr Pretorius, the first witness who testified on behalf of the plaintiff, as Lot 1, Lot 2 and Lot 3. I will refer herein to the properties as such. Claim 1 is based on the original mandate and claim 2 on an amended version of the mandate.

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[1] Gordon Lloyd Page & Associates v Rivera and Another (384/98) [2000] ZASCA 33; 2001 (1) SA 88 (SCA); [2000] 4 All SA 241 (A)

Claim1:

[4] The original mandate was signed on 8 May 2015 and the general terms of the mandate were as follows:

4.1 the plaintiff is entitled to 7,5% agent commission payable by the purchaser;
4.2 the auction was to be held on Thursday, 11 June 2015 at 11:00; and
4.3 an amount of R 133 078, 00 for advertising was payable by the Trust.

[5] The agreement, furthermore, contains the following term:

"The CLIENT agrees that the minimum price of R 45 million (excluding VAT) will be accepted if obtained. The deposit will be paid over to the conveyancers trust account after confirmation and deductions of expenses and fees. It is agreed the CLIENT hereby undertakes to provide an EXCLUSIVE MANDATE to the AGENT/AUCTIONEER for purposes of selling/ marketing the CLIENTS PROPERTY for the period dated as follows: FROM THE DATE OF SIGNING HEREOF UP TO AND INCLUDING 26 June 2015."

[6] Notwithstanding the express terms of the mandate, the plaintiff averred a further term in its particulars of claim, to wit; *"Should the trust breach in any respect and sell itself all the properties or some of the properties, the trust will become liable to the Plaintiff for agency commission calculated at 7,5% of the price at which the trust accepted in selling such property or properties, either by itself or through the assistance of another agent."*

[7] In respect of this further term, Pretorius testified that, on 15 April 2015 when he was introduced to the properties by Theron, a trustee of the Trust, he informed Theron that the Trust would be liable for commission should one / all of the properties be sold prior to the auction by a third party and/or the Trust. Theron did not respond to the aforesaid statement.

[8] After the aforesaid statement, the mandate was prepared by the plaintiff and was signed by the parties on 8 May 2015. The written agreement did not contain the statement.

[9] In clear breach of the mandate and on 18 May 2015, the Trust sold Lot 1 for R 9 million.

[10] The plaintiff's claim in respect of the selling of Lot 1 is formulated as follows in its particulars of claim:

"The trust sold the said… for the amount of R 9 million and by virtue of the agreement the Plaintiff pleads that it is entitled to payment to it by the trust of commission at a rate of 7,5% plus VAT calculated on R 9 million."

[11] The claim is for specific performance of a term that was not contained in the written mandate.

[12] It is trite that reliance on a term that is not contained in a written contract between parties is inadmissible. The rule is referred to as the parol evidence rule and was discussed as follows in *Johnston v Lelal* 1980 (3) SA 927 (A) at 938 D to 939 A

"This denial of recourse to evidence of an oral consensus applies to earlier, contemporaneous or subsequent oral agreements. In many instances recourse to evidence of an earlier or contemporaneous oral agreement would, in any event, be precluded by the so-called "parol evidence rule" (see Van Wyk v Rottcher's Saw Mills (Pty) Ltd (supra at 996)) or, more correctly, that branch of the "rule" which prescribes that, subject to certain qualifications (to which some reference will be made later), when a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract (see National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel 1975 (3) SA 16 (A) at 26A - D and the cases F there cited). The extrinsic evidence is excluded because it relates to matters which, by reason of the reduction of the contract to writing and its integration in a single memorial, have become legally immaterial or irrelevant (National Board

case supra at 26C). This parol evidence rule or "integration rule" (as it was termed in the National Board case supra at 26D; see also Venter v Birchholtz 1972 (1) SA 276 (A) at 282) does not preclude evidence of a subsequent oral agreement contradicting, altering, adding to or varying a written contract (see Venter v Birchholtz (supra at 282E - G)), but in the case of contracts governed by s 1 (1) such a subsequent oral agreement could be of no force or effect if it sought to contradict, etc a material term of the written contract (see Venter v Birchholtz (supra at 282E - G)), where the several effects of the requirement of writing ("skrifvereiste") under s 1 (1) and the integration H rule ("integrasiereël") are distinguished by JANSEN JA: and see also Kuper v Bolleurs 1913 TPD 334 at 336 - 7; Van Wyk v Rottcher's Saw Mills (Pty) Ltd (supra at 996); Neethling v Klopper en Andere 1967 (4) SA 459 (A) at 464 - 5). Similarly, a prior or contemporaneous oral agreement, evidence of which was not precluded by the integration rule, as, for example, a contemporaneous oral agreement that the written contract be subject to a suspensive condition (see Stiglingh v Theron 1907 TS 998 at 1003), would be rendered of no force or effect by s 1 (1) if it purported to contradict, etc a material term of the written contract (cf Du Plessis v Nel 1952 (1) SA 513 (A))."[2]

[10] I am mindful that the rule has been tempered by more recent judgments, but the relaxation of the rule in certain insistences pertain to the interpretation of agreements and not the insertion of a wholly new term that forms the subject matter of the claim.

[11] In the result, I am of the view that the plaintiff did not make out a *prima facie* case in respect of claim 1.

Claim 2

[12] Subsequent to the sale of Lot 1, the parties agreed that the original mandate be amended to provide for the sale by public auction of Lot 2 and Lot 3. All the other terms of the mandate remained the same.

[13] Lot 2 and Lot 3 was not sold at the public auction held on 11 June 2015. The confirmation period in terms of the mandate expired on 26 June 2015 and thereafter, on 19 August 2015, the Trust sold Lot 2 to Toüa Bosveld Boerdery

[2] Johnston v Leal (245/78) [1980] ZASCA 58

CC for an amount of R 3 500 000, 00. It is common cause that Mr Toüa a representative of the Closed Corporation was a registered bidder at the public auction that was held on 11 June 2015.

[14] The plaintiff's claim based on the aforesaid facts is set out as follows in its particulars of claim,:

" 13.

In the result the Plaintiff pleads that the Plaintiff:

13.1 Introduced the purchaser to the trust.

13.2 That the purchaser was at all relevant stages willing and able to purchase the said farm.

13.3 That by introducing the representative of the purchaser to the property and the trust the Plaintiff was the effective cause of the sale agreement.

14.

In the result the Plaintiff is entitled to commission of 7,5% on the purchase price of R 3,5 million, which is the amount of R 262 500, 00."

[15] Although the plaintiff's pleaded case is not based on the amended mandate, Mr Pretorius with reference to the mandate to sell at public auction, testified that the auction process, as is common practice, included the possibility to sell the property in terms of a private treaty or contract, before or after the auction, and that this often happened especially in the confirmation period.

[16] Mr Hershensohn SC, counsel for the plaintiff, furthermore, submitted that the mandate was not only in respect of the public auction, but also allowed the plaintiff to sell the properties after the auction, because the plaintiff's exclusive mandate only expired on 26 June 2015.

[17] In view of the plaintiff's pleaded case that it was the effective cause of the sale, the evidence pertaining to the terms of the amended mandate and what is common practice in the auctioneering industry, is irrelevant.

[18] The plaintiff must present evidence that *prima facie* supports its claim; to wit that it was the effective cause of the sale of Lot 2 to Toüa Bosveld Boerdery CC on 19 August 2015.

[19] Mr Hershensohn referred to various authorities dealing with the principles applicable to an estate agent that received a mandate from a seller to sell property by private treaty. The authorities are not helpful or applicable to the facts in *casu.*

[20] When a seller gives an estate agent a mandate / exclusive mandate to sell his/her property, the estate agent advertises the property at his/her own costs and spends considerable time introducing potential purchasers to the property. It follows that should the property be sold by anyone else and it transpires that the purchaser was introduced to the property by the estate agent, the estate agent is deemed to have been the *"effective cause "* of the sale and is entitled to commission.

[21] In *casu, the* only mandate received by the plaintiff from the Trust was to sell the properties by public auction. This much was confirmed by Pretorius in his evidence. It was expressly agreed between the parties that the plaintiff will only be entitled to commission if the properties were sold at the public auction and that the commission will be payable by the successful bidder/purchaser.

[22] It was, furthermore, agreed that the Trust will pay for the advertisement costs. To suggest that the plaintiff is in these circumstances, the *"effective cause "* of any subsequent sale by private treaty to a registered bidder, is astonishing to say the least.

[23] Mr Potgieter SC, counsel for the defendants, referred to the matter of *Martin v Currie* 1921 TPD 50 in which an auctioneer's entitlement to commission was discussed. Mr Potgieter referred to the following remarks in the *Currie* matter:

23.1 *"I think it is clear that the employment of an auctioneer does not give him any authority except to sell by auction."*

23.2 *"An auctioneer is employed to sell property by auction on the conditions arranged; if he sells the property he gets his commission: if he does not sell the property he gets no commission. That is the risk he takes, but he protects himself by a contract that the seller shall pay the cost of advertising. I think the law in England is the same."*[3]

[24] Having had regard to the plaintiff's pleaded case, I am of the view that the plaintiff has failed to make out a *prima facie* case for the relief claimed in claim 2.

Alternative claim against the third party

[25] The alternative claim only pertains to claim 1. The Trust pleaded that Theron did not have the authority to bind the Trust when he gave the exclusive mandate to the plaintiff. This is so because the Trust has another Trsutee and the Trust Deed provides that a decision to dispose of trust assets must be taken by both trustees.

[26] In the event that the court finds that the Trust is not bound by the terms of the exclusive mandate, the plaintiff sought to hold Theron personally liable for the plaintiff's claim. No such finding has been made, and it follows that the alternative claim falls away.

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[3] *Martin v* Currie 1921 TPD 50

Conclusion and costs

[27] In view of the findings *supra*, the defendants' application for absolution from the instance must succeed with costs. I am satisfied that the complexity of the matter justifies counsel's fees on scale C.

ORDER

The following order is granted.

The application for absolution from the instance is granted with costs, which costs include all reserved costs orders. Counsel's fees on scale C.

[redacted]

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD:

21, 22, 23 and 25 July 2025

DATE DELIVERED:

30 July 2025

APPEARANCES

Counsel for the Plaintiff: Adv J Hershensohn SC

Adv R de Leeuwe

Instructed by: Barbard & Patel Incorporated

Counsel for the defendants and the Third Party: T. A.L.L Potgieter SC

Instructed by: Weavind & Weavind Incorporated