

IN THE SUPREME COURT OF SOUTH AFRICA  
(APPELLATE DIVISION)

In the matter between:

SOPHIA ALETTA GREEFF

Appellant

and

DONALD JAMES ANDREWS

Respondent

Coram: E M Grosskopf, Nestadt,

Howie, Olivier et Schutz, JJA

Date of hearing: 13 May 1996

Date of delivery of judgment: 30 May 1996

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JUDGMENT

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Olivier JA:

This is an appeal, with special leave of this

Court, against a judgment of the Full Bench of the Eastern Cape Division (Kroon J, with the concurrence of Zietsman JP and Jones J) upholding an appeal against the judgment of Jennett J who presided at the trial of the above matter.

Prior to 1983 the respondent carried on the business of an estate agent and livestock auctioneer in Elliot. In or about July 1983, appellant, who was then recently widowed, joined respondent's firm. The agreement was that appellant was to act as an agent selling houses whilst respondent would devote his time mainly to selling farms and business properties. The agreement further provided that any commissions earned by each of the parties would be paid into the respondent's business account and then be divided equally between them. They would also each bear their own expenses; in exceptional cases the expenses would be shared.

Whether this relationship constituted a partnership, a contract of employment or some other *sui generis* contract was one of the questions debated in the court *a quo*. The precise legal character of the agreement is of academic interest only. The fact remains that the relationship between the parties was sound and amicable until it was terminated at approximately the end of October 1989.

The dispute between the parties arose as follows:

One Mills, a partner in a firm in Natal (Mills, Fitchet and Associates) that acted as land valuers and agents for investors, had become interested in the afforestation potential of the Elliot, Ugie and Maclear areas. After thorough research, assisted by another firm, Crickmay, Venter and Associates, ('Crickmay') he approached a large timber company, Mondi, wishing to raise its interest in buying land for afforestation in the said area. Mondi expressed interest, provided that approximately 40 000 hectares of suitable land could be secured under option at acceptable prices. A final decision would only then be taken by Mondi. The project was a big and risky one, and in January 1989 Mills approached respondent to assist him in obtaining the required options. In the course of a meeting between Mills and respondent held at Kokstad, it was agreed that they would co-operate in obtaining the said options and would share in the eventual commission on a 50/50 basis, although Mills did stipulate that he had to share some of the earnings with Crickmay. According to the evidence of respondent and Mills, the former mentioned appellant as someone who worked for him and was involved in selling property on a commission basis. Mills, according to the evidence given by himself and respondent, however, considered any participation by

appellant in the project as a problem, and, according to their evidence, stipulated as a condition that she was not to be involved in the project. Mills was to provide an assistant in the person of one Armstrong.

What happened between appellant and respondent and between respondent and Mills subsequent to the alleged agreement forms the very crux of the present dispute.

Appellant's version is that respondent informed her of the Mondi project, swore her to silence, but requested her to assist him wherever possible in telling farmers that a consortium was interested in purchasing land for cattle ranching, and in getting options signed. Commission was not mentioned but her understanding was that for that very same reason she would share in respondent's commission on a 50/50 basis as usual. Respondent did not tell her of Mills's attitude.

Respondent's version is that he did tell appellant of the Mondi project, and also that Mills did not desire her involvement in the project. His evidence is that he told appellant that 'if things worked out, I'd give her something'. Although she seemed put out by her exclusion from the potentially rich rewards of the Mondi project (it later turned out to amount to

approximately a million rand in commission earned by respondent) she accepted the position.

Mills and respondent both testified that after respondent's meeting with appellant and her acceptance of the fact that she was to be excluded from the project, respondent confirmed the arrangement between himself and appellant with Mills, and the project was commenced.

It is common cause that the meeting under discussion between appellant and respondent took place towards the end of January 1989. The Mondi project proceeded, options were obtained as required, and Mondi eventually bought the land in question. The commission earned by Mills and respondent from the project amounted to approximately R1 million, respondent's share being half of that. Appellant's case is that she is entitled to half of respondent's share.

The association between appellant and respondent was consensually terminated at the end of October 1989. The respondent's evidence, hotly disputed by the appellant, was that a payment made by him of R25 000 was made by virtue of his previous promise to pay the appellant 'something' in respect of the Mondi project, and that she accepted that payment gratefully. Her

evidence was that it was merely a down payment, pending final determination of the quantum of respondent's share of the commission and payment to her of her half-share.

In November 1990 appellant instituted action against the respondent in the Eastern Cape Division, claiming the rendering of an account in respect of commissions earned by him in connection with the Mondi project and payment to her of 50% of such earning less the sum of R25 000 already paid by respondent.

The trial proceeded before Jennett J. At the end thereof he gave judgment for the appellant. He correctly determined that the question to be decided was whether the parties agreed in January 1989 that appellant be excluded from sharing in respondent's income from the Mondi project. He also correctly placed on the respondent the onus of proving, on a balance of probabilities, his version of the agreement. The respective versions of the parties of what occurred at the meeting in January 1989 being contradictory and mutually destructive in that acceptance of the one would necessarily lead to the rejection of the other, he followed, quite properly, the well-known approach laid down in National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (EDC) at 440 D - 441 A by Eksteen AJP.

Jennett J found that neither the appellant nor the respondent was open to any criticism in their demeanour as witnesses. Both appeared to be honest and upright persons. After analysing the evidence he stated that he was not persuaded that either version of the meeting between the parties was more probable than the other, nor was the relative credibility of the parties such that he could say where the truth probably lay. The burden of proof being decisive, he gave judgment for the appellant.

On appeal, the Full Bench reversed the decision of Jennett J. Before the Full Bench counsel for the respondent attacked the trial judge's finding in respect of the credibility of the appellant as wholly inadequately critical of her, submitting *inter alia*, that not only did she show herself to be a witness given to making assertions which she could not substantiate but she also displayed a readiness to tailor her evidence where she thought this would advance her case. Despite arguments to the converse by counsel for the appellant, Kroon J expressed agreement with respondent's case. He criticized appellant for being vague in connection with the terms of the agreement in October 1989 terminating the business relationship. His main criticism, however, related to her evidence that she had played an active role in implementing the Mondi project in that she

had been actually engaged in the conclusion of some transactions. He found that appellant's case that she was to share in the Mondi commissions was inextricably bound up with her averment that she was to be fully involved in the project. In the view of Kroon J the rejection of the latter averment justified also the rejection of the former averment and thus of appellant's case.

We have to decide the appeal on the basis of the broad probabilities, bearing in mind that

*'...only where a consideration of the probabilities fails to indicate where the truth probably lies,... recourse is had to an estimate of relative credibility apart from the probabilities.'* (National Employers' General Insurance Co Ltd v Jagers, *supra*, at 441 A).

As far as the crucial issue is concerned, i.e. whether appellant and respondent agreed in January 1989 that she would not share in the project or in respondent's share of the commission, the probabilities favour the respondent.

Before us, counsel for the appellant, correctly in

my view, conceded that there was no reason for questioning the credibility or reliability of Mills. The trial court has not made an adverse finding concerning Mills, and he had no reason to prevaricate. From this it follows logically that one must also accept that Mills and respondent did agree at Kokstad in January 1989 that appellant would be excluded from the project. This was also conceded by appellant's counsel.

Once it is accepted that Mills and respondent agreed that appellant would be excluded, appellant's version that respondent did not tell her of such agreement but on the contrary told her that he wished her to be fully involved and to help him in all respects is clearly improbable. If respondent had acted as alleged by appellant, he would not only have been dishonest vis-a-vis the appellant, with whom he had maintained a good relationship, but he would also have acted fraudulently vis-a-vis Mills, having confirmed to him that he, respondent, had agreed with appellant as arranged. Such conduct inevitably would have led to problems with appellant - how to keep her out of involving herself in the 'legwork' attendant upon the project, once having asked her to be fully involved; and how to avoid sharing his commission with her. But manifestly it would also have led to serious problems with Mills, jeopardizing

respondent's involvement in the project and his share of the commission. How would he explain appellant's involvement in the physical work required by the project, particularly as already in January 1989 it must have been clear to respondent that Mills personally would be committed in the administration of the project, would come to Elliot regularly, and would be represented there by his own employee, Armstrong? Appellant's counsel suggested that respondent must have thought that he could 'manage' the situation. But the suggestion that respondent thought that he could dishonestly have 'managed' the situation seems to me somewhat far-fetched. One must also not lose sight of the fact that respondent must have realized during the meeting with Mills that he stood to earn a large sum by way of commission - a sum far in excess of what he could ever have earned as an estate agent in Elliot. Why would he jeopardize this chance by failing to comply with Mills's condition, and then also attempting to deceive Mills about it?

It should also be taken into account that there was no reason for respondent to be dishonest with appellant. From his point of view appellant was a mere employee, with whom he could terminate the contractual relationship at any time. Even if the relationship was more closely akin to a partnership (appellant's view) she really had no choice but to

accept respondent's terms, or have the relationship terminated. The probabilities favour the respondent's version that they agreed that she would not be involved in the project and that he would give her 'something'. At that stage there was a good relationship between them; she was not aware of the extent of the Mondi project and the potential earnings by respondent; and there was a risk that nothing would come of the project. Taking a broad view of the matter, one must conclude that respondent's version probably reflects the truth.

A further difficulty for the appellant is created by her version of a telephone conversation that she had with Mills. In the course of it he brusquely told her that she was to keep out of the Mondi transaction, and that it was no concern of hers. She was very upset by the tone in which he had addressed her and said as much. But she did not respond to his statement that Mondi was no affair of hers. That might just be explained by the fact that she was annoyed. However, the matter does not end there. According to her she later told Andrews what Mills had said, but there was no attempt on his part or hers to get to the bottom of Mills's attitude, which must have been extraordinary to her in the light of what had gone before, and which might threaten her expectations. The point had been reached where

Andrews's 'management' of her had come unstuck, yet there was none of the reaction that one would have expected if her version were true.

That it was the respondent who was speaking the truth is also borne out by what happened before and at the termination of the contractual relationship between the parties. Shortly prior to termination, both parties agree, respondent asked appellant what she expected from the Mondi project. This is reconcilable only with a prior agreement that appellant would get 'something' out of the project. It is not reconcilable with appellant's case that she was to get the normal half-share of respondent's commission. What then took place is also important. Respondent's version is that appellant suggested a figure of between R20 000 and R30 000 and that they agreed to split the difference. That is how they arrived at the sum of R25 000. Appellant says that the figure was arrived at by respondent telling her that the R25 000 was the share of the commission already received by him. Appellant's version appears dubious. By that time the success of the project was out in the open. The transfer of the farms purchased by Mondi was regularly reported in the Landbouweekblad, which appellant studied assiduously. It is unlikely that she would have accepted a mere R25 000 without demurring. But it appears from her own

evidence that she does not dispute respondent's evidence that on receipt of the cheque for R25 000 she kissed him and told him that he was a gentleman. Her explanation that '...ek het altyd dankie gesê as ek 'n tjek kry', is not convincing. One would have expected her to make it clear to respondent that she was not satisfied and that she expected payment of her share in full.

It is common cause that, on termination, the appellant complained that she had always, over the years, earned more commission than the respondent, and that he thereupon said that she should venture out on her own. It is also common cause that neither party mentioned the Mondi project. It is unthinkable that if she expected a half share in the respondent's commission from that project she could possibly have complained of his contribution always having been less than hers. It is equally inconceivable that the respondent would not have answered her complaint by referring to the enormous contribution he had brought in via that project.

The probabilities favouring the respondent, the conclusion reached by the court *a quo* has to be upheld.

Respondent was represented by two counsel. Although

the record is of considerable length, the matter is a factual one. Senior counsel for the respondent appeared alone in the trial court and the court *a quo*. Under these circumstances I do not consider this matter to justify the employment of two counsel at the appellant's expense.

The appeal is dismissed with costs.



P. J. OLIVIER JA

I agree. E M Grosskopf JA

Nestadt JA

Howie JA

Schutz JA