IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 5507/2011

DATE: 26 APRIL 2011

In the matter between:

BERNARD GILLESPIE	1st Applicant
CHRIS PIGGOTT	2nd Applicant
SONJA TAYLOR	3rd Applicant

and

DOMINIC GOMES ATTORNEYS	1st Respondent
HENQUE 3485 CC t/a CAPITAL COMMERCIAL PROPERTIES	2nd Respondent
ZENOS INVESTMENTS CC	3rd Respondent

JUDGMENT

CLEAVER. J:

This is an application for a temporary interdict, which has its genesis in a dispute between four estate agents, namely the three applicants and the second respondent, as to their entitlement to commission resulting from the sale of a property owned by the third respondent.

In terms of the deed of sale in question, the seller, the third respondent, is liable for commission in the sum of R800 000,00, which will be payable on transfer of the property into the name of the purchaser. The applicants contend that they are entitled to 53% of the commission resulting from the sale. The relief initially sought by the applicants was an order directing the first respondent, a firm of attorneys, which will be attending to the registration of the transfer of the property, to retain the total amount of agent's commission resulting from the sale in an interest bearing account, pending an action to be instituted by the applicants against the second respondent.

In its answering affidavit, the second respondent pointed out that the seller of the property had not been cited. This resulted in the applicants applying to join the seller and I, this morning, granted the application to join the seller as the third respondent. The applicants have now also applied to amend their notice of motion, so as to include the following alternative prayer, namely the third respondent is directed to retain 53% of the agent's commission in an interest bearing account, pending the outcome of an action to be instituted by the applicants against the second respondent. That application was also granted by me.

I am satisfied that on the papers before me, the applicants have made out a *prima facie* case against the second respondent, that they agreed to share the commission payable to the second respondent by the seller, on the basis set out in the papers. However, the issue is whether that agreement is sufficient to entitle them to the order directing the third respondent to retain funds pending the outcome of their dispute with the second respondent. The applicants have no claim against the third respondent, yet the effect of the alternative order, which is now being sought, is against him. There is no difference insofar as the effect of the order is concerned from the order initially sought against the first respondent, for the first respondent was acting as an agent for the third respondent.

Counsel for the applicants submitted that the application was not for an order which is sometimes referred to as a Mareva injunction or an anti-dissipation order. In my view the application is for such an order. The applicants ask for an order that the third respondent be prevented from dealing with or disposing of assets to which they cannot lay claim. That is precisely the situation which arises when an anti-dissipation order is sought. I refer in this regard to the judgment in Investec Employee Benefits v Electrical Industry KwaZulu Natal Pension Fund & Others reported in SA 2010 (1) 446 (W).
and in particular to paragraph 116, which reads as follows

> "The law in this regard is as set out in *Knox D'Arcy Ltd and Others V Jamieson and Others* 1996 (4) SA 348 (A) ([1996] 3 All SA 669) It was trenchantly summarised as follows in *Carmel Trading Co Ltd v Commissioner, South African Revenue Services, and Others* 2008 (2) SA 433 (SCA) ([2008 2 All SA 125) in para 3 as follows:
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>> 'Such an order, which interdicts a respondent from disposing of or dissipating assets, is granted in respect of a respondent's property to which the applicant can lay no special claim. To obtain the order, the applicant has to satisfy the court that the respondent is wasting or secreting assets with the intention of defeating the claims of creditors.'*

It is clear from the papers that the applicants have not, and did not seek to make out a case that the second respondent was wasting or secreting assets with a view to defeating the claims of the applicants. All that the applicants allege is that the second respondent has been very secretive about the transaction and:

> "On the other hand a reasonable apprehension of irreparable harm exists if the order is not granted, in that the applicants and I are not aware how the second respondent will utilise the commission if paid out to him."

I do not agree with the applicants' counsel that the third respondent is in the position of a stakeholder. He is not holding funds to which two competing creditors are laying claim. The funds which will accrue to him when he receives payment of the purchase consideration, will be his funds. He has nothing to do with the applicants and his obligations in respect of commission are to the second respondent only. The judgment cited in support of the applicants' case, namely Candid Electrics (Ptv) Limited v Merchandise Buying Syndicate (Ptv) Limited 1992 (2) SA 459 (C) concerned the disposal of goods which had been pledged *in securitatem debiti.* a far cry from the situation before me.

There has been no suggestion that the second respondent will not be able to meet a successful claim against it by the applicants. They are in no different a position from any other litigants seeking to enforce a monetary claim and are not entitled to the extraordinary relief which they seek.

The application is dismissed with costs.

CLEAVER, J