

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No : 17185/05

In the matter between :

WAKEFIELDS REAL ESTATE (PTY) LIMITED

Plaintiff

and

GAVIN WAYNE ATTREE

First Defendant

TRACEY ATTREE

Second Defendant

FIONA ISOBEL HOWARD

Third Party

J U D G M E N T

NICHOLSON J

[1] The plaintiff is a company, carrying on the business of estate agent, and is suing the first and second defendant, a married couple, for R 232 560,00 being commission due on the sale of a property at 37 Monteith Place, Durban (the property) purchased by the third party, Mrs Fiona Howard.

[2] The plaintiff alleges an oral agreement which resulted in an express, alternatively implied mandate to sell the property and that the introduction by the plaintiff's employee was the effective cause of the sale.

[3] It is common cause that a written agreement was concluded between the first and second defendants and the third party on 9 April 2005 for the sale of the property for R3 400 000,00. In terms of clause 12.1 of the sale agreement, the third party indemnified the first and second defendants for any claims for commission that may have arisen by any other agent arising out of the sale. The sale between first and second defendants and the third party was concluded through the agency Mrs de Marigny of Pam Golding Properties and commission was paid to them in the sum of R150 000,00.

[4] As a result of the indemnification clause the third party was joined but this issue was separated at the commencement of the trial and stood over for later determination.

[5] The trial proceeded and the plaintiff called four witnesses and the defendants and third party called two witnesses each. To a large degree the facts were common cause and I am of the view that the witnesses were basically telling the truth as best they could.

[6] Fiona Howard and her husband Shaun previously lived in Goodricke Road in Morningside and wished to move to a bigger home. On 23 January 2005 Mrs Howard attended a show day at Royalton and as a result of this, Mrs Walker, an estate agent employed by the plaintiff, learned that she was interested in buying a house. Mrs Walker showed Mrs Howard a number of houses and finally her eyes fell on the property at 37 Monteith Place. Mrs Howard was very interested after two visits the second of which included her husband.

[7] When Mrs Walker phoned Mrs Howard the next day she was informed that the Howards could not afford the property and were going to put their money in a development of part of the family business, being an Engen Garage. I interpolate to mention that Mr Howard at that stage was under pressure from Engen to establish a branch of Woolworths on the property. The Howards then abandoned any idea of buying the property and engaged architects to plan alterations to their home.

[8] Mrs de Marigny, an estate employed by Pam Golding Properties, met Mrs Howard and learned from her that Mrs Howard had visited the property with an agent from the plaintiff and although she liked the look of it, it was too expensive.

[9] On 7 April 2005 first defendant phoned Mrs de Marigny and told her he had dropped the price of the property from R3 995 000 to R3 400 000 (a matter of half a million rand). First defendant had given a sole mandate to Remax but he thought it ran from 11 April to 11 May 2005, whereas it ran from the date of signature being 7 April 2005. The Howards had not been impressed with Mrs Walker. The defendants described the Pam Golding agents as more persistent and professional. The property was advertised in the press for R3 495 000 on Friday 8 April 2005 at the instance of Remax.

[10] The Howards were very interested and visited the property. On the evening of 9 April a binding agreement was concluded for the sale of the property for R3 400 000 with sales commission of R150 000.

[11] It is clear that there was no express agreement, certainly insofar as the question of commission. The first question is whether there was a tacit one.

[12] The mere fact that the contract was tacit does not obviate the need to prove unequivocal conduct, by inference if necessary, that the parties did contract in the terms alleged. See Amler's Precedents of Pleadings Sixth Edition Harms page 95.

[13] The plaintiff pleaded that "the defendants agreed to pay the plaintiff commission ... at the rate of 6% together with the VAT thereon". There was therefore no question of a custom or trade usage being pleaded.

[14] It seems to me that the high water mark of the defendants' conduct was that they made the property available and said that any proposals should be brought to them. There was evidence that once a property is placed on the books of plaintiff a letter is sent similar to the sample (Exhibit B44). This letter has a space for the commission payable. There was evidence that it was the practice to send such a letter to every seller but there was no proof on the balance of probabilities that the seller received such a letter.

[15] Mrs de Marigny testified that first defendant was quite tough when it came to commission and negotiated her down to R150 000 which is less than 5%. I do not believe there was unequivocal evidence that the parties agreed to 6% plus VAT commission even by inference. The probabilities favour that the defendants would never have agreed to that rate but would have negotiated a reduction.

[16] There was, therefore, no agreement on an essential term namely the commission and for that reason alone the plaintiff's claim is doomed to failure.

[17] Even if I am wrong on this issue and there was a tacit mandate, that was not a sole mandate and was one shared at least by Pam Golding Properties.

[18] On the case law the only way in which an agent who finds a purchaser can succeed in proving that the finding of the purchaser was the effective cause of the sale, is by evidence that the purchaser was willing and able to buy on the seller's conditions and that the sale was bound to have gone through quite independently of any negotiations conducted by another agent. See **Eschini v Jones** 1929 CPD 18.

[19] I accept that the Howards were willing to buy when they were shown the property by Mrs Walker. The question which arises is whether they were able to buy. As I have mentioned the Howards explained that they could not afford the house at R3 995 000 or even R3 700 000 at the time that Mrs Walker was in the picture. The Howards explained that R1 500 000 was necessary for the Woolworths extension to their Engen service station and that put the house out of their price range.

[20] Not only was that not disputed by Mrs Walker she agreed with the evidence. Mr Troskie, who appeared for the defendants, and Mr McIntosh for the third party, made common cause given the similarity in their objectives.

[21] They argued that the factors which facilitated the final sale through Pam Golding were twofold in nature. Firstly the drop in price of half a million rand and secondly the fact that the commitment to put money up for the Woolworths extension had fallen away. Mr Shaun Howard testified that initially he had been under the impression that he could not resist Engen's request to conduct a Woolworths branch on his premises. He later learned that he was at liberty to decline to do so and that freed up a substantial sum of money for the purchase of the property.

[22] Mr Skinner who appeared for the plaintiff submitted that the introduction and visits facilitated by Mrs Walker were the effective cause of the sale and referred to a number of cases in this regard. In **Doyle v Gibbon** 1919 TPD 220 at 223 the Court held :

"If a purchaser is introduced directly by an agent and he chooses to negotiate with the owner and obtains the property for a smaller sum, then the owner is still responsible for the payment of commission; the reason for this is that the contract between the commission agent and the owner is that if the commission agent finds a person who will buy the property, and it is through his intervention that the sale actually takes place, then he is entitled to his commission even where the owner himself negotiates with such purchaser and reduces the prices. The owner tacitly undertakes that if he sells his house at a lower price directly to a person who is introduced to him through the intervention of an agent, he will pay the commission; notwithstanding that the actual contract is not made by the agent, and it must naturally be so because otherwise all the owner has to do is pretend ignorance to negotiate directly with a purchaser, and so escape the payment of commission. The owner may never have got the opportunity of selling to this person if he had not made use of the reputation, the business

connections and all the other circumstances which make a successful commission agent."

[23] As the Court further held at 225 :

"Whether the principal knows that such person comes or does not come from the agent, upon such introduction the commission will be paid."

As I have mentioned *in casu* there is a distinguishing factor, namely the presence of a competing estate agent.

[24] Mr Skinner also referred to **Burt v Ryan** 1926 TPD 680 at 681 where the Court held :

"Where an agent is given a mandate by his principal to sell property, the principal is entitled to claim an exact performance of the terms of the mandate. But if the agent fails to find a person who will purchase on the terms of the mandate, but introduces a person who negotiates with the principal and as a result of the introduction and the negotiations the seller agrees to accept a lower price, the agent becomes entitled to commission although he has failed to carry out the original mandate."

[25] Mr Skinner submitted that a mandate given to an estate agent to find a purchaser does not place the agent under any obligation to carry out the negotiations himself. He referred to **Van Zyl en Seuns (Edms) Beperk v Nel** 1975(3) SA 1983 N at 986 F - G. I accept these principles but would

distinguish them on the basis that the contribution of the competing estate agent must be evaluated.

[26] Mr Skinner pointed out that in **Munitz V Steer's Trust Co (Pty) Limited** 1993(2) SA 369 C the Court held that an agent does not himself have to overcome obstacles which originally stood in the way of the sale. Where obstacles are overcome by one or both of the parties by independent effort, with or without the assistance of a third party, the introducing agent would still be entitled to the commission. This is, indeed, correct and will of course ultimately depend on the weight to be attached to the second estate agent's effort in concluding the sale.

[27] I accept Mr Skinner's submission that in **Webranchek v L K Jacobs and Co Limited** 1948(4) SA 671 AD the Court pointed out that a common sense approach to the question of what really caused the sale to be concluded is required. That case is instructive because, as in the present, the defendant had given a number of estate agents a general mandate to sell. At page 678 the Court held that :

"Situations are conceivable in which it is impossible to distinguish between the efforts of one agent and another in terms of causality or degrees of causation. In such a situation it may well be (it is not necessary to decide the point) that the principal may owe commission to both agents and that he has only himself to blame for his predicament; for he should protect himself against that risk."

[28] Mr Skinner submitted however that this is not the case in the present instance. It was the introduction of the defendants to the property by Mrs Walker that was the material factor at all times.

[29] The difficult problem of evaluating the cogency and weight of various factors which induced a sale was dealt with in **Aida Real Estate Limited v Lipschitz** 1971(3) SA 871 W where the Court held :

"The test is an objective one in the sense that evidence of the seller or purchaser as to what induced him to contract with the other party is not decisive of the question. In this case the agent's efforts in effecting a sale are by common consent confined to the introduction. What happened thereafter occurred without his assistance, even without his knowledge. From what has been said before, however, it is clear that this cessation of activity on his part does not necessarily deprive him of his claim. The introduction might still be the overriding factor inducing the sale."

[30] At page 87 E - H the Court held :

"As regards the financial difficulties, it must be pointed out that almost every transaction brought about by an estate agent is preceded by protracted negotiations of a financial nature - namely, as regards the amount of the price as well as to the method and time of payment. Often success is only achieved through the intervention of third parties, and quite often the agent himself is not a participant in these negotiations. It would, however, be a mistake to say that the occurrence of these financial obstacles and their removal without the assistance of the agent necessarily go to show that the agent's introduction was not effective in bringing about the ultimate sale. Obstacles in the way of the sale and the fact that one or both of the parties by independent effort overcame them, may indeed support the very opposite view. It may be the measure of the wisdom and

business acumen of the agent in introducing to each other a seller who is so keen to sell and/or a purchaser who is so keen to buy that even formidable obstacles in the way of a sale were overcome; or, to put it more crudely, the willingness and ability of the purchaser introduced by the agent was so great that nothing could prevent the sale taking place. In such a case the agent would be entitled to remuneration, no matter whether he selected the potential purchaser by chance or by foresight. A commission agent is paid by results and not by good intentions or even hard work."

[31] In the case of **Basil Elk Estates (Pty) Limited v Curzon** 1990(2) SA 1 T the Court concluded that the first introduction was not the effective cause. Other factors intervened *inter alia* that initially the wife of the purchaser had been pregnant and thereafter had a miscarriage causing them to abandon their quest for a house, that nine months later she was pregnant again and in the mean time the purchaser had had a windfall at the races of R85 000. Mr Skinner sought to distinguish this case on a number of grounds.

[32] He pointed out that the third party applied for and was granted a bond of R4 000 000. That, of course, would have been more than adequate to purchase the property. This factor he said meant that the financial capacity was present throughout.

[33] In addition Mr Skinner submitted that the sale followed sufficiently closely on the heels of the introduction by Mrs Walker that it was clearly the dominant and effective cause.

[34] Although there was evidence of a few phone calls by Mrs Walker I did not get the impression that she made a serious effort to solve the problems in the way of the Howards purchasing the property. There was probably good reason for this as it was too expensive and the Woolworths addition stood in the way.

[35] There are other factors that impacted on the Howards buying from Mrs de Marigny. She negotiated a lower price than was advertised in the Sunday Tribune. She also accepted a lower commission than the 6% plus VAT regarded as the benchmark for the estate agency business.

[36] There is also another independent factor that helped Mrs de Marigny secure the sale. Mrs Deanne Hamilton of Remax carried out what was called "price counselling" which I understand to mean, advice as to the real value - probably a lower value - of the property.

[37] At some levels the facts speak for themselves. The Howards dealt with Mrs de Marigny because she was the most instrumental in securing a sale. Prior to the sale the Howards had no animosity to Mrs Walker and were not doing the deal with Mrs de Marigny out of pique. They were dealing with Mrs de Marigny because she did more than Mrs Walker to secure the sale. While I feel a sense of sympathy for the plaintiff I am not convinced a sale would have eventuated without the efforts of Mrs de Marigny.

[38] The last-mentioned was fortunate in meeting the Howards by accident and coming on the scene when the obstacles were capable of removal. Mrs de Marigny also showed the Howards the house again. This tends to offset the notion that the original introduction and visiting of the house was conclusive and dominating.

[39] I am of the judgment that the introduction by Mrs Walker was the cause *sine qua non* of the eventual sale but was it the *causa causans*? The efforts of Mrs de Marigny in the more favourable selling milieu seem to me to be the *causa causans* of the sale.

[40] It seems to me on a balance of probabilities that the cumulative effect of these factors outweighs the effect of the initial introduction by the plaintiff. See **Webranchek v L K Jacobs & Co Ltd** 1948(4) SA 671 (A).

[41] As I mentioned the issue as to whether the indemnity provided by the purchaser in favour of seller for claims by other agents for commission was separated. The third party was joined on the basis that she should be responsible if the defendants were ordered to pay the plaintiff. The joinder of the third party was at the instance of the defendants and the relief claimed was that the third party pay whatever sums defendants are ordered to pay.

[42] The effect of my order is that defendants will pay nothing and plaintiff will pay defendants' costs. The question remains who should pay the third party's costs or should she bear her own costs?

[43] There are two stages in this enquiry the first being up till the Rule 37 conference when the issues were effectively separated. The second stage deals with the costs thereafter. The test seems to be that the plaintiff will not be required to pay the third party's costs unless the defendant acted reasonably in bringing them in. See **Robertson v Durban Turf Club & Others** 1970(4) SA 649 (N) at 658 D - E.

[44] I cannot see how the plaintiff or the third party can be ordered to pay for the costs until the Rule 37 conference. Had the defendants been sufficiently confident in their defence to the claim there would have been no need for joining the third party. It seems to me that the defendants should pay all the third party's costs up to and including costs of attending the Rule 37 conference.

[45] While it is understandable that the third party and her husband would be needed by the defendants as witnesses at the trial, it is difficult to understand why the third party needed to be represented at the trial. The plaintiff was not responsible for those costs either. It seems to me that the third party should bear her own costs after the Rule 37 conference.

[46] I therefore make the following order :

- (a) The plaintiff's claim is dismissed.
- (b) Plaintiff is ordered to pay first and second defendant's costs.
- (c) First and second defendant are ordered to pay the third party's costs up to and including the Rule 37 conference held on 6 November 2009.
- (d) The third party is ordered to pay her own costs incurred after 6 November 2009.

Counsel for the Plaintiff : Mr Skinner SC with Mr Finnigan (instructed by Meumann White)

Counsel for the Defendant : Mr Troskie SC (instructed by Larson Falconer Inc)

Counsel for the Third Party : Mr McIntosh (instructed by Askew Grindlay & Partners)

Date of hearing : 27 November 2009

Date of Judgment : 10 February 2010