

19/84

CASE NO. 257/82
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

THE FIRS INVESTMENT LTD.

APPELLANT

and

LEVY BROS ESTATES (PTY) LTD.

RESPONDENT

Coram: Rabie, CJ, Kotzé, Joubert, Trengove JJA
et Smuts AJA

Heard: 28 February 1984

Delivered: 22 March 1984

J U D G M E N T

TRENGOVE, JA/

TRENGOVE, JA

The appellant is the owner of a shopping centre in Rosebank, Johannesburg, known as "The Firs". The respondent carries on business as a firm of estate agents. The respondent instituted an action against the appellant in the Witwatersrand Local Division for payment of R195 750 as damages for the alleged wrongful revocation of a mandate granting the respondent "the sole irrevocable authority expiring on 30th June, 1980 to effect the sale" of "The Firs" on certain terms and conditions which were embodied in a letter dated 5 December 1979, to which I shall presently refer more fully. When the case came

to/

to trial, it was common cause that the appellant had granted the respondent the mandate in question, but had withdrawn it before the date of expiry. The only issue before the trial court (and also before this court) was whether the appellant's revocation of the mandate constituted a breach of contract in respect of which the respondent was entitled to claim damages. The trial judge, F S Steyn J, decided this issue in favour of the respondent (plaintiff) and he accordingly gave judgment for the respondent as prayed, with costs; hence this appeal.

The facts are very simple. During or about September 1979 the appellant considered selling "The Firs" and it authorised the respondent to enter

into/

into negotiations with the Electricity Supply Commission Pension and Provident Fund (the Fund) which appeared to be interested in acquiring this property for investment purposes. On 5 December 1979, the appellant and the respondent entered into an agreement, the terms of which were embodied in the letter of 5 December 1979, to which I have already referred. The letter reads as follows:

"AUTHORITY TO SELL

Messrs Levy Brothers Estates (Pty) Ltd.,
12th Floor, North State
Cor. Market & Kruis Streets

JOHANNESBURG

Dear Sirs,

THE FIRS INVESTMENTS LIMITED herein
represented by ARON ARONOVSKY, Chairman
of the Company, who is duly authorised
by the Company ("the SELLER") - does
hereby grant you the sole irrevocable

authority/

authority expiring on 30th June 1980 to effect the sale of Lot 192, ROSEBANK, on which is erected the building known as "THE FIRS" (hereinafter referred to as "the property"), on the terms and conditions hereinafter set out.

1. PROPERTY

The property is defined as Lot 192, in the Township of ROSEBANK, Registration Division I.R. Transvaal; Measuring 7,952 (seven thousand nine hundred and fifty two) square metres; Held under Certificate of Consolidated Title No. T 7480/1978, in terms of the photostat copy of the Title Deed and Diagram attached hereto marked "A"

2. PURCHASE PRICE

The purchase price is the sum of R12 000 000,00 (Twelve Million Rand) which will be payable as follows:

- (a) on signature of the Deed of Sale the sum of R50 000,00 (Fifty Thousand Rand) to Messrs RAPHAELY-WEINER, 4th Floor, Nedbank Mall, cor. Commissioner & Smal Streets,

Johannesburg, / ...

Johannesburg, in trust, to be paid over by RAPHAELY-WEINER to the SELLER on registration of transfer of the property into the name of the PURCHASER;

- (b) the balance of the purchase price shall be payable in cash against registration of transfer into the name of the PURCHASER and pending such registration shall be secured by an approved Bankers Guarantee made payable to the SELLER against registration of transfer of the property into the name of the PURCHASER, which Guarantee shall be delivered to Messrs RAPHAELY-WEINER within a period of 45 (FORTY-FIVE) days from the date of the signing of the Deed of Sale.

3. SALE "VOETSTOOTS"

The property shall be sold as it stands "voetstoots" and shall be subject to all the terms, conditions and servitudes mentioned or referred to

in/

in the present or any prior Title Deeds relating to the property.

4. LEASES

The property is leased under sundry deeds of Lease and other tenancies, to various tenants.

The SELLER gives no warranties whatsoever in regard to the said Leases which will be made available for inspection by the PURCHASER or its representative.

5. POSSESSION

Possession of the property shall be given to the Purchaser on the date of registration of transfer, from which date the PURCHASER shall be entitled to all the benefits and shall be liable for all rates, taxes and other outgoings thereon. The PURCHASER shall be obliged to refund to the SELLER, on demand, any rates or other outgoings paid in advance of such date and shall be entitled to receive a proportionate share of any rents paid in advance of such date.

6. COSTS/

6. COSTS OF TRANSFER

The PURCHASER will be liable for all costs of and incidental to the Deed of Sale, all costs of transfer, transfer duty, stamp duty and all other matters incidental to the transfer.

7. CONVEYANCERS

Transfer shall be effected by RAPHAELY-WEINER as Conveyancers to the SELLER within a reasonable time after the PURCHASER has complied with the provisions of clause 2 hereof and has paid RAPHAELY-WEINER'S account for transfer duty, costs of transfer etc. within 7 (SEVEN) days after the rendering thereof.

8. BREACH OF CONTRACT

In the event of the PURCHASER failing to comply with any of the terms of the Deed of Sale, the SELLER shall be entitled but not obliged to declare the sale cancelled whereupon the deposit paid in terms of clause 2(a) shall be forfeited as a genuine pre-estimate of

damages/

damages sustained by the SELLER without prejudice to the SELLER'S right to enforce specific performance if it desires to do so.

9. CONDITIONS PRECEDENT

The Deed of Sale to be concluded between the SELLER and the PURCHASER shall contain the undermentioned conditions precedent:-

- (a) the sale will be conditional upon the existing holder or holders of the Debenture Bond registered over the property releasing the SELLER from all liability under the said Bond in respect of any period subsequent to the date of cancellation of the Bond simultaneously with the registration of transfer of the property into the name of the PURCHASER;

10. COMMISSION

In the event of the sale being completed and subject to the conditions precedent having been fulfilled, the SELLER shall pay to you, on registration of transfer, commission according to the tariff of

the/

the Institute of Estate Agents of
South Africa.

11. PUBLICITY

The irrevocable Authority is being granted to you on the understanding that whether a sale in terms of the Authority results or not, under no circumstances will you publicise the transaction through any of the news media.

DATED at JOHANNESBURG this 5th day of
December, 1979.

For:

THE FIRS INVESTMENTS LIMITED

(Signed) A Aronovsky

CHAIRMAN

who warrants that he is authorised
to give this Authority on behalf
of the Company. "

Then, on 2 June 1980, after the negotiations between the parties had been going on for some months, the Fund advised the appellant, by letter, that it was "ready, willing and

able"/

able" to enter into a contract with the appellant on the terms contained in the letter of 5 December 1979; and it requested the appellant to have the necessary deed of sale prepared so that the transaction could be concluded. At that stage the appellant had, apparently, already decided against selling the property. In a letter, which was dated 10 June 1980, the appellant's attorneys advised the Fund, that their client was no longer interested in proceeding with the negotiations in question and that it had, accordingly, terminated the respondent's mandate. On the same date, the attorneys also advised the respondent, by letter, that the appellant had decided to revoke its mandate

and/

and that it was no longer authorised to act in terms thereof. In brief, these are the facts forming the background to the dispute between the parties.

The outcome of this appeal depends, mainly, on the meaning and effect of the words "the sole irrevocable authority expiring on 30th June, 1980 to effect the sale" in the context of the letter of 5 December 1979 which, as I have stated, contains all the terms of the agreement between the parties.

In this regard we were referred, by counsel, to a large number of cases concerning estate agent contracts but, as was pointed out in Luxor (Eastbourne) Ltd.

(in liquidation and Others v. Cooper (1941) All ER 33,

Gluckman/

Gluckman v. Landau & Co. 1944 TPD 261 and Webranchek

v. L K Jacobs and Co. Ltd. 1948(4) S A 671(A), the legal

consequences of a contract of this nature depend, in

the first instance, on the language of the particular

contract. In the Luxor case (at pp. 40-41), the Lord

Chancellor observed:

"There is, I think, considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern, and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms. ... Each case turns on its own facts ..."

and,/

and, in similar vein, Lord Wright remarked:

"..... what is in question in all these cases is the interpretation of a particular contract. I deprecate in general the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law. To some extent decisions on one contract may help by way of analogy and illustration in the decision of another contract, but, however similar the contracts may appear, the decision as to each must depend on the consideration of the language of the particular contract, read in the light of the material circumstances of the parties in view of which the contract is made."

I now come to the interpretation of the words "the sole irrevocable authority expiring on 30th June 1980, to effect the sale" of the property in question. Although the expression "authority ... to effect/

effect the sale" may not, as such, be entirely free of ambiguity, I have no doubt as to its meaning in the context of the present agreement. It will be recalled that the letter of 5 December 1979, which is addressed to the respondent, bears the heading "Authority to Sell". After stating that the appellant is thereby granting the respondent "the sole irrevocable authority expiring on 30th June 1980, to effect the sale" of the property which is fully described (clause 1), the letter proceeds to set out the terms and conditions of sale in detail (clauses 2 - 9) and it concludes by providing for the payment of commission to the respondent in the event of a sale

being/

being completed. In view of these considerations, I am quite satisfied that the agreement between the parties was a composite one, comprising a mandate to the respondent to find a purchaser coupled with an authority to enter into a contract of sale in respect of the property, on the appellant's behalf. (See De Wet and Swanepoel, Kontraktereg en Handelsreg, 4th ed., p. 100; Kerr, The Law of Agency, 2nd ed., p. 8; LAWSA, vol. 17, Mandate and Negotiorum Gestio by D J Joubert and D H van Zyl, par. 6). The next thing to be noted about the words under consideration is that the respondent was granted "the sole irrevocable authority" to effect the sale of the property during the specified period./.....

period. It was submitted on the appellant's behalf that the appellant did not thereby deprive itself of the right to sell the property. The words "the sole ... authority" were not to be equated, so it was contended, with the sole right or power as against the appellant itself, but should be construed as being no more than an undertaking by the appellant not to appoint anyone else to find a purchaser during the aforementioned period. I am unable to accept this contention. The plain meaning of the expression "sole ... authority" is "exclusive right or power" and that, in my view, is how it should be construed in the present instance. The appellant granted the respondent the

exclusive/

exclusive right or power to effect the sale of the property on its behalf, and, by so doing, the appellant, in effect, deprived itself of the right to sell the property (except through the respondent) or to appoint anyone else to do so, during the specified period (cf. Bentall, Horsley and Baldry v. Vicary (1931)1

KB 253 at 258; Fridmans' Law of Agency, 4th ed.

p.332; and De Villiers and Macintosh, The Law of Agency in South Africa, 3rd ed. p. 411).

I now deal with the effect of the use of the word "irrevocable" in its present context, and with the question whether the appellant could revoke the respondent's mandate prematurely without rendering itself liable to a claim for damages for

breach/

breach of contract.

The question whether an authority to conclude juristic acts on behalf of a principal can be granted irrevocably is surrounded by a good deal of controversy (see LAWSA, vol 1, Agency and Representation by J C de Wet, par 125; De Villiers and Macintosh op cit p.p. 616-7 n.29; and Kerr, op cit, p.195) but it is not necessary, in the present case, to enter into this controversy. The respondent's case is not that its authority was irrevocable in the strict sense of the word, but merely in the sense that the premature termination thereof constituted a breach of contract which entitled the respondent to claim damages from the

appellant/

appellant in lieu of the commission it would have earned, but for such breach. Generally speaking, a principal has the right and power to revoke his agent's authority without incurring any liability for damages to the agent, but the particular terms and circumstances of the grant of the authority may show that such a revocation is a breach of contract. In

Ward v. Barret N.O. and Another 1962(4) S A 732 (N P D)

at p. 737 D-F Caney J stated:

"Generally, the authority of an agent is revocable by his principal and terminates on the death or insolvency of himself or of the principal. The question whether a power of attorney or the authority of an agent howsoever conferred is irrevocable depends, it

seems/

seems to me, upon an interpretation of the transaction into which the principal has entered with the agent and an application of the general principles of law to that transaction. There seems to be no particular magic in the use of the terms 'irrevocable' or 'procuratio in rem suam' or 'a power coupled with an interest'; it is essential to discover precisely what was the transaction. The principal may have bound himself to the agent in terms, express or implied, which oblige him contractually not to revoke the agent's authority save on pain of liability in damages."

(See also: Price Bros & Barnes Ltd. v. Snyman, 1936

T P D 332 at p. 333; Glover v Bothma 1948(1) S A 611

(W) at p. 626; Pretorius v. Erasmus 1975(2) S A 765 (T)

at p.p. 770-A - 771-H); Kotsopoulos v Bilardi 1970(2)

S A 391 (C) at 398).

To sum up the position thus far. On

5 December/

5 December 1979, the respondent was granted the sole mandate, expiring on 30 June 1980, to effect the sale of the appellant's property "The Firs". This mandate included an authority to enter into a contract of sale, on the appellant's behalf, on the terms and conditions set out in the letter of 5 December 1979. The respondent's right to commission was made contingent upon such a sale being completed. In terms of the mandate, the appellant's hands were tied during the period 5 December 1979 to 30 June 1980 - it could not sell the property except through the respondent. As a result of negotiations between the appellant, the respondent and the Fund, the latter advised the appellant on 2 June 1980 that it was

ready/

ready, willing and able to buy the property on the stipulated terms and conditions. It is common cause between the parties that if such a sale had been completed on or before 30 June 1980, the respondent would have been entitled to commission in the sum of R195 750.

In these circumstances, the appellant's termination of the mandate on 10 June 1980, clearly constituted a breach of contract. Counsel for the appellant conceded that this was so, but he submitted that the respondent was, nevertheless, not entitled to claim damages from the appellant. This submission was based on two grounds, the first being that the appellant was

under/

under no obligation to the respondent to sell the property and could, in fact, refuse to do so without incurring any liability for damages. In support of this contention, counsel relied very strongly on certain passages in the speeches in the Luxor case, which was approved in Gluckman's case, as correctly stating our law. In my view these authorities do not assist the appellant. They are clearly distinguishable from the present case on the facts. The fundamental distinction between those cases and the present one is that, in this instance, the estate agent (the respondent) was not merely given the sole mandate to find a purchaser, he was also vested with the sole authority

to/

to sell the property on the principal's (appellant's) behalf. As far as the respondent was concerned, the appellant's hands were tied for the period of the authority. That being the position, the appellant's decision not to sell the property, or to conclude a deed of sale with the Fund, was tantamount to a repudiation, or a revocation, of the mandate, and this, as I have already stated, rendered the appellant liable to a claim for damages at the instance of the respondent.

Appellant's counsel, furthermore, relied on the fact that the respondent's right to claim commission was contingent upon a sale being completed on or before 30 June 1980. He contended that the

respondent/

respondent was not entitled to claim damages,
in lieu of commission, because it had failed to
establish, on a balance of probabilities, that if
the mandate had not been revoked, the appellant and
the Fund would have concluded a deed of sale on or
before 30 June 1980. In my view there is no real
substance in this contention. The undisputed evidence
of the witness Annandale, an official of the Fund,
shows that by 2 June 1980 the Fund had already come
to a firm decision to purchase the property and that
it was, at that date, "ready, willing and able" to
enter into a formal deed of sale with the appellant
on all the stipulated terms and conditions. This is

confirmed/

confirmed by the Fund's letter of 2 June 1980 to the appellant, to which reference has already been made.

The witness Annandale also indicated that, if necessary, the Fund would have been quite prepared to conclude the contract with the respondent, as the appellant's duly authorised representative. However, I am satisfied that if the appellant had been willing to co-operate with the Fund during June 1980 there can be little doubt that a formal deed of sale would have been completed by 30 June 1980, in which event the respondent would have been entitled to commission in an amount of R195 750. The respondent would, on the probabilities, have earned this amount as commission had its mandate

not/

not been terminated prematurely. The respondent was, accordingly, entitled to claim this amount as damages.

In the result, the appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

TRENGOVE, JA

RABIE, CJ)	
KOTZÉ, JA)	
JOUBERT, JA)	Concur
SMUTS, AJA)	