Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 10887/2004

the matter of

JOMOVEST TWENTY-FIVE CC

t/a Chas Everitt City Bowl **Applicant / Defendant**

and

ENGEL & VOLKER WESTERN CAPE (PTY) LTD **Respondent / Plaintiff**

JUDGMENT DELIVERED : 17 JUNE 2010

MATTER HEARD ON 21 APRIL 2010

On behalf of Applicant/Defendant : **Adv S Walther**

Attorney(s) : **Ince Wood & Raubenheimer**

On behalf of Respondent/Plaintiff : **Adv P Eia**

Attorney(s) : **Rahman Inc**

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MOOSA, J

Introduction

[1] This is an application for leave to amend the plea in which the Applicant, who is the Defendant in the action, seeks to withdraw an admission made therein. The Respondent, who is the Plaintiff in the action, opposes the application. For the sake of convenience the parties will be referred to hereinafter as cited in the action, namely, the Defendant and the Plaintiff respectively.

[2] On 15 December 2004, the Plaintiff instituted action against the Defendant

claiming payment of the sum of R111 000.00 being its share of the commission arising from the sale of certain immovable property situate at 8 Theresa Avenue, Camps Bay and owned by Mr and Mrs Lasker. The Defendant defended the action and filed a plea in which it made certain admission that form the subject matter of this application.

The Proposed Amendment

[3] The Defendant seeks leave to amend paragraphs 2 and 4 of its plea in the following respects:

(a) Paragraph 2 by deleting the words: *"and other than to admit that Defendant had a joint mandate as alleged (which expired and was replaced by a sole mandate as from 31 August 2004)"* and by inserting the following at the end of the paragraph: *"In amplification of its denial, and without derogating from the generality thereof, Defendant avers that the joint mandate and the sole mandate referred to were held by Retrospective Trading 466 CC t/a Chas Everitt Atlantic Seaboard, Reg No 2003/074897/23 and not by Defendant".*

(b) Paragraph 4 by deleting the words: "*Other than to admit that Defendant had received a sole mandate from the seller and that Plaintiff was made aware thereof*" and by inserting the following at the end of the paragraph: *"In amplification of its denial and without derogating from the generality thereof, Defendant reiterates that the sole mandate was received by Retrospective Trading 466 CC t/a Chas Everitt, Atlantic Seaboard, Reg No 2003/074897/23 and not by Defendant".*

The Unamended Pleadings

[4] The Plaintiff in its Particulars of Claim to the Summons alleges: (i) that in or

about June 2004, the Defendant was appointed and/or provided with a joint mandate to sell the immovable property situated at 8 Theresa Avenue, Camps Bay (the "property"), by the owners being Mr and Mrs Lasker (the "sellers"); (ii) that, in or about mid September 2004, Plaintiff introduced the purchaser, Jacqueline Clark (the "buyer") to the property; (iii) that at the time the Defendant informed the Plaintiff that it had the sole mandate to sell the property; and (iv) that it was a term of an oral agreement between the Plaintiff and the Defendant that they would share the commission on a 50/50 basis in accordance with prevailing custom among estate agents.

[5] The Defendant in its Plea admits: (i) that the Defendant held a joint mandate to sell the property, which joint mandate was replaced with a sole mandate as from 31 August 2004; (ii) that the Plaintiff was made aware thereof and (iii) that it earned the commission on the sale of the property but avers (iv) that there was no oral agreement to share the commission on a 50/50 basis as alleged.

[6] The Plea as it stands, in my opinion, amounts to a confession and avoidance. The Defendant in clear and unequivocal terms makes certain admissions in the Plea, which constitute the confession. The Defendant in clear and unequivocal terms denies that an oral agreement was concluded between the Defendant and the Plaintiff to share the commission and such denial constitutes the avoidance. In light of the admissions, it is unnecessary for the Plaintiff to adduce evidence to prove the admitted facts and it is equally unnecessary for the Defendant to adduce evidence to contradict those facts. The only issue the Plaintiff is called upon to prove is the oral agreement to share the commission. Should the amendment be granted, the Plaintiff will also be required to prove that the Defendant held the mandate to sell the property.

[7] The Defendant seeks to withdraw the admissions on the basis that it was not involved in the transaction, but one of its associated entities, namely Retrospective Trading 466 CC ("Retrospective"), had held the mandate to sell the property and had earned the commission. It is common cause that the sale of the property was concluded by Reid using the pro forma deed of sale of the Defendant and in terms of the concluded deed of sale, the commission was payable to the Defendant. It is also common cause that, at all material times of the transaction, the same members constituted both the Defendant and Retrospective.

The Law

[8] As a general rule an amendment to any pleadings will be permitted unless the application to amend, on the one hand, is *mala fide* on the part of the one party and, on the other hand, is prejudicial or unjust to the opposite party, which cannot be compensated by way of postponement and/or order of costs (**Moolman v Estate Moolman** 1927 CPD 27 at 29; **Frenkel Wise & Co Ltd v Cuthbert** 1947 (4) SA 715 (C) and **Caxton Ltd and Others v Reevas Forman (Pty) Ltd and Another** 1990 (3) SA 547 (A)).

[9] As a general rule, an amendment to withdraw an admission will not be allowed unless evidence is tendered to show a reasonable basis firstly, for making the original mistaken admission and secondly, for seeking the withdrawal of such admission (**Gordon v Tarnow** 1947 (3) SA 525 (A) and **Amod v South African Mutual Fire and General Insurance Co Ltd** 1971 (2) SA 611 (N)). The establishment of such threshold is in legal parlance described as a "jurisdictional fact". The presence of the jurisdictional fact is a prerequisite to the court exercising its discretion whether or not to grant the amendment to withdraw the admission.

[10] **Erasmus** *on Superior Court Practice* at B1-182/2, to be read with footnotes 8 and 1 respectively, comments as follows:

> *"... withdrawal of an admission is usually more difficult to achieve because (i) it involves a change of front which requires full explanation to convince the court of the bona fides thereof, and (ii) it is more likely to prejudice the other party, who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence. The Court will, therefore, in the exercise of its discretion, require an explanation of the circumstances under which the admission was made and the reasons for now seeking to withdraw it."*

[11] Before the court exercises its discretion whether or not to grant the amendment to withdraw the admissions, the court is required to determine the presence or absence of the jurisdictional fact. The test to determine the presence or absence of the jurisdictional fact, in this matter, is an objective one. Should the court find that the Defendant has failed to establish the jurisdictional fact, the proposed amendment is refused. On the other hand, should the court find that the Defendant has established the jurisdictional fact, such finding triggers the exercise of the court's discretion. In exercising such discretion, the court considers the question of *mala fides* on the part of the Defendant in seeking the amendment and of the potential prejudice or injustice that the Plaintiff may suffer if such amendment is granted.

[12] The principle and approach to the exercise of the court's discretion in such instance, is succinctly set out, albeit with regard to the exercise of public power, by

Corbett,J (as he then was) in **S A Defence & Aid Fund & Another v Minister of Justice** 1967 (1) SA 31 (C) at 34F-35D. **Corbett,J** identified two broad categories of jurisdictional fact. The existence of one is objectively assessed and the existence of the other is subjectively assessed. The court held that the existence of the one which is objectively assessed is justiciable in a court whereas the existence of the other which is subjectively assessed is not justiciable. In that regard **Corbett, J**, states the following:

> *"I turn now to the possible grounds upon which the exercise of the power granted by sec. 2 (2) may be assailed in a Court of law. It is a necessary condition to the exercise of this statutory power that the State President should be satisfied upon one or more of the matters listed in paras. (a) to (e) of the sub-section. The content of this kind of condition is often referred to as a 'jurisdictional fact' (see* ***Minister of the Interior v Bechler and Others****, 1948 (3) SA 409 (A.D.) at p.442; Rose-Innes,* ***Judicial Review of Administrative Tribunals in S.A.*** *pp .99-100) in the sense that it is a fact the existence of which is contemplated by the Legislature as a necessary pre-requisite to the exercise of the statutory power. The power itself is a discretionary one. Even though the jurisdictional fact exists, the authority in whom the power resides is not bound to exercise it. On the other hand, if the jurisdictional fact does not exist, then the power may not be exercised and any purported exercise of the power would be invalid.*
>
> *Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the*

objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of the power (see e.g. ***Kellerman v Minister of Interior,*** *1945 T.P.D. 179;* ***Tefu v Minister of Justice and Another,*** *1953 (2) SA 61 (T)). On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense, but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid on the ground of non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted* ***male fide*** *or from ulterior motive or failed to apply his mind to the matter. (See e.g.* ***Minister of the Interior v Bechler and Others*** *supra;* ***African Commercial and Distributive Workers' Union v Schoeman N.O. and Another,*** *1951 (4) S.A. 266 (T);* ***R v Sachs,*** *1953 (1) S.A. 392 (A.D.).)"*

In my view the same principle and approach are applicable on the facts of this case.

[13] In our matter under consideration, the jurisdictional fact falls under the first

category described above by **Corbett J** and is accordingly justiciable as it calls for evidence to show a reasonable basis for making the confession and a reasonable basis for seeking to withdraw such confession. Such evidence, objectively speaking, must have existed before the discretion to grant or refuse the amendment could validly be exercised.

Evaluation

[14] I now evaluate the evidence to determine whether the Defendant, objectively speaking, has crossed the threshold to establish the existence of the jurisdictional fact, namely, whether the Defendant has tendered evidence to show a reasonable basis for making the original mistaken admission and for withdrawing such admission. The evidence tendered is as follows:

(i) In the first place, Van der Spuy states in the founding affidavit that Reid used the incorrect Deed of Sale and she did not apply her mind to the issue that the incorrect party had been sued. These statements not only amount to hearsay, but are contradicted by Reid in her founding affidavit in support of the application for security. Van der Spuy goes on to state that Reid is uncooperative with the present attorney of the Defendant. This is confirmed by Eugene Nico Bester ("Bester") in his affidavit dated 1 April 2010. No explanation is given by them why Reid is uncooperative. The only plausible inference the court can draw is that she does not want to contradict the affidavit filed by her in support of the application for security for costs and in the circumstances perjure herself. Besides the fact that the crucial allegations of both Pienaar and van der Spuy concerning the mistaken admission being hearsay, the founding affidavit of Reid in the application for security for costs stands uncontradicted and is inconsistent with the proposed amendment.

(ii) In the second place, Reid in her founding affidavit dated 14 June 2005 to the

application for security for costs, states:

(a) Firstly, that the Defendant had a sole mandate, expiring on 30 September 2004, to sell the property. It appears that a joint mandate was replaced by a sole mandate after 31 August 2004, which appears to have lasted only for a month as it expired on 30 September 2004. It appears further that the property was sold within the period of the sole mandate and the Defendant earned the commission;

(b) Secondly, that she (Reid) *was* also the effective cause of the transaction as she was personally involved in the transaction as well as in the dealings with Marion Taylor, the Plaintiff's agent;

(c) Thirdly, that no agreement to share commission was concluded between Marion Taylor and herself.

(iii) In the third place, it is not disputed that the cheque for the commission was made out by the conveyancing attorney to the Defendant. Reid confirms under oath that the commission was earned by the Defendant. This does not detract from the fact that the cheque was either endorsed over to Retrospective or the proceeds paid over to it. Counsel for the Defendant submitted that the probabilities favour the Defendant's case that at the time of the alleged oral agreement, Reid was acting on behalf of Retrospective. This is pure speculation and flies in the face of a statement under oath by Reid that she was acting for the Defendant in this transaction. No acceptable evidence has been tendered to the contrary.

(iv) In the fourth place, the Defendant sought to withdraw the admissions on the basis that it was not involved in the transaction at all. The Defendant avers that another entity namely, Retrospective was the party who in fact held the mandate to sell the property and that Retrospective earned the commission from the sale. It is

common cause that, at the time of the transaction in question, the same persons comprised the members of the Defendant and that of Retrospective. It must be inferred therefrom that constructive, if not actual, knowledge must be imputed to the Defendant and to Retrospective in respect of the particular transaction. In amplification of the above, I refer to the case of **Town Council of Barberton v Ocean Accident and Guarantee Corporation Ltd** 1945 TPD 306 at 311 wherein **Malan, J** states the following:

> *"Where any fact or circumstance, material to any transaction, business, or matter in respect of which an agent is employed, comes to his knowledge in the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof as from the time that he would have received such notice if the agent had performed his duty, and taken such steps to communicate the fact or circumstance as he ought reasonably to have taken."*

It is only at a very late stage of the proceedings and after a number of years that the Defendant seeks to withdraw the admissions.

(v) In the fifth place, even if I am wrong in the conclusion that both the Defendant and Retrospective had constructive, if not actual knowledge, of the transaction, in my view, there is an implied warranty of authority by Reid to contract for the Defendant. In this respect **Innes, CJ** in **Blower v Van Noorden** 1909 TS 890 at 900-901 described the true nature of the transaction, when the ostensible agent contracts in the name of her "principal" with a third party, as follows:

> *"What takes place is this: the agent in effect represents to the other*

contracting party that he has authority to bind his principal; and within the limits of that authority he consents to the terms of the agreement on his principal's behalf. There is a representation by the agent personally, and a contract by him in his capacity as agent. The representation is in respect of a matter which is peculiarly within his knowledge, and of which the other party knows nothing at all. But the latter enters into the contract on the faith of the representation and, the agent intends that he shall do so; it forms the basis of the whole agreement. Under these circumstances we are surely justified in implying, on the part of the agent, a personal undertaking that his principal shall be bound by the contract, and that if not, he will place the other party in as good a position as if the principal were bound."

In this regard counsel for the Plaintiff referred to the so called *Turquand Rule* as contained in **Royal British Bank v Turquand** (1856) 6 E&B 327; 119 ER 886 which was accepted as part of our common law under the *General Law of Agency* and incorporated in Section 36 of the Companies Act, No 61 of 1973.

(vi) In the sixth place, according to the founding affidavit of Heather Louise van der Spuy ("van der Spuy"), a member of the Defendant, she only became aware of the error in November 2009, when a copy of the indemnity dated 26 October 2004, which was presumably signed by one RA Reid, the husband of Reid, was brought to her attention. The indemnity was allegedly given to the Sellers by Retrospective and indemnified the Sellers against any claim for commission by the Plaintiff. The copy of the indemnity is unsigned and appears on the letterhead of "Chas Everett International" and no confirmatory affidavit attesting to its authenticity has been tendered. Very little, if any, reliance can be placed on such letter.

(vii) In the seventh place, in support of the fact that Respective was the responsible party, van der Spuy annexed two franchise agreements, one allegedly concluded between the Franchisor and the Defendant in respect of the City Bowl area and the other between the Franchisor and Retrospective in respect of the Atlantic Seaboard area. A close scrutiny of the two franchise agreements reflects the following:

(a) The Franchise agreement in respect of the City Bowl area reflects: firstly, that it is not signed by the Franchisor; secondly, that it is dated 14 May 2008 and signed on behalf of the Franchisee by van der Spuy and Antoinette Louisa Britz ("Britz") and thirdly, that Reid is not a party to such agreement and neither did she sign as surety;

(b) The one in respect of Atlantic Seaboard area shows: firstly, that it was signed in Cape Town in May 2008 by Reid and her husband, RA Reid on behalf of the Franchisee and by the Franchisor in Johannesburg on 11 June 2008; secondly, that van der Spuy and Britz were not a party to such agreement and thirdly, that Reid and one RA Reid bound themselves as sureties in respect of this agreement.

(c) These franchise agreements do not show what situation prevailed at the time the sale of the property was concluded and which parties were involved. It therefore has very little, if any, evidential value.

(viii) In the eighth place, no franchise agreement purporting to show that Retrospective held a joint or sole mandate in respect of properties in the Atlantic Seaboard at the time of this transaction, was tendered as evidence. One of the admissions made by the Defendant, which it now seeks to withdraw, is that the Defendant held a joint mandate. There is no explanation what is meant by joint mandate and with whom the Defendant held the joint mandate. What is even more

more surprising is the fact firstly, that a joint mandate was replaced by a sole mandate after 31 August 2004 and the sole mandate expired a month later, that is on 30 September 2004; secondly, that the transaction was concluded within that month; and thirdly, the sellers insisted on an indemnity against a possible claim of commission by the Plaintiff.

(ix) In the ninth place, the court cannot exclude the possibility that the joint mandate was held by the Defendant and Retrospective. In this regard, the following facts are compelling: firstly, that both entities had the same members; secondly, that the joint mandate expired on 31 August 2004 and thereafter the sole mandate was secured; thirdly, that the administrative address of both entities is given as 139, Kloof Street, Gardens to which address the banking statements were sent; fourthly, the sale of the property was completed on the Deed of Sale of the Defendant and fifthly, the commission cheque was made payable to the Defendant, but was either endorsed over to, or the proceeds paid over to Retrospective and lastly but importantly, that the Reids held the franchise for the Atlantic Seaboard in accordance with the franchise agreement tendered as evidence and dated 11 June 2008 and what is significant is the fact that Mr Reid purported to have given the indemnity to the Sellers and dated 26 October 2004 and the transaction was negotiated by Mrs Reid and concluded in and during September 2004. The element of bad faith cannot be excluded. However, for present purposes I am not required to make such finding for reason that will become apparent in due course.

The Finding

[15] In the circumstances, I conclude that the admissions made in the Plea is consistent with the objective facts and inconsistent with the allegations contained in the proposed

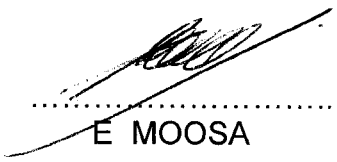
amendment. I accordingly hold that the Defendant has failed to establish the jurisdictional fact by tendering evidence to show a reasonable basis firstly, for making the mistaken admissions and secondly, for withdrawing such admissions.

The Exercise of Discretion

[16] I have stated earlier that in order for the court to exercise its discretion to grant or refuse the amendment to withdraw the admissions, the existence of the jurisdictional fact was a prerequisite to the exercise of such discretion. The Plaintiff submitted that the Defendant was actuated by *mala fides* to bring this application. The Plaintiff also contended that it will be prejudiced and an injustice will result if the amendment is granted as the claim against Retrospective will have become prescribed. As the Defendant has failed to cross the first hurdle, namely, the existence of the jurisdictional fact, it is unnecessary for the court to determine the issues of *mala fides,* prejudice or injustice as a prerequisite to the exercise of its discretion to grant or refuse the proposed amendment.

The Order

[17] In the premises the application for the amendment of the Plea to withdraw the admission is refused with costs.



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