

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Appeal Case No: **A220/2023**
Court *a quo* Case No: **11824/2021**

In the matter between:

PROPERTY KNIGHT (PTY) LTD

Appellant

versus

VAN NIEKERK GROENEWOUD AND VAN ZYL

First Respondent

ADDAE-TWENEBOACH BERNARD

Second Respondent

BA REAL ESTATES (PTY) LTD

Third Respondent

VIRTUAL REALTY GROUP (PTY) LTD

Fourth Respondent

**THE TRUSTEES FOR THE TIME BEING OF THE
VW TRUST**

Fifth Respondent

Coram: Binns-Ward J et Adhikari AJ
Heard: 2 February 2024
Delivered: 7 February 2024

JUDGMENT DELIVERED ELECTRONICALLY ON 7 FEBRUARY 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the hand-down is deemed to be on 7 February 2024.

ADHIKARI AJ (BINNS-WARD J concurring):

[1] This is an appeal from a decision in interpleader proceedings in the Magistrate's Court.

[2] On or about 6 September 2021 the fifth respondent ('the Trust') and one Mary Tshabalala ('the purchaser') concluded a written agreement of sale ('the sale agreement') in terms of which the Trust sold certain immovable property¹ to the purchaser for an amount of R1 500 000 ('the sale price'). The sale agreement provides, *inter alia*, for payment of commission calculated at 5% inclusive of VAT on the purchase price ('the commission') to the fourth respondent ('VR Group').

[3] The appellant ('Property Knight') and VR Group are both companies that conduct business as estate agents. At the time of the conclusion of the sale agreement Property Knight employed the second respondent ('Bernard') as an intern estate agent. It appears from the sale agreement that Bernard, acting as agent on behalf of the Trust, offered the property for sale to the purchaser. The first respondent ('VGV') was instructed to attend to the transfer of the property.

[4] On 12 October 2021, Property Knight instituted urgent proceedings in the Magistrates Court in which it sought to interdict VGV from paying the commission to Bernard and VR Group, and an order directing VGV to pay the commission to it (that is to Property Knight) on registration of transfer of the property ('the urgent application'). The urgent application was dismissed on 23 November 2021.

¹ The property in question comprises a unit and a garage in a sectional title scheme known as Ruskin Villas ('the property').

[5] On 30 November 2023, having received a copy of the order dismissing the urgent application, VGV informed Property Knight's attorney ('Fotoh') that it would proceed to pay the commission over to VR Group's attorneys.

[6] Fotoh on 1 December 2021 addressed correspondence to VGV in which he stated that he was of the view that the order dismissing the urgent application did not permit VGV to pay the commission over to VR Group's attorneys. Fotoh further stated in the correspondence to VGV that *"the seller's position is that Bernard must provide a valid FCC under Virtual Realty [ie VR Group] at the time of the sale, failing which [VGV] must pay the commission to the seller".*²

[7] On the same date, VR Group's attorney ('Moosa') in response to Fotoh's correspondence advised VGV that he was of the view that VGV was contractually bound to pay the commission over to VR Group on registration of transfer, and that in light of the dismissal of the urgent application, there was no longer a live dispute between VR Group and Property Knight as regards the entitlement to payment of the commission. Moosa further advised that unless the commission was paid into his firm's trust account by close of business that day (that is 1 December 2021) urgent proceedings would be launched against VGV for failure to pay over the commission to VR Group.

[8] On 14 December 2021, VGV in light of the apparently conflicting claims of Property Knight and VR Group, issued an interpleader summons. Property Knight and VR Group both delivered interpleader particulars of claim, in essence contending that they were each entitled to payment of the commission.

² VR Group in the appeal raises certain concerns about Fotoh's alleged representation of the Trust. I return to this issue later in the judgment.

[9] In summary:

[9.1] VR Group contended that on a proper interpretation of the terms of the sale agreement, it is entitled to payment of the commission because the sale agreement identifies VR Group as the party to which the commission is payable.

[9.2] Property Knight contended that it is entitled to payment of the commission because Bernard (a) was the effective cause of the sale; (b) was employed by Property Knight at the time that the sale was concluded; and (c) held a fidelity fund certificate that identified him as an intern estate agent operating under the supervision of Property Knight.

[10] The Magistrate ultimately found that Property Knight had failed to make out a case that it is entitled to payment of the commission in that Property Knight is not referred to at all in the sale agreement, and that VR Group is entitled to payment of the commission on the basis of the terms of the sale agreement. Consequently, the Magistrate ordered that VGV pay the commission to VR Group. The Magistrate further ordered that Property Knight pay VR Group's costs on an attorney client scale, and VGV's costs on a party and party scale.

[11] Property Knight appeals the order that VGV pay the commission to VR Group. There is no appeal against the costs orders made by the Magistrate.

PRELIMINARY ISSUES

[12] Before dealing with the merits of the appeal, I deal with two preliminary issues, first, the nature and extent of the proceedings in the Magistrates Court and second, the various condonation applications delivered by the parties.

[13] After the delivery of the interpleader summons and the parties' respective interpleader particulars of claim, a ten-day trial ensued in the Magistrates Court, during which extensive oral evidence was led, resulting in an appeal record comprising some twelve volumes. It appears that a portion of the record was not transcribed and consequently, on the morning of the hearing of the appeal, the parties by agreement delivered a further volume containing what is described as a "*statement of facts in respect of the evidence in chief of Matthew Knight*".

[14] This appeal turns on a discrete point of law. That is, whether on a proper interpretation of the sale agreement, VG Group or Property Knight is entitled to payment of the commission. There was no need for oral evidence to have been led as none of the facts on which the issue before the Magistrate ought to have been decided are in dispute. Mr Moosa for VR Group submitted at the hearing of the appeal that he had raised precisely this issue at the commencement of the proceedings before the Magistrate but that Property Knight and Fotoh had persisted that it was necessary to lead oral evidence on the issues which Property Knight contended were in dispute. None of this, however, appears from the record. We were informed by Mr Moosa that this is as a result of the fact that the first day of the proceedings before the Magistrate had not been transcribed.

[15] Whatever the case may be, it is unfortunate that the Magistrate did not identify the crisp issue for determination at the outset of the proceedings. Had this been done, it would have obviated the need for the leading of extensive oral evidence, or indeed any evidence at all.

[16] Both Property Knight and VR Group sought condonation for the late delivery of their respective heads of argument. Further, Property Knight sought condonation for the late delivery of the appeal record. None of the condonation applications were opposed and no prejudice was alleged by either party resulting from the late delivery of the record or of the heads of argument. The record and the heads of argument were provided to the court in sufficient time to allow us to consider the record and the heads of argument prior to the hearing of the appeal. Consequently, the late delivery of the record and the heads of argument has not caused significant inconvenience to the court. In light of these facts, condonation was granted for the late delivery of the record of appeal and for the late delivery of the parties' heads of argument.

THE MERITS OF THE APPEAL

[17] As I have mentioned, this appeal turns on the proper interpretation of the sale agreement. The sale agreement, in relevant part, provides:

[17.1] The purchaser offered to purchase the property from the Trust (the seller) for the purchase price of R1 150 000 on the terms set out in the sale agreement (clause 1, read with clauses 2.1; 2.2 and 3).

[17.2] The sale agreement was subject to the suspensive condition that the purchaser is granted a loan by a financial institution within 20 days of acceptance of the offer (clause 4.1).

- [17.3] Transfer of the property would be effected by VGV on 1 November 2021 or as soon as reasonably possible after the parties had complied with the terms of the sale agreement (clause 5.1).
- [17.4] The sale agreement would not be varied or cancelled unless such variation or cancellation was reduced to writing and signed by all the parties or their duly authorized representatives (clause 11.1).
- [17.5] The sale agreement constitutes the whole agreement between the parties and no other agreements, representations or warranties or whatever nature have been made by the parties or "*the Agent*"³ save as included in the sale agreement (clause 11.2).
- [17.6] Commission, calculated at 5% inclusive of VAT, on the purchase price was to be paid by the Trust to VR Group trading as BA Real Estates (clause 12.1).
- [17.7] Commission would be deemed to have been earned on acceptance of the offer and fulfilment or waiver of any suspensive conditions contained in the sale agreement (clause 12.1).
- [17.8] Commission would be payable on registration of transfer and VGV was irrevocably instructed by the parties not to pass transfer until it had sufficient funds to secure the commission due to VR Group trading as BA Real Estate (clause 12.2).
- [17.9] The Trust irrevocably authorised and instructed VGV to make payment of the commission to VR Group trading as BA Real Estate from the

³ The term "*Agent*" is not defined in the sale agreement.

deposit held by VGV upon fulfilment of the suspensive conditions, and if the deposit was insufficient therefore, from the proceeds of the sale (clause 12.3).

[17.10] VGV was irrevocably instructed to make payment of the commission directly to VR Group trading as BA Real Estate, when the commission was due in terms of the sale agreement (clause 12.4).

[17.11] If the sale agreement was cancelled as a result of default on the part of the purchaser or the seller:

[17.11.1] VR Group trading as BA Real Estate would be entitled to payment of the “*professional fee*”⁴ from the party at fault or;

[17.11.2] By mutual agreement between the purchaser and the seller, VR Group trading as BA Real Estate would be entitled to payment of the professional fee from the seller and purchaser jointly and severally the one paying the other to be absolved on the basis that the party making payment would be entitled, in the absence of any written agreement to the contrary, to claim half of the amount so paid by him from the other party (clause 12.5).

[17.12] If the sale agreement was cancelled prior to registration of transfer but after the fulfilment of any applicable suspensive conditions, VR Group

⁴ The term “*professional fee*” is not defined in the sale agreement, but having regard to the context in which the term appears, it is evident that the term refers to the commission payable in terms of the sale agreement.

trading as BA Real Estate would become entitled to payment of the commission immediately upon such cancellation and VGV was instructed to effect payment accordingly (clause 12.6).

[17.13] The purchaser warranted that she was introduced to the property by “*the Agent*” and that “*the Agent*”⁵ was the effective cause of the sale.

[18] Property Knight’s case is that notwithstanding the terms of the sale agreement, it is entitled to payment of the commission because Bernard, as the effective cause of the sale, was employed by it and held a fidelity fund certificate that identified him as an intern estate agent operating under the supervision of Property Knight. There is, however, no legal basis for this contention.

[19] It is well settled that an estate agent's contractual relationship with his or her principal is like any other contractual relationship and is not subject to special rules of law.⁶ Whether the agent is entitled to the payment of commission will depend upon what was agreed between the parties. Where such a claim is made, one has to look at the particular contract and see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened on the occurrence of which the commission is expressed to be payable.⁷

[20] Consequently, in order to determine whether Property Knight is entitled to payment of the commission that the Trust instructed VGV to pay from deposit held by it in terms of the agreement of sale regard must be had to the terms of the agreement, properly interpreted.

⁵ It is apparent from the context of the sale agreement that the term “*Agent*” although not defined, refers to the estate agent, whose conduct is the immediate cause of the sale.

⁶ *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (A) at paras [1] and [8].

⁷ *Id.* See also *Midgley Estates Ltd v Hand* [1952] 2 QB 432 (CA) at 435.

[21] It is trite that the interpretation of written agreements is a unitary exercise where the words of the document are considered in the light of all relevant and admissible context.⁸ While one is at liberty to depart from the words used, if having regard to admissible background and surrounding factors it is evident that the words used would lead to a result contrary to the purpose and intention of the parties, a court cannot make a contract for the parties.⁹

[22] Bearing these principles in mind, it is clear from the terms of the sale agreement that the commission was to be paid to VR Group on registration of transfer. The sale agreement is unambiguous in this regard. The sale agreement does not contain a single provision that can reasonably be interpreted as entitling any party other than VR Group to payment of the commission. Critically, there is no reference at all to Property Knight in the sale agreement. Further, none of the evidence establishes that it was the common intention of the parties to the sale agreement, that Property Knight be entitled to payment of the commission. This is, in any event, not Property Knight's case.¹⁰ Further, it is common cause that all of the contractual provisions for the payment of the commission have been fulfilled.

[23] Consequently, the sale agreement properly interpreted entitles VR Group to payment of the commission and there is no basis in law for the commission to be paid by VGV to Property Knight. For these reasons the findings of the Magistrate cannot be faulted, and the appeal must fail.

⁸ *Bothma-Batho Transport v S Bothma & Seun Transport* 2014 (2) SA 494 SCA at para [12].

⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

¹⁰ Property Knight does not seek the rectification of the sale agreement, it does not contend that the sale agreement expressly provides that it is entitled to payment of the commission, nor does it contend that the sale agreement contains a tacit term to that effect.

[24] It may be that Property Knight might be entitled to payment of commission by the Trust in terms of any separate agreement that it might have had in respect of the marketing and sale of the property. If there is such an agreement, Property Knight's remedy lies in enforcing its rights under *that* agreement. It was a stranger to the contract in issue in the current case. There was no basis upon which it could superimpose any claim in terms of a separate contract to which it might be party with the Trust on the contract between the Trust and VR Group.

COSTS

[25] As to the issue of costs, there is no reason why costs ought not to follow the result. It was submitted on behalf of VR Group that it would be appropriate for Property Knight to pay the costs of the appeal on an attorney-client scale because the appeal is without merit and can be characterised as "*hopeless*".

[26] The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted and requires an applicant to demonstrate the existence of special considerations arising either from the circumstances which gave rise to the action, or from the conduct of the losing party. However, where the court is satisfied that there is an absence of *bona fides* in bringing or defending an action it will not hesitate to award attorney and client costs.

[27] Although the appeal has not succeeded, there is no basis on which to find that Property Knight lacked *bona fides* in bringing the appeal. Rather it appears to have been badly advised. This is, however, not sufficient reason to warrant the granting of a punitive costs order. (We might have been disposed to make a punitive costs order on the basis of the oft cited approach articulated in *In re Alluvial Creek Ltd*

1929 CPD 532 had the appellant persisted with its meritless claim in the face of a more clearly reasoned judgment by the court a quo, but, regrettably, the magistrate did not dispose of the matter as plainly and firmly as it deserved to be.)

REFERENCE OF THE APPELLANT'S ATTORNEY TO THE LEGAL PRACTICE COUNCIL

[28] Finally, VR Group further asks for the referral of Fotoh to the Legal Practice Council ('LPC') on the basis that he misrepresented to the parties and to the court below that he represented the Trust.

[29] It appears from the record that VR Group at some stage challenged Fotoh's authority to act for the Trust.¹¹ In response, Fotoh on 16 February 2022 delivered a notice indicating that they no longer act for the Trust. Further on 7 December 2021 Fotoh sent an email to VGV stating that Fotoh would accept service of the interpleader summons via email on behalf of the Trust and on behalf of Property Knight. Ms Chantal Schreuder ('Schreuder'), of KIS Construction which is a close corporation owned by Mr Robert Wolfes ('Wolfes') of the Trust was copied into Fotoh's email. Wolfes gave evidence that he left Schreuder, his secretary, to attend to all the details of the sale transaction in respect of the property. Consequently, despite Wolfes' testimony that he did not know Fotoh or instruct him to act on the part of the Trust it appears from the record that Schreuder was aware of the fact that Fotoh was purporting to act on behalf of the Trust. There is no indication on the record that she raised a concern about Fotoh's contentions in this regard. Consequently, it appears that Fotoh may have been mistaken about whether he in fact was instructed by the Trust and once his authority was challenged, he withdrew

¹¹ An undated copy of a notice in terms of Rule 52(2) forms part of the appeal record.

as attorney of record for the Trust. Fotoh's conduct in this regard does not merit a referral to the LPC.

REFERENCE TO THE PROPERTY PRACTITIONERS' REGULATORY AUTHORITY

[30] As mentioned, the evidence adduced in the court a quo suggested that the purchaser was introduced to the property by Bernard. It appears that he was an 'intern' as defined in s 2 of the Standard of Training of Estate Agents Regulations, 2008.¹² In terms of s 26 of the (since repealed) Estate Agents Act 112 of 1976, as amended, no person was permitted perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him. It would appear that the Estate Agents Board had issued an intern's certificate in respect of Bernard in his capacity as intern in the employ of Property Knight.

[31] It appears to us, prima facie, that the validity of a fidelity certificate issued to an intern is limited to the intern's activities under the auspices of the firm of estate agents identified on the certificate as the intern's principal. There was no evidence that Bernard held a fidelity certificate as an employee or intern of VR Group that stipulated for commission in the current case.

[32] Furthermore, the regulations imposed strict constraints on the ability of an intern to act as an estate agent, save under the direct supervision 'of a principal estate agent or of an estate agent who has continuously held a valid fidelity fund certificate issued by the Board for a period of not less than 3 years'.¹³ The regulatory

¹² Published in RGN R633 in GG 31125 of 4 June 2008.

¹³ Reg. 2(4) and (5).

provisions in question are directed at the protection of the public and it is therefore in the public interest that they be properly policed and enforced.

[33] The evidence left us in doubt as to whether Bernard and/or VR Group acted in compliance with these requirements and restraints in the transaction in issue in the current case. Matters that in law affected the entitlement of either of them to claim commission. We make no findings on these questions as they were not explored in the court *a quo*. It does, however, seem to us, on the evidence that was adduced in the proceedings before the magistrate, that they are questions deserving of investigation by the Property Practitioners' Regulatory Authority,¹⁴ which is the statutory successor to the erstwhile Estate Agents Affairs Board. We shall therefore direct that the Registrar forward a copy of this judgment to the Chief Executive Officer of the Authority for the attention of the Authority's Board.

In the result I make the following order:

1. The appeal is dismissed.
2. The appellant shall pay the fourth respondent's costs on appeal as between party and party.
3. The Registrar is directed to forward a copy of this judgment to the Chief Executive Officer of the Property Practitioners Regulatory Authority with reference to the issues identified in para 30-33.

¹⁴ Established in terms of s 5 of the Property Practitioners Act 22 of 2019, which came into operation with effect from 1 February 2022.

M. ADHIKARI

**Acting Judge of the High
Court**

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES:**Applicant's Attorney:****Mr F Moosa****Instructed by:****Moosa and Pearson****Respondents' Counsel:****Adv A Titus****Instructed by:****Fotoh and Associates**