

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 2006/26060

In the matter between:

FIRST REALTY (RANDBURG) CC

t/a CHAS EVERITT INTERNATIONAL PROPERTY GROUP

Plaintiff

and

JANET HUGO

Defendant

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MEYER, J

[1] The plaintiff's claim in terms of its particulars of claim is based on a sole authority to sell the defendant's immovable property and the breach thereof by the defendant. It is alleged that the plaintiff would have been able to effect a valid sale had it not been for the defendant's breach. Damages are accordingly claimed against the defendant.

[2] By agreement between the parties a separation and staying of the issue of the *quantum* of damages from all the other issues was ordered. Counsel were *ad idem* that the only issues that remain by the end of this trial are whether or not the defendant had given a mandate to the plaintiff, its terms and whether or not they were breached if it had been given.

[3] The plaintiff's representative, Ms. Ann-Marie Manuel, and the defendant, Ms. Janet Hugo, are the only witnesses who testified. It emerged from their evidence that Ms. Hugo was the owner of an immovable property situated at 35 Kessel Street, Fairland ('the Kessel Street property'). A certain Mr. Hartman Ries was the owner of a cluster unit situated at 114a, 11<sup>th</sup> Avenue, Fairland ('the 11<sup>th</sup> Avenue property'). Ms. Manuel, in the performance of a mandate that was given to the plaintiff by Mr. Ries, held a showday of the 11<sup>th</sup> Avenue property on Sunday, 2 October 2005. The land of the Kessel Street property was 2 974 square metres in extent, and Ms. Hugo had been looking for a smaller property for the past several years. Ms. Hugo accordingly attended and viewed the 11<sup>th</sup> Avenue property. She was interested, but she considered the asking price to be beyond her reach. Ms. Manuel and Ms. Hugo *inter alia* spoke about her Kessel Street property. Ms. Manuel told her that Mr. Ries might be interested in purchasing the Kessel Street property since he was a property developer and always on the look out for larger properties in the Fairland/Northcliff area that could be subdivided and developed.

[4] Negotiations aimed at Ms. Hugo purchasing the 11<sup>th</sup> Avenue property and Mr. Ries purchasing the Kessel Street property ensued over the next few days. Ms. Manuel took Mr. Ries to the Kessel Street property several times, either alone, or accompanied by his children, or a building contractor, or his wife, Mrs. Ronel Ries. The negotiations failed since the parties could not reach agreement on the selling prices of their respective properties. It is common cause that Mr. Ries wanted more for the 11<sup>th</sup> Avenue property than Ms. Hugo was prepared to pay. Ms. Hugo testified that he also tried to pay as little as possible for the Kessel Street property. Another factor that made this transaction unachievable was the plaintiff's insistence on a commission of a 5% plus VAT on the purchase price of each property. The result was Mr. Ries informing Ms. Hugo that he was no longer interested in the plaintiff's property; a souring of the relationship between Mr. Ries and Ms. Manuel to an extent that he terminated the plaintiff's mandate to further market the 11<sup>th</sup> Avenue property; Ms. Hugo informing Ms. Manuel that she was not prepared to pay the difference between the asking prices of the respective properties that she in terms of the final proposal was required to pay; and, apart from a telephone conversation the next day when Ms. Manuel asked her to reconsider the final proposal, the end of the dealings between Ms. Hugo and Ms. Manuel or the plaintiff.

[5] Within two weeks, Ms. Hugo viewed another property, a townhouse in Fairland, which was marketed by the estate agent, Elna Pieterse Property Consultant ('Elna Pieterse'). She made a written offer on this property which was

accepted. Once this transaction had been concluded successfully, the plaintiff, on 14 October 2005, gave an exclusive mandate to Elna Pieterse to find a purchaser for the Kessel Street property. On 26 October 2005, Mrs. Ries, through the estate agency of Elna Pieterse, offered to purchase the Kessel Street property for the total purchase consideration of R1, 9 million. Ms. Hugo accepted the offer on 7 November 2005. Ms. Hugo paid agent's commission to Elna Pieterse in a sum equivalent to 6%, inclusive of VAT, on the purchase price.

[6] The plaintiff, in its particulars of claim, avers that as a consequence of the sale through another agency, the defendant, Ms. Hugo, had breached the terms of her mandate agreement with the plaintiff. The mandate on which the plaintiff relies in its particulars of claim is a verbal one in terms whereof the defendant, during or about September 2005, appointed the plaintiff as her sole agent to find a purchaser for the Kessel Street property. Exhibit A.18 is a document headed 'mandate' and dated 2 October 2005, which is the same date as the date upon which Ms. Hugo viewed the 11<sup>th</sup> Avenue property. It records the giving by Ms. Hugo of a sole mandate for a period of ninety days to the plaintiff to procure a willing and able purchaser for the sum of R1, 850.00 for the Kessel Street property in exchange for the payment of a commission calculated at 7.5% plus VAT on the purchase price. Ms. Manuel testified that she wrote on this document what Ms. Hugo had said she would agree to. Ms. Manuel left the document with Ms. Hugo to sign and to return to her. It is common cause that Ms. Hugo never signed it.

[7] Ms. Hugo testified that she at the outset told Ms. Manuel that the asking price for the 11<sup>th</sup> Avenue property was outside her price range. She told her about the Kessel Street property, but made it clear to her that she had been looking for a smaller property for a few years, that she was not in a hurry to find one, and that she would only place her property on the market once she had purchased one. It was Ms. Manuel who suggested to her the possibility of an exchange or, according to her, in the words of Ms. Manuel a 'swop' of properties between her and Mr. Ries, which transaction would probably involve a payment of money by Ms. Hugo to Mr. Ries because of the unlikelihood that the properties were equal in value. Ms. Hugo indicated that she would consider such a transaction depending on the amount that she would be required to pay in terms of such a transaction. Once Mr. Ries had viewed the Kessel Street property, Ms. Manuel informed her that he was interested in such a transaction. The figures that Ms. Manuel presented to her as acceptable to him and the amount she was required to pay in were also acceptable to Ms. Hugo. But the figures which Ms. Manuel presented to her subsequently required her to pay a much larger sum, which she refused. Specifically on the issue of the mandate document on which the plaintiff relies, Ms. Hugo testified that the document was merely handed to her in circumstances where the giving of a mandate was not discussed fully and where Ms. Hugo was not near a point of making a decision whether or not to give a mandate for the sale of her property. Her property would not be for sale if the proposed transaction with Mr. Ries did not work out. She was not prepared to

place her property on the market until she had purchased another property. When the negotiations failed, she told Ms. Manuel that her property was off the market.

[8] Ms. Manuel generally did not inspire confidence on the witness stand. She became argumentative with counsel for the defendant, Adv. Williams; she was evasive on occasion; and she contradicted herself on material aspects. I need not elaborate on these since her version of the mandate that Ms. Hugo had allegedly given to the plaintiff and the terms thereof are improbable and inconsistent with the proven facts. It is refuted by the written account that she had given to the plaintiff's principal, Mr. and Mrs. Ries, at a time when Ms. Manuel probably had no reason to distort the facts just before the negotiations failed (exhibit A.7). In this letter she first sets out what corresponds to the evidence of Ms. Hugo of the two sets of figures or 'offers' that had been presented to her by Ms. Manuel. The second set of figures required Ms. Hugo to pay R140, 000.00 more than had been required of her in terms of the first set of figures. Ms. Manuel wrote that this was 'too expensive' for Ms. Hugo. It also appears clearly from this letter that the sales of the two properties were interlinked. But more importantly, Ms. Manuel informed the plaintiff's principal of the following:

'I have no mandate on 35 Kessel. I did not know what her bottom line was. Her home was not on the market!'

[9] The explanation proffered by Ms. Manuel under cross-examination that she used the incorrect wording and left the word 'written' out, in other words that what she meant was that she had 'no written mandate', is simply not plausible. This in any event does not explain why she also informed the plaintiff's principal that Ms. Hugo's home was not on the market. Although the evidence of Ms. Hugo can also be criticised in certain respects, her evidence on these issues is not only consistent with the account given by Ms. Manuel in this letter, but also with the undisputed facts. Suffice it to mention that Ms. Hugo did not sign the written mandate immediately or at any time after it had been given to her and I need to add that Ms. Manuel's evidence as to why it was not signed immediately is contradictory; Ms. Hugo did not allow Ms. Manuel or the plaintiff to market the Kessel Street property once the negotiations failed in respect of the 'swop' or exchange transaction; and she only gave a sole mandate to Elna Pieterse to find a purchaser for the Kessel Street property once she had purchased a smaller property. Ms. Manuel's version that Ms. Hugo had given a sole mandate to the plaintiff, her version of the terms of such mandate, and her version that they were breached by Ms. Hugo, is accordingly rejected.

[10] Adv. Heystek, who appeared for the plaintiff, submitted that a tacit contract of mandate should be inferred on the evidence of the defendant. Ms. Hugo allowed Ms. Manuel to find Mr. Ries as the purchaser for the Kessel Street property as part of a transaction in which she purchases the 11<sup>th</sup> Avenue

property. Such mandate, if it was one, was not performed by the plaintiff nor was it breached by Ms. Hugo.

[11] In the result the following order is made:

The plaintiff's action is dismissed with costs.

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P.A. MEYER  
JUDGE OF THE HIGH COURT

20 October 2009