

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 11226/2012

- (1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED Yes.

.....
DATE

.....
SIGNATURE

In the matter between

TOTAL AUCTIONEERING SERVICES AND SALES CC
t/a CONSOLIDATED AUCTIONEERS

PLAINTIFF

and

TRANSPACO SHEET EXTRUSION (PTY) LTD
t/a TERBO PLASTICS

FIRST DEFENDANT

SNAPSHOT INVESTMENTS 34 (PTY) LTD

SECOND DEFENDANT

J U D G M E N T

WEPENER J:

[1] In this action the plaintiff seeks payment of a sum of money which it alleges is owed to it by the defendant pursuant to an agreement of mandate. The plaintiff is a concern which, pursuant to mandates given to it, auctions property of parties supplying such mandates to the plaintiff to do so.

The Pleadings

[2] Before I deal with the evidence in the matter I set out the relevant portions of the pleadings, more particularly the allegations pertinent to the mandate.

[4] On or about 25 January 2012 and at or near Johannesburg, the Plaintiff, then represented by Mr Edidio Filipe Goncalves ("Chico") Da Silva and Mr Grant Stockdale, they being duly authorised thereto and the First Defendant, alternatively, the Second Defendant, then represented by Ilse Uys, the First Defendant's Project Manager, she being duly authorised thereto, and/or Louis Weinberg, he being duly authorised thereto entered into an Oral Mandate Agreement (the Agreement), in terms whereof, the Plaintiff was mandated, as the First Defendant / Second Defendant's auctioneer, to sell the Property by way of public auction.

...

[7] The material terms of the Agreement, whether express, alternatively implied, further alternatively tacit, included inter alia the following:

7.1 the Property was to be auctioned on 25 January 2012;

7.2 In the event that the Plaintiff caused the property to be sold unconditionally for a selling price in excess of R2 600 000.00 nett of commission, the First Defendant alternatively the Second Defendant would accept such selling price and would conclude an agreement of sale with the purchaser who offered such purchase price.

[8] Pursuant to the conclusion of the Agreement, the Property was auctioned on 25 January 2012, with the following secured offers being obtained by the Plaintiff on behalf of the First Defendant, alternatively the Second Defendant, at the auction and shortly thereafter:

8.1 an offer of R2,600,000-00 plus commission of R260 000-00, i.e. a total offer to purchase of R2,860,000-00;

8.2 an improved offer of R3,000,000-00 plus commission of R300 000-00, ie a total offer to purchase of R3,300,000-00, secured by the plaintiff of 27 January 2012.

[9] Such offers were communicated by the Plaintiff to the First Defendant.

[10] In breach, alternatively in repudiation of the Agreement (which repudiation the Plaintiff does not accept), on 30 January 2012, the First Defendant, alternatively, the Second Defendant, then represented by Louis Weinberg, a director of the Second Defendant:

10.1 orally declined the offers obtained by the Plaintiff as referred to in 8 above; and

10.2 orally advised the Plaintiff, that the Frist Defendant, alternatively, the Second Defendant had obtained an offer for R3,050,000-00 which offer, the First Defendant, alternatively, the Second Defendant had accepted.'

[3] These allegations were met by the defendants' placing in issue the first defendant's liability and alleging that the mandate was given by the second defendant in the following terms:

'2.2. The relevant and express, alternatively implied, further alternatively tacit terms of the agreement were the following:

2.2.1 The plaintiff would, on behalf of the second defendant, invite offers to the purchase of the immovable property being Remaining Extent and Portion 1 of ERf 74, Chamdor situate at 27 Chenik Street, Chamdor, Krugersdorp ("the immovable property"), by way of public auction to be held on the 25th of January 2012;

2.2.2. The second defendant would be entitled, but not obliged, to accept in writing any offer received at the said auction.'

The Evidence on behalf of the Plaintiff

[4] The plaintiff called three witnesses, Mr Da Silva, Mr Stockdale and Ms Pinto. Mr Da Silva, who is a member of the plaintiff and was the driving force behind the execution of the mandate to sell the immovable property, testified about the background of the matter and how it came about that the oral mandate to sell the immovable property came about. By virtue of my view of the quality of the evidence of Mr Da Silva, which I set out below, I summarise it briefly and not in detail.

[5] The first defendant, as owner of movable property mandated the plaintiff in writing during 2012 to auction movable property on 25 January 2012. All the terms of the mandate were reduced to writing and neither party experienced any difficulty in relation to this agreement between them.

[6] A few days prior to the auction it appeared that the immovable property of the second defendant could also be on the market. As a result of this the plaintiff's staff prepared certain for sale signs and advised prospective clients of the immovable property to be auctioned. When acting thus the plaintiff did not yet have a mandate to sell the immovable property. All the preparations to auction the immovable property were made without a mandate to sell it.

[7] Only on the morning of the auction is it said that Ms Uys, an employee of the holding company of the first respondent, orally agreed that the immovable property may be placed on an auction.

[8] The terms of the mandate were that if the plaintiff auctioned the immovable property for more than R2,6 million, the owner would sell it. This, in its terms, implies that the plaintiff would have earned a commission on the sale of the immovable property.

[9] Mr Da Silva testified that the auction realised R2,6 million. Thus, on any party's version the mandate was not fulfilled. However, Mr Da Silva stated that during the morning prior to the auction it was also discussed that the auction of the immovable property would be subject to confirmation. This meant that the owner could either accept or reject the price realised at the auction. I hasten to mention that the witnesses who testified on behalf of the defendants agreed that the putting up of the immovable property for sale was indeed subject to confirmation by the owner. I will deal with aspect more fully later.

[10] Mr Da Silva, however, added that the sale of the immovable property subject to confirmation by the seller also allowed the plaintiff to obtain improved offers during a seven day period during which the auction price was subject to confirmation. This was vehemently denied by the defendants' witnesses. It is this aspect of the evidence that needs careful consideration.

[11] It is common cause that within the period of seven days post the auction the plaintiff presented an offer in excess of R2,6 million to the defendant, but at that time the second defendant had accepted an offer for R3,1 million from another party.

[12] Before dealing with the remaining witnesses who testified on behalf of the plaintiff, I find Mr Da Silva to be a particularly untrustworthy witness. He contradicted his own evidence; he contradicted other witnesses who testified on behalf of the plaintiff; it was quite obvious that he failed to respond to questions adequately or properly.

[13] The reason for this latter fact was that he failed to listen to what was asked of him or was put to him. If anything was said by counsel he would go off on what can best be described as a tangent without listening or properly responding to the issue at hand. I have little doubt that having regard to Mr Da Silva's coming to conclusions without having regard to what was being said or asked, he is an untrustworthy witness in so far as the discussions between him and Ms Uys is concerned. Indeed, having regard to the deficiencies in his evidence it falls to be rejected.

[14] It is also noteworthy that the version that the plaintiff could supply further offers after the auction date to the second defendant and that the latter was obliged to accept it if the offer exceeded R2,6 million, is nowhere to be found in the pleadings. It does not appear in an email which Mr Da Silva sent to the defendant shortly after the auction, nor in a letter of demand to the defendant shortly thereafter. I will deal with the probabilities flowing from this omission below.

[15] The second witness on behalf of the plaintiff, Mr Stockdale, was not the party who concluded the so-called mandate agreement with the defendant. He did what a property marketing employee does, when told to do so by his employer i.e. prepare the documents necessary to put in a 'buyers pack' for prospective purchasers and to make known the fact that the auction of the immovable property would take place on the 25th of January 2012. He contradicts the evidence of Mr Da Silva in various respects. He confirms that

Ms Uys, who acted for the defendants, showed himself, Mr Da Silva and Ms Pinto a document which she said was an offer to purchase the immovable property. Although there is a dispute amongst the witnesses whether Mr Da Silva looked at the document or paged through it or read it, it is irrelevant. The fact is that the document contained an offer in excess of the R2,6 million. The witness could not explain why Ms Uys, on behalf of the owner, having an offer well in excess of R2,6 million would have agreed that the plaintiff would be successful in fulfilling its mandate if it received R1 more than R2,6 million.

[16] The witness further testified how he prepared the 'buyers pack' of documents and other signage in relation to the sale. Again, it is significant that all this homework was done without any mandate to sell the immovable property and the preparation in relation to the auction is consequently of no moment as it is common cause that no mandate to sell the immovable property existed prior to the 25th of January 2012. It is also noteworthy that Mr Stockdale went so far as to state that he laboured under the impression that the plaintiff had received a sole mandate to sell the immovable property from Ms Uys. This, of course, is completely incorrect and no such sole mandate existed. He testified that his view that his evidence that the plaintiff had this extended period to obtain higher offers than the R2,6 million and which would then oblige the owner to accept the offer, was based on his perception that a sole mandate was offered to the plaintiff. In this regard he stated that he believed that the plaintiff had a sole mandate to market the immovable property for a period of seven days.

[17] This term i.e. that the plaintiff could go from the auction and solicit further offers, according to Mr Stockdale, was only agreed to during the afternoon after the auction when Mr Da Silva announced so. This evidence contradicts Ms Pinto and indeed seems to be an afterthought by the witness in relation to the allegation that there was a period of seven days during which

the plaintiff could attempt to obtain higher offers which the owner of the property would be obliged to accept if higher than R2,6 million.

[18] In any event, Mr Stockdale testified that it was an announcement by Mr Da Silva. There is not a shred of evidence that Ms Uys accepted this belated announcement after the auction as part of the mandate to auction the immovable property subject to confirmation.

[19] In any event, this version that the seven day window period was declared by Mr Da Silva after the auction, was also a version proffered by Mr Da Silva in cross examination contrary to his evidence in chief. Such declaration after the auction, in my view, cannot form part of the alleged mandate.

[20] It becomes very clear that Mr Da Silva did not obtain a good enough price at the auction and that he was eager to see if he could do better and earn a commission. This does not elevate his eagerness to form part of the mandate given to him by Ms Uys prior to the auction.

[21] Having regard to the contradictions in his own evidence, which I do not tabulate and the contradictions between the witness and Mr Da Silva I will be reluctant to rely on any of his or Mr Da Silva's evidence in so far as it is contradicted by the witnesses of the defendant. It is noteworthy, however, that Mr Stockdale contradicts Mr Da Silva on the very issue in relation to the plaintiff's right to solicit higher offers during a period of seven days, which the owner of the building was then obliged to accept. This crucial contradiction, in my view, results in the fact that a court cannot place reliance on the evidence of these two witnesses in relation to the alleged oral mandate.

[22] The final witness called by the plaintiff was Ms Pinto. Ms Pinto contradicted Mr Stockdale. She contradicted Mr Da Silva in certain respects. On her version the purpose of the seven day window period was to allow the plaintiff to better the offer which was received at the auction. Her emphasis was on this aspect and not the fact that the sale at the auction would be subject to the confirmation by the owner thereof. She confirmed that when she met Ms Uys on Friday 20 January 2012, the only discussion was that a sale of immovable property would be subject to confirmation. She confirmed that Ms Uys produced an offer in writing by someone else which was referred to during the discussion prior to the auction. It was put to Ms Pinto that the written offer was for R2,8 million and there would be no reason for Ms Uys to say that it was an offer for R2,6 million and Ms Pinto agreed that she could not explain such strange conduct on behalf of Ms Uys.

[23] Ms Pinto contradicts both Mr Da Silva and Mr Stockdale and is a lone witness as far as the alleged mandate given to the plaintiff prior to the auction for a period of seven days is concerned. Plaintiff's and defendant's witnesses contradict her, the defendants' witnesses who did convincingly so if regard is had to the probabilities referred to below, including the case as pleaded.

Evidence on behalf of the defendant

[24] Mr Weinberg, a director of the first defendant, testified that he was aware that the movable property was to be auctioned on the 25th of January 2012. He was aware that Ms Uys had arranged for the auction to occur. He testified that the second defendant was the owner of the immovable property. He testified that he had received certain offers in relation to the immovable property. He testified that all final decisions in relation to the sale of the

immovable property had to be taken by a co-director or the chief executive officer, being a Mr Abelheim, who was at that time in Germany. He confirmed the evidence of Ms Uys that she could not enter into a mandate to sell the immovable property without authority from Mr Abelheim. Mr Weinberg confirmed that he was aware that there was a private buyer that would lead to a nett income for the seller of R2,66 million at the time when the meeting was held with Mr Da Silva shortly before the auction. Mr Da Silva mentioned that the immovable property could be put on auction subject to confirmation i.e. subject to the seller confirming the price obtained being acceptable. He denied that there was any discussion that the owner would sell the property if an amount in excess of R2,6 million was obtained at the auction or at a later date. He stated that he did not agree to such terms by virtue of the fact that the second defendant was in no hurry to sell the property; the second defendant already had a greater offer than R2,6 million in hand; and thirdly neither he nor Ms Uys had the authority to decide to sell the property without the sanction of the Mr Abelheim.

[25] Mr Weinberg confirmed that during the course of the next few days an offer for R3,1 million was received through an independent agent and that with the concurrence of Mr Abelheim that offer was accepted. He confirmed that the plaintiff also submitted a further offer during the next few days but that it was not accepted.

[26] Mr Weinberg made a good impression on me and no criticism was levelled against him and I am of the view that none can be levelled against him. His evidence was clear in every respect and I accept it without hesitation.

[27] The next witness was Ms Uys who testified regarding the written agreement to auction the movables. She stated that, shortly before the day of the auction, it was suggested that the immovable property also be auctioned

and that it was agreed that it could be done on the basis that it would be subject to confirmation. She further confirmed that whatever she agreed was subject to the approval of her chief executive officer, Mr Abelheim. She is borne out by her contemporaneous note sent to Mr Abelheim in relation to her dealings with the immovable property. It is clear that the contemporaneous note only states that the immovable property could be placed on auction subject to confirmation. The additional version, that the plaintiff could supply higher offers within a period of seven days and that that would oblige the defendant to sell the property, is nowhere to be found. She further confirmed the evidence of Mr Weinberg that at the time that the mandate was entered into on the morning of the 25th of January 2012, there was a higher offer than R2,6 million in her possession which would have ensured a higher income i.e. at least R2,66 million to the second defendant . She further confirmed that on the morning of the auction she saw the notice boards detailing the sale of immovable property at which she was surprised. Although this surprise, was argued to be out of place, I find the argument without merit. It is common cause that all the preparation to sell the immovable property on the auction was done without a mandate. The mandate was allegedly finally arrived at on the morning of the auction prior to the auction. It is only the terms of the mandate which are in dispute between the parties

[28] The witnesses were further all in agreement that the meeting prior to the auction was quick and short. No indepth discussion took place. They were all in agreement that Ms Uys had a document which she said contained an offer. For some reason the plaintiff wishes me to believe that she said it was an offer for R2,6 million only and that if the plaintiff obtained an offer in excess thereof, that the owner would sell the property. I will deal with the probability in relation to this aspect hereunder. All the witnesses agree that the sale of the immovable property was subject to confirmation by the owner. Ms Uys, like Mr Weinberg, denied that the seven day window period was for the benefit of the plaintiff to submit improved offers for the sale of the immovable property. Ms Uys, too, made a good impression on me and there is little, if any, criticism

against her evidence. I accept her evidence and prefer her evidence where it is in contrary to the evidence of the plaintiff's witnesses.

[29] Having stated what is said herein and having come to the aforesaid conclusion and preferring the evidence of the witnesses of the defendants, I find that the plaintiff's version that it had the seven day window period in which it could submit higher offers to the owner of the immovable property which it was obliged to accept, to be in conflict with the truth. In addition I am of the view that the probabilities in this matter favour the defendants and far outweigh any probability that may exist in favour of the plaintiff.

Probabilities

[30] There are a number of probabilities which favour the defendants' version. The first and foremost of these is the fact that the second defendant had in its possession a written offer to purchase in excess of R2,6 million or to put it in the way that the plaintiff wants me to believe, in excess of R2,6 million and R1. It would be inconceivable why Ms Uys would have granted the plaintiff a mandate to sell the immovable property for R2,6 million plus R1 while a written offer in her possession would have secured a much higher amount. None of the witnesses could explain this strange behaviour on behalf of Ms Uys and I find that it is not strange but indeed improbable that she would have finally given a mandate that the property could be sold if R1 more than R2,6 million was attained by the plaintiff whilst she had a written offer in excess thereof.

[31] A further probability is that it cannot be disputed and indeed it is common cause that Ms Uys was under obligation to obtain approval from Mr Abelheim, who was in Germany, before she could enter into any agreement

such as the mandate alleged by the plaintiff. That this is so is borne out by the email sent by her contemporaneously to Mr Abelheim at the time. Indeed Mr Da Silva was aware that Ms Uys had to obtain authority to enter into agreements at the auction for selling some of the larger movable items which were to be auctioned. He stated 'Obviously the principals are overseas in Germany. Should it be the case, under the new Consumer Protection Bill, we are mandated to maximise and get the best possible price for our client. We have given our client certain indicatives of what we believe the machines would achieve, but should it be the case that we do not achieve the relevant the market value on the relevant machines – the two major extruders – automatically we will reserve those machines, subject to confirmations within two hours.' Mr Da Silva was very much aware that it was highly improbable that Ms Uys could there and then take a decision regarding the immovable property without the principal in Germany agreeing thereto.

[32] It was the policy of the plaintiff to document its contractual provisions with sellers. This included standard agreements of mandate which had to be signed before the plaintiff proceeded with any auction. Such a document was indeed signed in relation to the movables. Mr Stockdale testified that a similar document in relation to the sale of the immovable property existed. This was not produced to show that it contained the disputed oral term. The defendant similarly had a policy to require written record of contractual provisions. This is borne out by the numerous emails between the parties and Uys requiring written quotations before she could obtain authorisation.

[33] It cannot be disputed that neither Ms Uys nor Mr Weinberg had authority to agree to the sale of the property. If that is so why would they have given authority that the property may be sold at the price alleged by the plaintiff without the authority from Mr Abelheim in Germany? It is common cause that Mr Abelheim approved the agreements in relation to the sale of the movables. I find it improbable that the parties did not know that Mr Abelheim

would have to approve the sale of an important asset such as the immovable property.

[34] Mr Weinberg testified there was no urgency to have the property sold and it was more sensible to 'test the waters' by putting the property up for sale at the reserved price to see what could be realised rather than to commit the defendant to a forced sale should the plaintiff realise R2,6 million plus R.1 As indicated above, this is an amount which is less than the amount of the offer second defendant had in hand.

[35] I have indicated that the contents of the pleadings, emails and letters which all occurred after the auction, are entirely inconsistent with the plaintiff's version. Indeed the plaintiff's version about the seven day window period when it had the sole right to bring offers higher than R2,6 million, I find to be an afterthought. Such a case is not apparent from its pleadings which I set out earlier.

[36] Additionally, if one has regard to the rules of auction and the agreement and conditions of sale, such are entirely inconsistent with the plaintiff's witnesses' understanding that the sale would be subject to confirmation but that a forced sale would take place should an offer of R2,6 million plus R1 be obtained. In both these documents the second defendant's unfettered discretion to accept or decline any offer is recorded.

[37] There is not a single document which supports the contention of the plaintiff that it had the right to solicit further offers after the end of the auction which according to the auction rules closed 'on the fall of the hammer'.

[38] The plaintiff's case, on the probabilities, must fail.

Consumer Protection Act 68 of 2008

[39] The first defendant also pleaded that pursuant to the regulations issued by the Minister of Trade and Industry pursuant to the Consumer Protection Act 68 of 2008, the auction of the immovable property did not comply with such regulations and was pursuant to the provisions of s 51(3) as read with s 51(1) of the aforementioned act, void.

[40] Having regard to the conclusions reached above it is not necessary to venture into this issue.

Counterclaim

[41] The plaintiff sued both the first and second defendants in the alternative as being the party who gave the oral mandate to it to sell the immovable property. It is quite clear from the evidence that the first defendant did not and could not grant to the plaintiff any mandate to sell the immovable property. I need say little further about this issue and it was conceded on behalf of the plaintiff that its claim, if any, lies against the owner of the immovable property, the second defendant.

[42] Not much turns on this issue by virtue of the conclusion reached by me above. However, this fact is only relevant regarding the first defendant's counter claim. It is common cause that after auctioning the movables of the first defendant pursuant to the written mandate given to it, the plaintiff retained

sums of money based on the allegation that the first defendant owed it a sum of money by virtue of the plaintiff having performed its mandate to sell the immovable property.

[43] The plaintiff was not entitled to withhold the money realised at the auction in relation to the selling of movable property save for its agreed costs and commission and was obliged to pay over the monies realised less its costs and commission to the first defendant. The withholding of a portion of the money on the basis that such was owed to it by the first defendant or seemed due to the successful performance of its mandate to obtain an offer in excess of R2,6 million for the immovable property, was based on an erroneous understanding of the facts and the law.

[44] The first defendant is accordingly entitled to judgment in its favour for the amounts withheld by the plaintiff. The parties were in agreement as to the amount owing pursuant to the plaintiff having paid certain amounts over to the first defendant and transferring the balance to be held in trust by the first defendant's attorneys.

Conclusion

[45] In all the circumstances the plaintiff's claim falls to be dismissed with costs and judgment is entered for the first defendant against the plaintiff as follows:

1. It is declared that:

1.1. The plaintiff is indebted to the first defendant in the amount of R277 088.04, together with interest:

- 1.1.1. On the amount of R227 088.04 at the rate of 15.5% per annum from 9 February 2012 to date of payment;
 - 1.1.2. On the amount of R68 400 at the rate of 15.5% per annum from 9 February 2012 to 18 July 2013.
- 1.2. The first defendant's attorneys are entitled to pay out to the first defendant the amount held in trust by them together with the interest accrued in respect of this amount;
2. The plaintiff is ordered to pay the first defendant the balance of the amount referred to in 1.1 above, after payment of the amount referred to in 1.2 above.
3. The plaintiff is ordered to pay the first defendant's costs of suit in respect of its counterclaim.

WEPENER J
JUDGE OF THE HIGH COURT

COUNSEL FOR THE PLAINTIFF: *Advocate L. Hollander*

APPLICANT'S ATTORNEYS: *Nowitz Attorneys*

COUNSEL FOR THE RESPONDENT: *Advocate A. De Kok*

RESPONDENT'S ATTORNEYS: *Fluxmans Inc*

DATES OF HEARING: 24 – 26 July 2013

DATE OF JUDGMENT: 1 August 2013