REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2013/08585

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

4/10/2013
DATE

SIGNATURE

In the matter between:

PAM GOLDING PROPERTIES (PTY) LTD Applicant

and

NKOSI, HOSEA J First Respondent

NDLOVU, DAIMOND HECTOR GUGULETHU Second Respondent

JUDGMENT

CHOHAN AJ:

INTRODUCTION

1. The applicant, an estate agent and holder of a valid Fidelity Fund certificate, seeks payment of a commission in the sum of R450 000.00, plus VAT, from the respondents who were the purchasers of an immovable property known as Portion 229 of the Farm Roodekrans 183 IQ, District Gauteng Province ("the property").

2. The claim for commission is premised on a breach by the respondents of an agreement concluded on 10 September 2012 ("the Ivory Palm agreement") and the cancellation of that agreement by the sellers and the consequent entitlement in terms of clause 9.3 of that agreement to a commission or brokerage fee.

3. Clause 9 of the Ivory Palm agreement reads as follows:

> *"9. **BROKERAGE***
>
> *9.1 The seller shall pay PGP's brokerage calculated at 6% of the purchase price plus VAT which brokerage shall be deemed to have been earned and payable on transfer or on cancellation in the circumstances contemplated in 9.2, 9.3 or 9.4.*
>
> *9.2 On transfer or on the date of cancellation by mutual consent between the seller and the purchaser, PGP may appropriate the deposit to meet its brokerage claim and if such deposit is insufficient or is held by the conveyancers, then the conveyancers are irrevocably authorised by the seller and the purchaser to appropriate the brokerage from funds held by the conveyancers and*

account to PGP.

9.3 If the sale is cancelled as a consequence of default by the purchaser, the purchaser acknowledges that he/she/it shall be liable to PGP for payment of the equivalent of the brokerage by way of liquidated damages without prejudice to the rights of PGP against the seller in terms of this agreement or otherwise.

9.4 If the agreement is cancelled as a consequence of default by the seller, the seller acknowledges that he/she/it shall immediately be liable to PGP for payment of the brokerage contemplated herein. Any legal costs incurred by PGP in enforcing its rights to brokerage against the seller and/or the purchaser shall be paid by the defendant party on the scale as between attorney and client.

9.5 The provisions of this clause and this selection of a domicilium citandi et executandi by the seller and the purchaser are inserted and are intended for the benefit of PGP."

4. The claim for a commission or brokerage fee is opposed by the respondents. A number of defences have been advanced in support of that opposition. They amount briefly to the following:

4.1. the applicant's claim is one based on a *stipulatio alteri* and because the applicant has failed to plead the necessary requirements relating to contracts for the benefit of third parties, the applicant has not established a cause of action and the

application accordingly falls to be dismissed with costs;[1]

4.2. the applicant ought to have joined the sellers of the immovable property and in the absence thereof, the application falls to be dismissed;[2]

4.3. the Ivory Palm agreement fails to comply with the provisions of the Alienation of Land Act 68 of 1981 ("the Alienation Act") in as much as the name of the sellers has not been properly described;[3]

4.4. the Ivory Palm agreement is void *ab initio* because the property sold thereunder was also the subject matter of another agreement where the sellers were the joint liquidators of Aquila Verreaux Guest House CC ("the Aquila Verreaux agreement");[4]

4.5. the Ivory Palm agreement was subject to the consent of the Master of the High Court or a resolution adopted by the court and as no consent by the Master or any resolution adopted by the court was adopted, the suspensive condition was not met and the agreement accordingly lapsed, alternatively as no allegation relating to the fulfilment of that suspensive condition was made in the applicant's founding affidavit, a case had not

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1 This is a defence that was not raised by the respondents in their answering affidavit, but was argued at the hearing of the application.
2 Answering affidavit: p 56, para 5.13
3 The sellers were described as the joint liquidators of Ivory Palm Properties CC (in liquidation) and the argument is that because no details were set out as to who the joint liquidators were, including their names and identities, the agreement failed to comply with the Alienation of Land Act 68 of 1981 and was thus void *ab initio*.
Answering affidavit: p 57, para 5.14
4 Answering affidavit: p 58, para 5.15

been made out by it for the relief sought;[5]

4.6. as a result of a representation by one Angelique Edwards, representing the applicant, that the property had been zoned for business when in fact it was not and was only zoned for consent use, the respondents were induced to conclude both the Ivory Palm and the Aquila Verreaux agreements[6] and had they known that the property was not zoned for business use, they would not have concluded either of the agreements;[7]

4.7. both the Ivory Palm and Aquila Verreaux agreements were inextricably linked and in the event of one of the agreements being null and void or having lapsed or having been cancelled, then the other would similarly be null and void, would have lapsed or would have been cancelled.[8]

5. I deal with each of these defences below.

THE *STIPULATIO ALTERI* DEFENCE

6. The *stipulatio alteri* defence was, as I have said before, not raised by the respondents in their answering affidavit. Counsel for the respondents submitted that there was no obligation on the part of the respondents to raise the alleged non-compliance with the requirements for establishing a contract for the benefit of a third party in the respondents' answering affidavit and that such a point could appropriately be taken at the hearing of the matter.

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5 Answering affidavit: p 67, para 22.2-22.3
6 Answering affidavit: pp 71-73, para 22.7-22.10
7 Answering affidavit: p 74, para 22.11
8 Answering affidavit: p 74, para 22.13

7. I do not necessarily agree. The purpose behind our rules is to ensure that parties are not taken by surprise. Far too often it has been said that litigation is not a game where advantages are to be scored by ambush. Issues having purely legal connotations should be identified (and not argued) in a party's papers so as to afford the other an opportunity of carefully considering the merits thereof. In my view, the *stipulatio alteri* defence ought to have been adequately raised by the respondents in their answering affidavit.

8. Nevertheless, and insofar as it has now been raised at the hearing of the matter, it is a defence that I proceed to address.

9. The high water mark of that defence is the apparent failure on the part of the applicant to have expressly stated that its claim for commission is based on a contract for the benefit of a third party. That of course presupposes that the applicant's claim is indeed a claim that arises by virtue of a contract concluded between two parties and which is designed to enable a third party to enter into a contractual relationship with the other of the two parties.[9]

10. In the present instance, the contract is in fact a tripartite contract. It is signed, not only by the sellers and the respondents, but also by the applicant. Clause 9 of the agreement specifically contemplates the payment of a commission to the applicant by either the sellers or the respondents depending on the circumstances. The Ivory Palm agreement is thus not a contract for the benefit of a third party. The third party, being the applicant is very much a party to the agreement itself. In the result, the

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[9] Crookes N.O. v Watson 1956 (1) SA 277 (A) 291

respondents' reliance on a *stipulatio alteri* is misplaced and the obligation to plead its requirements misconceived.

11. But in any event, and even if I am wrong as to the legal nature of the Ivory Palm agreement, it is quite clear from the respondents' answering affidavit that they read the terms contained in the agreement (as they have initialled a number of places in the agreement) and would no doubt have thus appreciated that a commission or brokerage fee would be payable to the applicant should that agreement be cancelled as a result of their breach.

12. Moreover, it is not only an express acceptance of the benefit contained in the Ivory Palm agreement that is required. Such acceptance may well be inferred from conduct.[10]

13. In this regard, the respondents negotiated the conclusion of the Ivory Palm agreement with a representative of the applicant, namely Ms Edwards. The Ivory Palm agreement is itself signed by the applicant and if one has regard to the signature contained thereon, that signature appears to be Ms Edwards' signature, as is evident from a cursory analysis of the confirmatory affidavit deposed to by Ms Edwards on 28 August 2013. It is highly unlikely that the benefit conferred to the applicant was not accepted by it and that the respondents would not have known thereof and in particular of the applicant's entitlement to recover a commission or brokerage fee in circumstances where the agreement is cancelled because of a breach by the respondents.

14. In my view, the *stipulatio alteri* defence therefore fails.

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[10] Jurgens Eiendomsagente v Sharé 1990 (4) SA 664 (A)

THE NON-JOINDER DEFENCE

15. This defence was premised, as I understood the argument, on the fact that the applicant in its notice of motion sought an order confirming that the brokerage or commission may be paid from monies retained by it in its trust account, together with an order that the payment of the remaining balance of the deposit received from the respondents be paid to the sellers of the property.

16. In the course of argument, the applicant abandoned both such prayers and in the circumstances, there is no further need to consider this defence. Predicated as it was on the relief sought by the applicant, it too must fall away.

THE NON-COMPLIANCE WITH THE ALIENATION ACT DEFENCE

17. The respondents contend that because the Ivory Palm agreement does not reflect the individual names and identities of the joint liquidators (the sellers of the property), the agreement fails to comply with section 2 of the Alienation Act.

18. In my view, this defence too has no merit. The seller has been adequately identified as the joint liquidators of Ivory Palm Properties CC (in liquidation). The names of the joint liquidators are easily identifiable and have in fact been identified in the certificate of appointment attached by the applicant as annexure "R2" to its replying affidavit.[11]

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[11] See Coronel v Kaufman 1920 TPD 207 at 209-210; Van Wyk v Rottcher's Sawmills (Pty) Ltd 1948 (1) SA 983 (A) at 990-991

THE SAME PROPERTY/CONFUSION DEFENCE

19. The respondents argue that because both the Ivory Palm and Aquila Verreaux agreements contemplate the sale of the same property[12], there is confusion and ambiguity resulting in the Ivory Palm agreement being null and void.

20. The applicant contends that the Aquila Verreaux agreement is not an agreement for the sale of the property as Aquila Verreaux Guest House CC was not even the owner of the property. It contends that the second agreement is void *ab initio* for want of compliance with the Alienation Act.[13]

21. It is true that the Aquila Verreaux agreement[14] relates to the purchase of the property that is also the subject matter of the Ivory Palm agreement. A standard offer to purchase appears to have been utilised by the applicant, but the copy that has been attached to the respondents' answering affidavit has not been signed by either the seller or by the applicant.[15] *Ex facie* the two agreements, it would appear then that the same property is being sold by two different sellers. But that appearance is more apparent than real, because the respondents themselves acknowledge that they made an offer to the joint liquidators of Ivory Palm Properties CC (in liquidation) in respect of the property itself and that they made a further offer to the joint liquidators of Aquila Verreaux Guest House CC (in liquidation) for the purchase of the business.[16] The respondents understood the Aquila Verreaux agreement to relate to the sale of the business and not to the sale

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[12] The seller being two different parties.
[13] Replying affidavit: p 115, para 40-41
[14] Answering affidavit: annexure "C"
[15] Answering affidavit: p 90
[16] Answering affidavit: p 71, para 22.7

of the property.

22. The absence of any evidence that the Aquila Verreaux agreement was signed by either the applicant or the seller is likewise significant. All that the respondents contend is that on 10 September 2002 they concluded two written agreements titled *"OFFER TO PURCHASE"* and that they are not in possession of any signed copy of the Aquila Verreaux agreement.[17] They do not suggest that the offer was in fact accepted by the seller and the applicant does not confirm that such offer was accepted by the seller or indeed signed by it.

23. In these circumstances, the presence of the Aquila Verreaux agreement and the fact that it refers to the same property being sold as that in the Ivory Palm agreement, is a red herring and does not avail the respondents. The Ivory Palm agreement does not, by reason of that fact alone, become null and void.

THE SUSPENSIVE CONDITION DEFENCE

24. The Ivory Palm agreement was subject to the consent of the Master of the High Court or resolutions adopted by the Court.[18]

25. Such consent by the Master was in fact provided on 11 July 2012.[19]

26. Although annexure "R1" refers to Portion 22 of the Farm Roodekrans (and not Portion 229 of the Farm Roodekrans), it is apparent that the omission of the figure *"9"* is nothing more than a typographical error. There is no suggestion that any other property was being sold by the liquidators of Ivory

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[17] Answering affidavit: p 62, para 16.1
[18] Answering affidavit: p 66, para 22
[19] Replying affidavit: annexure "R1", pp 126-128

Palm Properties CC.

27. The respondents contend nevertheless that even if the suspensive condition had been fulfilled, reference thereto should have been made by the applicant in its founding papers and that in the absence thereof, no case had been made out by the applicant and for that reason alone the application should be dismissed with costs.

28. It is however important to bear in mind that the requirement or obligation to have paid a deposit in terms of the Ivory Palm agreement, was not subject to any consent being obtained by the Master or any resolutions adopted by the Court. In terms of clause 2.1 of the Ivory Palm agreement, the sum of R1 000 000.00 had to be paid within seven days of the agreement being signed by the sellers and it is common cause that the full amount of R1 000 000.00 had not been paid by the respondents within that period. The condition (if it is truly a condition) thus relied upon by the respondents is more of a resolutive condition than a suspensive condition and, in those circumstances, it was not incumbent upon the applicant to have referred to the consent by the Master in its founding papers.

THE MISREPRESENTATION DEFENCE

29. The respondents contend that they would not have concluded the Ivory Palm agreement had they been told that the zoning in respect of the property was only for consent use and not for business use.

30. Those allegations have been denied by the applicant in reply.[20]

31. In amplification however, the applicant appears to have misunderstood the

[20] Replying affidavit: p 121, para 69

gravamen of the misrepresentation complaint. That is because greater emphasis was placed in the reply to the denial that Ms Edwards had ever represented to the respondents that the Aquila Verreaux agreement was for the sale of the property.[21] No response was furnished by the applicant relating to whether the property was zoned for business or consent use. But equally so, no substantial proof was furnished by the respondents that the property was in fact zoned for consent use and not business use.

32. The question that then arises is whether or not the respondents' claims that they were misrepresented as to the business rights of the property is a genuine *bona fide* dispute and, if so, whether it is capable of resolution on motion proceedings?

33. Admittedly, it is not a version that was advanced by the respondents prior to the answering affidavit being filed. Thus this is not one where the applicant could have anticipated a dispute of fact and one where motion proceedings should not have been proceeded with.[22]

34. However, , I am unable on paper to say that the defence is impalpable or untenable. The allegations go wider than a mere negligent misrepresentation and in fact the contention is that Ms Edwards intentionally and deliberately misled the respondents into believing that the property was zoned for business use when on their version it was not.

35. This is accordingly an instance where a referral to trial is, in my view, appropriate.

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[21] Replying affidavit: p 122, para 74

[22] Contra Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1978 (4) SA 696 (T); Sewmungal & another N.N.O v Regent Cinema 1977 (1) SA 814 (N); Trust Bank van Afrika Bpk v Western Bank Bpk en andere N.N.O 1978 (4) SA 281 (A)

36. I accordingly propose to refer the issue relating to the misrepresentation defence to trial as opposed to oral evidence, primarily because the defence has wide reaching implications and because neither of the parties have had the benefit of addressing me on a referral to oral evidence and which witnesses ought to be available for examination and/or cross-examination. I would accordingly be loath to impose upon them directions as to who may or may not be called as witnesses.

37. Although neither of the parties have sought a referral to trial on this aspect, I am of the view that I may in my discretion *mero motu* order a referral to trial when it is appropriate in the circumstances.[23] The circumstances are such that any other order would not be in the interests of justice.

THE INEXTRICABLE LINK BETWEEN THE IVORY PALM AGREEMENT AND THE AQUILA VERREAUX AGREEMENT

38. The respondents contend that both the Ivory Palm and Aquila Verreaux agreements are inextricably linked and that a finding that either of the agreements is void or illegal or has been cancelled will, of necessity, result in the other suffering a similar fate.

39. This proposition of course presupposes the existence and validity of the Aquila Verreaux agreement and because no signed copy of the Aquila Verreaux agreement has been furnished and because the applicant itself has not confirmed the validity of that agreement, it is a defence that is stillborn.

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[23] The question as to whether or not a court has the power to order a reference to trial *mero moto* has been described as one *"not free from difficulty"* by the Supreme Court of Appeal and has not yet been decided by that court. See Minister of Land Affairs and Agriculture v DNF Wevell Trust 2008 (2) SA 184 (SCA) at 207E; Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd 2008 (4) SA 325 (SCA) at 340D-E

40. But in any event, neither of the agreements contain any reference to the other and other than the respondents' *ipse dixit* on the link between the two agreements, there is nothing to warrant the conclusion that they were linked or that a failure of one agreement would result in the failure of the other.

41. It would seem to me moreover that, insofar as the respondents rely on the misrepresentation defence as having also induced them to enter into the Ivory Palm agreement, there is no real need for them to rely on any link between the two agreements. The link was raised in order to afford the respondents an opportunity to escape the consequences of the Ivory Palm agreement. But that link is unnecessary if the misrepresentation defence is successful. If it is not, then the link does not assist the respondents in any event for the reasons already mentioned.

42. For these reasons, I would likewise reject this defence.

CONCLUSION

43. In light of my views regarding the respondents' misrepresentation defence, I make the following order:

43.1. a determination of the respondents' misrepresentation defence as set out in paragraphs 22.7 to 22.11 is referred to trial;

43.2. the applicant's notice of motion shall stand as a simple summons and the respondents' answering affidavit shall stand as a notice of intention to defend;

43.3. the applicant is to deliver a declaration within 30 days from the

date hereof;

43.4. the Uniform Rules of Court pertaining to trial actions shall thereafter apply;

43.5. the costs of this application are to stand over for later determination.

M A CHOHAN
ACTING JUDGE OF THE HIGH COURT

HEARD: 30 SEPTEMBER 2013

DELIVERED: 4 OCTOBER 2013

COUNSEL FOR APPLICANT:	B M HEYSTEK
INSTRUCTED BY:	KG TSERKEZIS INC
COUNSEL FOR RESPONDENTS:	S RESS
INSTRUCTED BY:	LP SKOSANA ATTORNEYS

(jmt.4.6.13)