REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CONSOLIDATED CASE NUMBER: 40775/11

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

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SIGNATURE **DATE**

In the matter between:

LIBERTY GROUP LIMITED PLAINTIFF

and

E.B. BOTES DEFENDANTS

F. VILJOEN

T. TAGGART

L. BERGH

L. KOOPMAN

JUDGMENT

WINDELL J:

Introduction

[1] This judgment relates to five separate, but inter-related actions, in which judgment is sought against the defendants. The plaintiff is Liberty Group Limited, trading as Liberty Life, a company which conducts business as life insurers. The defendants are all experienced insurance agents. During September 2009 to December 2009, the defendants were headhunted to join the Liberty Group. They all joined Liberty and were each paid a lump sum for the loss of their second year income at their previous company.

[2] A couple of months after the defendants joined Liberty, they terminated their employment contracts with Liberty as they felt that Liberty did not fulfill its promises. The plaintiff now claims the return of the lump sums for the loss of their second year income and commissions earned during their employment with Liberty. The plaintiff's claim is based on an agency agreement. ("the agency agreement")

[3] Defendants denied that they concluded the agency agreement and pleaded that they entered into a completely different agreement ("the Schedule"). The defendants alleged that the Schedule was the only true agreement between the parties. The defendants also instituted counterclaims against Liberty for losses suffered as a result of Liberty's failure to make good on their promises.

[4] It is common cause that the central issue between the parties is the following: Is the agency agreement as alleged by plaintiff the contract between the parties or is the Schedule as alleged by the defendants the contract between the parties?

Background

[5] In the particulars of claim the plaintiff alleged that the defendants concluded the agency agreement (that included an addendum) with Liberty, when they joined the company. The material terms of the agency agreement are the following:

1. The defendants were appointed as agents.

2. The defendants' remuneration is commission based.

3. Any commission paid in advance shall be repayable on termination of the agency agreement.

4. If any of the premiums paid in respect of a contract are returned to the policy holder for any reason whatsoever, or is a premium on a contract remains unpaid for 60 days and the contract has lapsed, the defendants shall return the commission in respect of such contract.

5. Liberty and the defendants may terminate the agreement at any time for any reason.

6. The agreement is the entire agreement between the parties and may only be amended or modified in writing signed by both parties.

7. The agency agreement cancels and replaces all prior agency agreements or any such like agreements and supplementary agreements, if any.

[6] The defendants were all experienced insurance agents that left their previous employer to join Liberty. Liberty averred that the addendum to the agency agreement was therefore specifically drawn up to make provision for the lump sum payable to the defendants. Liberty alleged that the defendants agreed to the following additional terms in the addendum:

1. The addendum supplements the terms and conditions set out in the agency agreement.

2. Liberty shall pay the defendants a retention fee subject to the following terms and conditions:

a) 50% of the retention fee shall be paid within 10 days of the opening of an accounting code.

b) The remaining 50% will be paid on the first, second and third anniversary of the date of signature of this addendum.

c) The amounts are subject to tax.

d) In the event of the main agreement or addendum beieng terminated, then all amounts paid to the defendants under this addendum and the main agreement shall immediately become due and payable in full.

e) It is expressly recorded that the defendants are paid the retention fee for the loss of second year and annuity income from other sources.

[7] In their plea the defendants denied all the averments in the summons. In addition, defendants pleaded a totally different agreement (the Schedule) which it alleged was concluded between them and Liberty, who at the time was represented by Ms. Fendick. They pleaded that it was agreed that the defendants would terminate their employment with the previous employer and take up employment with Liberty. It was further agreed that Liberty will pay a lump sum together with an annual payment for a three year period, an annual income, a secretarial allowance , an own office consultant allowance and a pension fund contribution calculated on the annual income. The defendants alleged that Liberty failed to perform and meet its obligations in terms of this agreement and the defendants therefore terminated the employment relationship.

***Locus standi* and cession.**

[8] The plaintiff sues as cessionary in respect of cessions concluded between the plaintiff and Liberty Active Limited, Capital Alliance Limited and Rentmeester Assurance Limited as cedents. The defendants admitted that the plaintiff trades by the name of Liberty Life Group but disputed that it conducts the business of a Life Insurer and that it is duly registered with the provisions of the Long Term Insurance Act 52 of 1998. The defendants also disputes that Liberty Active Limited, Capital Alliance Life Limited and Rentmeester Assurance Limited ceded their respective claims against the defendants to the plaintiff.

[9] Plaintiff provided copies of the Certificate issued by the Registrar of Companies confirming the plaintiff's name as Liberty Group, its registration number and the date of registration. CIPRO certificates were also provided for Rentmeester Assurance, Capital Alliance Life and Liberty Active. Plaintiff also provided the cession agreements.

[10] The evidence relating to the CIPRO certificates and cession were not disputed during cross examination and no evidence was given by defendants to counter the

evidence of the plaintiff. The parties agreed at the outset that all documents were what it purported to be without admitting the contents thereof. I am satisfied that the plaintiff has the necessary locus standi and that the claims from Liberty Active limited, Capital Alliance Life Limited and Rentmeester Assurance Limited were ceded to the plaintiff.

Evidence

[11] Mr. Oosthuizen, the manager at the Talent Acquisition Centre at Liberty, was the sole witness in the case. He testified that Ms. Fendick was instructed to "headhunt" experienced financial advisors. The five defendants were recruited by Ms. Fendick. Information was gathered on each of the defendants and in order to persuade the defendants to join Liberty, a document (the Schedule) was prepared for each defendant setting out figures that included a lump sum offered to the defendants based on previous performance. Ms. Fendick was authorized to explain the offer contained in the Schedule to the defendants. The Schedule made provision for an upfront payment, a further annual payment every year for 3 years, a secretarial allowance, an own office allowance and pension fund contribution. It also provided for target PCR's (production credits). It also indicated a possible income if the targets were met. Targets would be met by selling new products or enhancing existing products. It specifically stated that the figures were illustrative and that the contract will reflect the final numbers. Ms. Fendick did not have the authority to enter into any contract with the defendants or to amend Liberty's standard agency agreement. The Schedule was merely for illustrative purposes and did not constitute an agreement.

[12] Mr. Oosthuizen testified that after the offers contained in the Schedules were accepted, the defendants entered into the standard agency agreement and the addendum that was specially designed for the experienced agents. It was only after the agency agreements were signed that Liberty was able to register the agents on Liberty's FSB register and open their commission code. Liberty also had to remove the defendants from their previous employer's FSB register. Only then did Liberty pay the defendants the lump sums contained in the addendum to the agency agreement.

[13] The defendants were also paid a secretarial allowance and an office allowance retrospectively. This was paid after the defendants complained that it was promised to

them when they joined Liberty. The allowances were calculated by taking into consideration a factor of their actual sales during a month. The addendum to the agency agreement did not contain the allowances as reflected in the Schedule, as these benefits were standard to all Liberty consultants and the addendum only provided for the extra remuneration the defendants would receive.

Legal principles

[14] Before dealing with the legal principles and the evidence, I want to say a word or two about the pleadings. It is clear that the defendant's plea in this case was not a confession and avoidance - a confession that they had signed the contract but was not bound by its terms. The defendant's plea was a bare denial of the agency agreement. The plaintiff sought further particulars to prepare for trial but was not given any particulars.

[15] It is trite that a person alleging a contract must prove the terms of the agreement which he seeks to enforce. The defendants did not plead an additional term to an existing contract but a totally different contract from the one the plaintiff relied upon. The *onus* of proving the agency agreement therefore rested on the plaintiff and the *onus* of proving the Schedule rested on the defendants. The plaintiff called one witness, Mr. Oosthuizen to prove the agency agreement and the defendants closed their case without calling any witnesses.

[16] The defendants did not produce any evidence to proof that the Schedule was the contract between the parties. The statements made during cross examination are not evidence. Mr. Oosthuizen specifically testified that Ms Fendick did not have the authority or mandate to conclude a contract with the defendants. Her mandate was limited to the recruitment of experienced financial advisors. She recruited the defendants and was authorized to explain the offer to them, which was contained in the Schedule. He testified that the Schedule was not the contract between the parties and was only for illustrative basis. The Schedule specifically states that the contract will reflect the final numbers.

[17] The defendants stated during cross examination that it was an implied term and/or a tacit term of the agreement concluded with Fendick, that the lump sum for the loss of second year commission would not be paid back in the event of termination

of the agreement. This was never pleaded and there is no evidence to substantiate this allegation. I am satisfied that the defendants did not prove that the Schedule was the agreement between the parties. There is also no evidence in support of the counterclaim and the counterclaims are dismissed.

[18] The question is if the evidence of Mr. Oosthuizen proved the existence of the agency agreement, or to put it differently; if his evidence constitutes *prima facie* evidence as to the existence of the agency agreement.

[19] Mr. Oosthuizen testified that he was not present when the contracts were signed but is aware of the fact that the all the defendants concluded agency agreements with Liberty. If they did not conclude the agency agreement they would not be on Liberty's FSB register and would not have been paid the lump sums or commissions. After perusing the agency agreements, Mr. Oosthuizen testified that it appeared from the contents that Ms. Odendaal signed on behalf of the plaintiff. He also testified that he cannot confirm the defendants' signatures but that it appears as if the five defendants signed the agency agreement and the addendum.

[20] *Prima facie* evidence as pointed out by Stratford JA in *Ex parte Minister Of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 478 is :

> *"Prima facie evidence, in its more usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence."*

[21] If the *prima facie* evidence or proof remains unrebutted at the close of the case, it becomes "sufficient proof" of the fact or facts (on the issues with which it is concerned) necessarily to be established by the party bearing the *onus* of proof. In *R v Mantle 1959 (1) SA 771 (C) ,* Bloch J, in considering the meaning of the words '*prima facie* evidence', stated the following:

> *"Prima facie evidence" in its customary sense is not merely "some evidence". It must be of such a character that if unanswered it would justify men of ordinary reason and fairness in affirming the question which the party upon whom the onus lies is bound to maintain'."*

[22] In *Senekal v Trust Bank of South Africa Ltd 1978 (3) SA 375 (A)* it was held that the inquiry is whether at the end of the case the *prima facie* evidence afforded had been so disturbed, as to prevent it becoming sufficient proof. Miller JA stated at page 383 B-C that a court is entitled , when considering that question, to take into account that the defendant closed his case without having led any evidence whatsoever.

[23] In *Union Government (Minister of Railways*) v *Sykes* 1913 AD 156 at 176, it was held that less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would otherwise be required.

[24] The defendants did not deny during cross examination of Mr. Oosthuizen that the signatures on the agency agreement and addendum belonged to them. They also never expressly disputed during cross examination that they entered into the agency agreement and the addendum to the agency agreement. This information was readily available to the defendants. The defendants' failure to admit or deny the signatures and the agency agreement is suspicious especially in light of the fact that one of the defendants, Mr. Eben Botes, admitted in his resignation letter that there was an offer made to him and that he signed "the contract". As was pointed put by Jansen JA in *Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A)* at 39G-H, the failure of the respondent to reply or lead evidence in rebuttal of a fact peculiarly within his knowledge is taken into account when one decides whether a *prima facie* case has been made out.

[25] In *Hasselbacher Papier Import and Export (Body Corporate) and Another v MV Stavroula 1987(1) SA 75 (C)* it was found that it is proper to put the failure to deny into the scale before one decides that a *prima facie* case has been established. To hold otherwise would have the effect of making the inference to be drawn from the failure redundant. Burger J stated at p 79-80 that :

> *"The respondent's failure to reply does not by itself prove the applicants' case; this fact must obviously be taken with the evidence provided by the applicants together with such considerations as to whether the relevant information is or is not readily available to the applicants or the respondent. In the Galante case cited by Jansen JA supra the requirement was that, if there are two reasonable alternatives, the adverse inference can then be drawn in favour of the plaintiff. In*

> *the present case one could hardly speak of two alternatives unless one regards the absence of control as an alternative; possibly one should rather say that, if the applicant has shown that according to all the information available to him it is a reasonable possibility and that there are no facts to the contrary, then the Court is entitled to hold that a prima facie case has been established if the respondent has failed to place a denial on record when it could easily do so. As was aptly pointed out by Wigmore in the passage referred to above, to hold otherwise would tend to obscure the truth and create an artificial situation. In fact a respondent would adopt the attitude: 'It may be correct what you say, but you can't prove it.'*

[26] I believe Oosthuizen and I accept his evidence. In the absence of any evidence to the contrary, there is no reason why the Court should not accept that the defendants concluded the agency agreement and the addendum with the plaintiff. In my opinion in the light of the evidence and the pleadings, the *prima facie* case has ripened into proper proof. The whole tenor of the cross-examination was directed to create a suspicion that the parties also entered into another agreement with Liberty. The defendant did at his own peril refrain from giving or leading evidence to counter the *prima facie* proof of the existence of the agency agreement between the plaintiff and the defendants. A court should be loath to retreat into a formalism which provides an escape route to a party which no longer considers it expedient to abide the agreement. See *Owner of the MV "Snow Crystal" v Transnet Ltd t/a National Ports Authority [2007] 2 All SA 416 (C)*.

[27] In terms of the agency agreement and addendum thereto the plaintiff is entitled to the return of the lump sums and the commissions earned.

Quantum

[28] The plaintiff and the defendants agreed on the following amounts in the event of the plaintiff proving the agency agreement.

a) Mr. L. Bergh: Upfront payment: R 294 897.77. Commission : R 75 805.58
b) Mr. T. Taggart: Upfront payment: R 287 713.55. Commission : R 116 487.27
c) Mr. E.B Botes: Upfront payment: R 321 706.66. Commission : R 103 111.16
d) Mr. F. Viljoen: Upfront payment: R 375 429.99. Commission: R 20 105.56

e) Mr. L. Koopman: Upfront payment: R 482 559.98. Commission: R 30 619.32

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

1. Judgment is granted against L. Bergh in the sum of R 370 703.35 with costs. Interest payable at 15, 5 % per annum from date of service of summons to date of final payment.
2. Judgment is granted against T Taggart in the sum of R 404 200.82 with costs. Interest payable at 15, 5 % per annum from date of service of summons to date of final payment.
3. Judgment is granted against E.B Botes in the sum of R 424 817.82 with costs. Interest payable at 15, 5 % per annum from date of service of summons to date of final payment.
4. Judgment is granted against F. Viljoen in the sum of R 395 535.55 with costs. Interest payable at 15, 5 % per annum from date of service of summons to date of final payment.
5. Judgment is granted against L. Koopman in the sum of R 513 179.30 with costs. Interest payable at 15, 5 % per annum from date of service of summons to date of final payment.

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L.WINDELL

Judge of the South Gauteng High Court

Attorney for the Plaintiff : RC Christie Incorporated
Counsel for Plaintiff : Adv. C.D Roux
Attorney for defendants : Renee S Naidoo Attorneys
Counsel for defendants : Adv. V. Garvey
Date matter heard : 16 February-17 February 2015
Judgment date : 27 March 2015