IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A61/15

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED. ✓

23/8/16
DATE

SIGNATURE

23/8/2016

In the matter between:

HAFFENDEN GROVES (PTY) LTD **APPELLANT**

AND

SAMTOY CC **RESPONDENT**

JUDGMENT

Fabricius J,

1

This is an appeal against the order made in the Court a quo by Makhubele AJ on 14 April 2014, leave to appeal having been granted.

2.

Plaintiff in the Court a quo trades as an estate agent.

It pleaded in the Particulars of Claim that Defendant, represented by Brebner, orally gave Plaintiff, represented by Van Eyssen, a mandate to find a purchaser for Defendant's property being Portion 8 and 9 of a certain farm, at a selling price to be negotiated by Defendant and a purchaser and to be accepted by Defendant. This mandate was given on 3 June 2011.

3.

It was further pleaded that during that period, Defendant instructed the Plaintiff to concentrate on selling the West portion. In August 2011, Defendant required this portion to be marketed at R 7, 650, 000.

4.

On 20 October 2011, Plaintiff introduced Van Rooyen to this fact, as it was pleaded.

5.

On 27 October 2011, and at the residence of Brebner, Defendant requested Plaintiff to pursue the said Van Rooyen who had viewed the West Farm about a year earlier, but had not been satisfied with the price.

6.

On 17 April 2012, defendant sold the property to a company of which Van Rooyen's son, R. A. van Rooyen, had been the only director, for R 8, 800, 000.

7.

It was alleged that Plaintiff had been the effective cause of this sale and was thus entitled to commission of 7.5%.

Accordingly, R 660, 000 was claimed.

8.

In essence, apart from surrounding circumstances, Defendant pleaded that it had instructed Van Eyssen to find a willing and able buyer for the West portion. Plaintiff then demanded an exclusive mandate for a certain period, which was granted. A copy of this contract was annexed to the Plea. It was pleaded that this contract would replace all others ('A').

9.

Plaintiff could not fulfil this mandate. As a consequence, and on 27 October 2011, a second written contract of mandate was concluded, Annexure 'B' to the Plea.

10.

Defendant further pleaded that during June 2011, Defendant Brebner, via e-mails, forwarded details of the relevant farm to P. van Rooyen. Brebner was also approached directly by R. A. van Rooyen to purchase the farm. R van Rooyen then warranted that he was not introduced to the property through auspices of an estate agent.

11.

It was admitted that the property was sold as alleged by Plaintiff. Neither Van Eyssen nor Plaintiff, were the effective cause of this sale, and accordingly liability to pay commission was denied.

12.

The relevant trial ensued and the record of the proceedings comprises 10 Volumes of some 1020 pages.

13.

The learned acting Judge a quo made a particularly detailed and careful analysis of all the evidence and found in favour of Plaintiff.

14.

I do not intend to repeat the detailed evidence, the crux of which is contained in the Pleadings, and of which all details appears in the 55 page written judgment.

15.

The crux of Defendant's case is that the general oral mandate had not been given, that P. Van Rooyen had visited the farm previously and had never lost interest, and that the particular written mandates had not been fulfilled and had in fact lapsed by effluxion of time.

16.

No separate value for each portion of the farm had been proven and accordingly the Court a quo had erred in making an order based on a general oral mandate.

17.

In my view no material error of fact or law made by the Court a quo exists, or has been shown. The surprising feature of this case is rather the following and I quote from the record:

"COURT: Mr Uys, can I understand? You are saying Mr Brebner will say there was no mandate to sell, an oral mandate, because Mr Van Eyssen says there was an oral mandate to sell and then there was the exclusive...that exclusive mandate for two weeks that expired and then it was replaced by the non-exclusive mandate.

MR UYS: Correct, My Lady.

COURT: Which one is Mr Brebner agreeing to?

MR UYS: Mr Brebner says to me, My Lady and I am willing to concede that it is a legal conclusion.

COURT: Yes.

MR UYS: That is why we pleaded, we say there was this instruction, there was this meeting. So I am willing to say though individuals, natural persons, they did not know what the legal consequences are, but the legal consequences that there was a mandate prior to the exclusive mandate... [intervene].

COURT: There was a mandate?

MR UYS: It must be the legal conclusion.

COURT: Yes.

MR UYS: I am consenting to that. But what happens here, is this oral mandate is actually is actually irrelevant, because that is what Mr Brebner said. He said to him, focus on selling the West farm, I am giving you a mandate to sell the West farm. Then he signed the exclusive mandate to sell the West farm. Then he signed the non-exclusive mandate also to sell the West farm.

The reason why this becomes important is Your Ladyship would have noted, the commissions that they are claiming for are for both farms, not only for the West farm. That is why they do not want to move away from that.

So what I am putting to the witness and I am giving him an opportunity to respond. I am saying, he, that is Mr Brebner, his understanding was that when they signed the exclusive mandate, he had given to Mr Van Eyssen and AJ Estate Agents... the only mandate that existed between them was that first exclusive mandate.

COURT: To sell the West portion?

MR UYS: To sell the West portion only.

COURT: And there has never been a mandate to sell the whole farm, that is what you are saying?

MR UYS: He said he gave... prior to that... [intervene].

COURT: Can you put to the witness so he can answer?

MR UYS: I am putting to you... [intervene].

COURT: What Mr Brebner will testify about the mandates.

MR UYS: Yes. Mr Brebner will testify about the mandates, that he gave you the information about both farms, he concedes that. He said that you never discussed the commission. He says that he gave you all the information but he understood

that, until prior 3 July, he had given you a mandate to seek or source a willing and able buyer. --- For the whole farm.

Yes. His understanding is, that on 3 July when he sent you that email, he changed your mandate, he changed the instruction. You had a mandate to sell the West farm and you agreed to it. --- The reason that we signed the non-exclusive... the exclusive mandate in September, was Mr Terreblanche had asked me to secure the farm for two weeks, so that he could look into the finer details for... [indistinct] irrigation. But in the event he wanted to buy the East portion, he would... Mr Brebner will entertain the whole offer.

Mr Brebner says his understanding is when the non-exclusive mandate lapsed, he gave you that further mandate. You asked him listen here, our mandate had lapsed, please give me a further mandate and he gave you a further mandate only in respect of the West farm. ---

Push the farm, sell the farm, sell the farm.

COURT: What is being put to you, is ... if you do not agree say I do not agree. ---

Yes.

Is that Mr Brebner gave you the mandate to sell the whole farm, but that was changed to the West portion by that exclusive mandate, right? So when he gave you the exclusive mandate, it actually cancelled that first mandate to sell the whole farm. He said to you, now I want you to sell the West portion. When that expired and he gave you the non-exclusive mandate, that was with regard to the West portion. Just say I do not agree or I agree. --- No, I do not agree that Mr Brebner cancelled our original mandate.

He did not? --- Our original mandate stood to sell the whole farm.

MR UYS: But it was changed like you conceded? --- It was changed, the reason why I asked Mr Brebner for the two week mandate, because Mr Terreblanche had requested that we secure the farm for two weeks so that he could look into the finer details which is the irrigation and hopefully in the two weeks' time come with an offer to purchase the farm.

COURT: And you say that... I think we have made the point, Mr Uys. He says the non-exclusive is actually for the whole farm, that is his version. --- That is correct.

18.

Any reasonable reader of these passages would then have expected the evidence of Brebner, who was in Court. He was however not called as a witness, although he was obviously the only person who could give evidence about the relevant mandate and its scope and Plaintiff's role in the context of price discussions. The Court a quo was therefore correct in holding that Plaintiff's evidence must be accepted in the absence of other factors relating to improbability or lack of credibility. No such exist herein. Many material common cause facts also supported Plaintiff's case, who met Brebner on a number of occasions to discuss the latter's preference to sell the whole farm, amongst others. The high price compared to other similar properties in the area also played a role.

19.

The failure to call Brebner in these proceedings is in my view fatal to Appellant's case. He was Defendant's representative during all discussions about a mandate. He was the only one who could dispute Plaintiff's version. I agree with Plaintiff's

Counsel that an adverse inference can justifiably be made against Defendant's whole case. It would be an error however to have confined Brebner's evidence to the question of the terms of a mandate only.

See: ***The South African Law of Evidence, D. T. Zeffert and Others, 5TH Edition, page 136.***

20.

At the hearing of the appeal, Appellant's Counsel accepted that Plaintiff's version as to the mandate should be accepted. Only the issue of the effective cause of the sale was argued. Mr T. Potgieter SC on behalf of Respondent, called this turn-around "astounding". He submitted that the evidence was clear and that the Court a quo had correctly dealt with the line of causation, using the common sense approach.

See: ***Aida Real Estate v Lipschitz 1971 (3) SA 871 WLD at 873 H and 874 A - D.***

I agree. The farm was bought through Plaintiff's auspices when the price had been in the right range, and when this had come to the knowledge of the purchaser, which it undeniably did. Although Mr J. Maritz SC on behalf of Appellant, conceded

that Plaintiff's evidence regarding the general mandate was to be accepted, this does not mean that Brebner's evidence, or rather the absence thereof, becomes irrelevant.

There are a number of important considerations:

20.1 It, on the common sense approach, cannot be a mere co-incidence that the farm was purchased once the price had been reduced;

20.2 Brebner was repeatedly told by Plaintiff, that the purchase price was too high, having regard to a number of other objective facts;

20.3 Brebner asked Van Eyssen to "pursue" Van Rooyen, even if he had known about the existence of the farm and its initial high price;

20.4 There is no evidence that Brebner and P. van Rooyen were in negotiations throughout, and that Plaintiff's activities or role had no effect on the ultimate sale whatsoever;

20.5 The "trigger" of the sale was the price reduction as clearly put by Defendant's Counsel, Mr Uys, during the trial (Vol. 5 p. 521 – 522). This also appears from other objective facts;

20.6 On that version Mr Brebner would almost as a matter of certainty have had to make that concession.

21.

Apart from the above considerations, Appellant's problem is that the trial Court was steeped in the atmosphere of the trial. It made detailed findings of fact and impressions.

It has consistently been said that any appellate Court is very reluctant to upset the findings of a trial Judge. A conclusion will only be reversed if the Court of appeal is convinced that it is wrong. If there is a mere doubt, the correctness will be upheld.

See: ***R v Dhlumayo 1948 (2) SA 677 AD.***

These dicta apply to civil proceedings as well.

22.

The result is that the findings of the Court a quo cannot be disturbed.

The appeal is dismissed with costs including the costs of two Counsel.

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

I Agree

JUDGE E. MOLAHLEHI

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

I Agree

JUDGE T. MOOSA

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

Date of judgment: