

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)**

CASE NO: 81695/2017

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

31 January 2022

DATE



SIGNATURE

In the matter between:

JACQUELYN ANN HARDMAN

PLAINTIFF

And

WAREHOUSE FINDER CC

(Registration number: 2011/053559/23)

DEFENDANT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her

secretary. The date of this judgment is deemed to be 31 JANUARY 2022.

JUDGMENT

COLLIS J

INTRODUCTION

[1] On or about December 2014, the plaintiff who acted personally and the defendant duly represented by Mr Craig Cooper entered into a written contract for the employment of the plaintiff by the defendant as a property broker.¹

[2] In terms of this agreement the plaintiff was responsible for facilitating the conclusion of transactions between buyers and sellers or landlords and lessees, as the case may be, for which she was in turn remunerated on the basis of commissions earned on the transactions she was responsible for their conclusion.

ISSUES IN DISPUTE

[3] In the present action, the Plaintiff as an estate agent/broker has instituted action against the defendant (*her previous employer*) in respect

¹ Index 01 Annexure B

of outstanding commission in respect of claim 2 and 3 that she alleges is due to her on the basis that she successfully brokered these agreements.

[4] If this court finds that she has successfully brokered these agreements, then it is further required to determine the amount of the commission due to her.

COMMON ISSUES

[5] As per the Joint Practice Note filed between the parties, the following issues are listed as common cause issues between the parties:²

5.1 That the plaintiff is an estate agent and the holder of a valid Fidelity Fund Certificate;

5.2 that the plaintiff and the defendant entered into the employment agreement as set out in the Particulars of Claim;

5.3 that it is further common cause that the plaintiff brokered the agreements pleaded in the Particulars of Claim and that all the suspensive conditions contained in such agreements were complied with;

5.4 that the defendant has received compensation from all the clients in respect of the agreement brokered by the plaintiff.

² Joint Practice Note Index 06 p 06-1 to 06-4 dated 3 August 2021.

[6] In order for this court to determine the issues in dispute, the pleaded case of the parties and the terms contained in the contract of employment becomes relevant.

[7] In this regard the plaintiff's pleaded case per paragraph 4 is instructive and is quoted hereunder for ease of reference:

4.

'THE EMPLOYMENT AGREEMENT ('THE AGREEMENT'):

On or about December 2014 and at Pretoria, the Plaintiff who acted personally and the Defendant who was duly represented by Mr. Craig Cooper entered into a written contract of employment, a copy of which is annexed hereto as ANNEXURE "B". The material, express and/or implied tacit terms of the contract of employment were as follows:

4.1 The Plaintiff will be employed by the Defendant as a property broker;

4.2 The date of commencement of employment as a broker will be 8 December 2014 (clause 4);

4.3 The contract of employment shall commence on the commencement date, as set out above, and continue for an indefinite period unless terminated in terms of clause 8 of the agreement (clause 6);

4.4 The agreement may be terminated by either party on 2 (two) weeks written notice to the other during the first year, whereafter the

agreement may be terminated by either party on 4 (four) weeks written notice (clause 8.1);

4.5 The Plaintiff will perform all of the tasks reasonable required of a property broker, including but not limited to finding buying and sellers, listing properties, matching the requirements of buyers and sellers and facilitating the conclusion of transactions;

4.6 'Transaction' means the conclusion of an unconditional, valid and binding agreement of sale or lease between a Buyer and a Seller, or a lessor and a lessee, as the case may be, in respect of a commercial, industrial, retail or any other property, in terms of which the Employer is entitled to receive Commission;

4.7 To obtain new clients for the Defendant;

4.8 Maintaining existing relationships with client through client visits, telephone contact and participating in marketing exercises (clause 10.2);

4.9 As remuneration for the services to be rendered by the Plaintiff, the Defendant will pay the Plaintiff commission in accordance with clause 12 of the agreement (clause 11.2);

4.10 Commission in respect of a lease agreement will become due once the lease agreement is concluded and all suspensive conditions (if any) in respect of the lease agreement are fulfilled (clause 11.4);

4.11 In respect of a sale agreement commission becomes payable:

4.11.1 On the last day of the month, following the transfer of a property and the successful conclusion of a transaction;

4.11.2 As long as the Defendant has been paid the commission by the seller;

4.12 On a proper interpretation of the employment agreement commission in respect of a lease agreement becomes payable when the commission in respect of the lease agreement is paid by the relevant lessor;

4.13 Payment of the remuneration, nett of all statutory deductions and other deductions as authorized by the Plaintiff, shall be made into a bank account at a financial institution of the Plaintiff's choice on the last day of each month, payable in arrears (clause 11.8);

4.14 The statutory deductions referred to in paragraph 11.1 of the contract of employment includes withholding tax, SITE and PAYE, UIF and the other deductions that the Defendant is required to make by law (clause 11.9);

4.15 Stock or buyers, listed by an agent or broker other than in clause 12.1 and 12.2 of the contract of employment will qualify the Plaintiff that initiated the listing for a listing fee as follows:

4.15.1 The Plaintiff will earn 12.5% of the commission received by the Defendant;

4.15.2 The Plaintiff that adds new stock as a result of an edit shall be entitled to a listing fee pertaining to a new stock listed as a result thereof (clause 12.5);

4.15.3 The Defendant shall at all times retain no less than 50% of the commission received by the Defendant;

4.15.4 The remaining 50% shall be paid to the employee or broker involved in the deal as afore stated (clause 12.7).

4.16 If the Plaintiff resigns from employment or if the agreement is terminated in accordance with clause 8 above or for any other reason the Plaintiff shall be entitled to any commissions that became due to him up to the date of termination. This commission will subsequent be paid when it becomes payable.'

[7] In paragraph 4.16 the plaintiff pleaded the following as to when commission is payable upon resignation, namely that:

'If the plaintiff resigns from employment or if the agreement is terminated in accordance with clause 8 above or for any other reason the Plaintiff shall be entitled to any commissions that became due to him up to the date of his termination. This commission will subsequently be paid when it becomes payable.'

[8] Insofar as the percentage of commission payable to the plaintiff is concerned it pleaded in paragraph 5.1 as follows:

'On or about January 2017 and at Centurion, the Defendant (duly represented by Mr Cooper) initiated an incentive of the Plaintiff's commission from 50% to 60% subject to the plaintiff achieving her targets set for 2017.'

DEFENCES

[9] The Defendant in its plea admitted paragraphs 4, 4.1 to 4.5 in their entirety but denied what was pleaded by the plaintiff in paragraph 4.6 of her Particulars of Claim.³ In essence it was the defendants' pleaded case that the contract of employment distinguishes when commissions are due and when commissions are payable and as pleaded by the defendant, the plaintiff would only be entitled to be paid commission on a transaction, if both these requirements have been satisfied.⁴

[10] In addition it was the defendant's plea that a commission becomes due if all the suspensive conditions of the transaction are fulfilled, but only becomes payable if the transaction is ultimately successfully concluded and the defendant has actually been paid the commission by the client/customer. This is specifically provided for in clause 11.4 of the contract of employment i.e that commissions became 'due' once all the suspensive conditions in terms of a 'Transaction' are fulfilled.⁵

[11] As for when payment of the remuneration is to take place, the contract of employment specifically provides that remuneration is to be paid to the plaintiff in terms of clause 11.2 of the employment contract in accordance with clause 12 below.⁶

³ Defendant's Plea Index 01-13 p 01-53 to 01-65

⁴ Defendant's Plea Index 01-13 para 6.3 p 01-54

⁵ Annexure A p 32 clause 11.4.

⁶ Annexure A p 32 clause 11.2.

[12] In this regard the defendant in paragraph 7.3 pleaded as follows:

‘Properly construed, commission is only payable by the defendant to the plaintiff for a transaction. A transaction in turn is clearly defined as a completed transaction, being one where the suspensive conditions are fulfilled then the transaction is concluded, and the defendant’s fee for the transaction is actually paid into the bank account of the defendant.’

[13] In paragraph 7.4 it is further pleaded:

‘In short, the obligation of the defendant to pay commission to the plaintiff only arises when all these prerequisites are fulfilled.’

[14] In paragraph 10.3 the defendant further pleaded what will transpire regarding the payment of commission if a situation arises when the employee resigns. The relevant paragraph reads as follows:

‘In the case of resignation, and in terms of clause 12.9, the plaintiff would only become entitled to commissions actually due to her up to the date of termination of employment. In line with the provisions of the agreement referred to above, this would only be for completed transactions, namely where the fee payable by the client has actually been paid into the bank account of the defendant. This is amplified by the reference to clause 11.5, in the text clause 12.9 itself, which refers to actual payment being made to the employer (the defendant).’

[15] In paragraph 10.4 the defendant went further to plead that:

‘The defendant accordingly pleads that properly construed, the plaintiff is only entitled, if she resigns, to commission that are actually payable to her as at date of termination of employment.’

[16] It is also relevant to set out what was pleaded, by the defendant relevant to the issues that this court was called upon to decide. In paragraph 11 the defendant pleaded the following:

‘11.1.....

11.2 In terms of clause 27.1 of the agreement, any amendments of the agreement will only be valid if reduced to writing and signed by the parties.

11.3.....

11.4 The plaintiff has failed to make out a case that these amendments were reduced to writing and signed by the parties. As such, it would not be valid and cannot form the basis of any claim brought by the plaintiff.’

RELEVANT TERMS CONTAINED IN THE AGREEMENT CRUCIAL TO DETERMINING THE DISPUTED ISSUES

[12] The underlying contract of employment contains the following relevant terms for the adjudication of the dispute between the parties.

[13] In this regard clause 11.5 provides that commissions are only payable on the last day of the month following the transfer of a property and the successful conclusion of a Transaction, as long as the employer has been paid the commission by the seller.

[14] Furthermore, clause 2.1.6 provides that the commission earned on a transaction is paid to the defendant, and not the plaintiff as broker.

[15] In addition clauses 12.6 and 12.7 provides that the commission paid on a Transaction is shared between the defendant and the plaintiff on the basis of 50% each, subject to the proviso that the defendant shall at all times retain no less than 50% of the commission.

[16] Furthermore, clause 12.8 provides when a 50% commission share will not apply. The first instance is where the broker goes on leave and hands his deal to another broker who then concludes the deal. Secondly, and of direct relevance *in casu*, is the case where the employment of the employee (broker) terminates.

[17] Clause 12.9 of the underlying contract of employment further provides that the employee shall only be entitled to any commission that become

due to him up to the date of his termination in accordance with clause 11.5 above.

[18] The contract of employment defines in clause 2.1.15 the phrase 'termination date' as follows: *Termination date* is defined as meaning the date on which the employee ceases for any reason to be employed by the employer.

[19] Finally, the employment contract contains a provision that the contract itself is the entire contract, and any amendment of the employment contract will only be valid and binding if its reduced to writing and signed by both parties.⁷

EVIDENCE

[20] In the present action the plaintiff instituted action in respect of three claims. Claim 1 being the Reviva Lease agreement, Claim 2 for the Blue Array Lease Agreement and Claim 3 for the Liberty Food Lease Agreement.

[21] Before this Court, only claims 2 and 3 was to be determined, as on 7 February 2018, the plaintiff obtained Summary Judgment in respect of claim 1.⁸

⁷ Annexure B p 39 clause 27.1.

⁸ Indexed Bundle 01-19 p 01-103

[22] The plaintiff gave evidence that prior to the events giving rise to this matter in August 2017, she had a dispute with the defendant's management, and in particular the manner in which the CEO, Mr Craig Cooper was conducting aspects of the business.

[23] In this regard she consulted her attorneys for legal advice. Around 3 August 2017, she was presented with a notice to attend a disciplinary enquiry on two misconduct charges, the one being for conduct detrimental to the maintenance of good working order and / or bringing the company name into disrepute, and the other for gross insubordination and / or gross insolence.⁹ The enquiry was scheduled for 7 August 2017.

[24] In anticipation of the scheduled disciplinary hearing she consulted with her employment law attorney and referred an unfair labour practice dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act on 4 August 2017.

[25] She did not want to go through with the disciplinary hearing, as she believed the outcome would be pre-determined. She also indicated that she did not want to continue with her employment with the defendant.

[26] As a result of this she instructed her attorneys to approach the defendant for a possible settlement for three reasons. She did not want to

⁹ Indexed Bundle-Trial 04 p 45 – 46.

participate in the disciplinary hearing, neither did she intend pursuing her dispute with Cooper. She also wanted to ensure that she was to be paid her commissions that she believed she had earned and was due to her.

[27] This resulted in her attorneys approaching the defendant with a possible settlement of the continued employment relationship between the parties and to prevent further litigation of disputes emanating from the employment relationship.¹⁰

[28] It was proposed that the plaintiff resigns voluntarily, instead of going through the disciplinary hearing. It was, however stated, that the resignation is tendered with the proviso that the plaintiff received a written undertaking that her commissions in respect of the Blue Array and Liberty Foods transactions payable in the 'normal course of business', would be paid.

[29] To this proposal, the defendant replied on 4 August 2017 as follows: 'We agree to accept Jacquelyn Hardman voluntary resignation on the following conditions'¹¹ The conditions listed were that the defendant would honour the commissions due to the plaintiff 'as per her employment contract', provided she does not correspond, influence or attempt to move a number of clients specifically listed for a period of 12 months from signature, she withdraws the CCMA case, and that she honours the restraint

¹⁰ Index Bundle 04- 5.

¹¹ Index Bundle 04-2 to 3.

in her employment contract. It was stated that if this was not agreed to, the disciplinary hearing would proceed on 7 August 2017.

[30] Subsequent thereto, her attorneys addressed further correspondence to the defendant wherein they formulated restraint undertakings which the plaintiff undertook to commit to.¹² They also recorded that it be agreed that the plaintiff would be entitled to commission payments for Blue Array, Reviva and Liberty Foods, in the specific amounts set out in the letter. It was stated that if the defendant agreed to and accepted these proposals, the plaintiff would voluntarily resign and withdraw the CCMA referral.

[31] Another response was received from the defendant on the same day which stated that only the Rand value commission for Blue Array and Reviva Technology was accepted, but the Liberty Foods amount was not accepted as the defendant did not know the final commission at the time. It was also stated that the plaintiff would be paid as soon as the monies reflected in the defendant's business account.¹³

[32] These exchange of correspondence then ultimately culminated in the conclusion of a settlement agreement, recorded in a letter drawn up by the plaintiff's attorneys, and signed by both parties on 7 August 2017.¹⁴ It provided for restraint undertakings given by the plaintiff, the defendant

¹² Index Bundle 01-40 to 41.

¹³ Index Bundle 04-6.

¹⁴ Index Bundle 04-10 to 11.

acknowledging that the plaintiff is entitled to commission payments for Blue Array and Reviva Technology in the amounts stated, but where it came to Liberty Foods there was only an acknowledgment of an 'endeavour' to pay commission at a 60/40 split in terms of her contract of employment. In terms of the settlement, the plaintiff withdrew the CCMA referral and resigned with immediate effect.

[33] The plaintiff thereafter resigned on 7 August 2017,¹⁵ and she immediately started employment with 5th Avenue Properties the following day. This new employer was a direct competitor of the defendant in the exact same area as she previously serviced whilst employed with the defendant.

[34] It is common cause that eventually a dispute arose, with regards to the settlement agreement concluded between the parties as the plaintiff took up employment with 5th Avenue Properties, and proceeded to advertise four commercial properties of previously existing clients of the defendant,¹⁶ which the plaintiff conceded she knew was also clients of the defendant. This the defendant considered as a breach of the restraint undertaking provided by the plaintiff in the settlement agreement which ultimately resulted with the plaintiff's attorneys giving notice on 13 September 2017 that the settlement agreement was cancelled.¹⁷ All this

¹⁵ Index Bundle 04-12.

¹⁶ Index Bundle 04-14.

¹⁷ Index Bundle 04-22.

evidence was either confirmed by Mr Cooper when he testified, or either not challenged by him.

BLUE ARRAY AND LIBERTY FOOD TRANSACTIONS

[35] It was common cause that the landlord in the Blue Array transaction paid the commission invoiced by the defendant, to the defendant on 29 August 2017.

[36] It was also common cause that the commission in respect of the Liberty Foods transaction was paid by the landlord on 6 October 2017 and that both these payments in respect of these transactions were brokered by the plaintiff but paid to the defendant after the employment of the plaintiff was terminated with the defendant and in the case of the Liberty Foods transaction only after the settlement agreement had also been cancelled.

[37] As the defendant had failed to pay the plaintiff her commission, which she alleges was payable to her, she then elected to issue summons against the defendant on 1 December 2017.

[38] As previously mentioned it is trite that parties, will be held to their respective pleaded cases and any evidence presented before a court, should be presented in support of their pleaded cases.

[39] Furthermore, as the dispute between the parties emanates from a contractual relationship entered into between the parties, and in the alternative on a settlement agreement concluded between them, this court must first consider the evidence presented before it as against the terms agreed to between them in their contract of employment, alternatively on the terms agreed to in the settlement agreement.

THE QUESTION THAT THEN BEGS AN ANSWER IS WHEN WAS THE COMMISSION PAYABLE IN RESPECT OF CLAIM 2 AND CLAIM 3?

[40] As it is common case from the evidence presented that the plaintiff brokered the transactions in respect of claim 2 and claim 3, as mentioned in paragraph 13 *surpra*, it clearly stipulates, when commission on the two claims in terms of the contract of employment becomes payable. This much was also pleaded by the plaintiff in paragraph 12.4 of her Particulars of Claim, and was indeed the evidence presented to her during her testimony.

[41] In this regard she gave evidence that when she resigned from the employment of the defendant, she would be entitled to commissions 'due' up to the date of termination, and the commission would be subsequently paid over to her when it was paid by the landlord to the defendant.¹⁸ In this regard clause 11.4 of the employment contract reads as follows:

"Commission will become due once all suspensive conditions in respect of a transaction are fulfilled."

¹⁸ Index Bundle 01-9 para 4.16.

[42] As to when commission which became due, would become payable, the contract further provides in clause 11.5 as follows:

"Commissions become payable:

11.5 On the last day of the month following the transfer of a property and the successful conclusion of a transaction; as long as the Employer has been paid the Commission by the Seller."

[43] On behalf of the defendant it was argued that the case sought to be advanced by the plaintiff in court was that no payment by the landlord was necessary for commission to be payable to her by the defendant. This however, was not the evidence presented by the plaintiff nor was it testified to by the defendant, i.e that irrespective of the landlord paying the defendant, that the defendant was still required to pay the plaintiff her commission she earned.

[44] On behalf of the plaintiff it was argued, that there can be no question that prior to her resignation, the plaintiff's commission in respect of both the Blue Array as well as the Liberty Foods transactions became due albeit that payment was deferred once same was received by the defendant from the respective landlords. This much Mr Cooper conceded.

[45] In respect of the two transactions in question, it is common cause that this occurred on the 29th of August 2017 and the 5th of October 2017 respectively.

[46] Mr Cooper, however, testified that when a property broker employee resigns after commission has become due but before it has become payable (i.e before the full commission is received by the defendant from its client), such a property broker would forfeit his right to any commission.

[47] This testimony on the forfeiture of the commission upon resignation of an employee is, however, not provided for in the contract of employment. Furthermore, there is nothing in the express terms of the contract of employment that suggests that the plaintiff (or any property broker) would forfeit commissions that became due prior to resignation but only paid after termination and then automatically forfeited by the property broker.

[48] In the absence thereof the plaintiff must be given the benefit, as we now know that the defendant firm has been paid the commission in respect of transactions successfully brokered by the plaintiff.

THE NEXT QUESTION TO BE ANSWERED IS WHAT PERCENTAGE OF COMMISSION SHOULD BE PAID TO THE PLAINTIFF.

[49] The answer to this question is also provided for in the contract of employment concluded between the plaintiff and the defendant. In this regard as mentioned clause 12.9 is of relevance.

[50] It is common cause between the parties that commission is earned on the successful conclusion of a transaction and the fulfilment of all its suspensive conditions and that commission is first paid to the defendant by a lessor and then in turn paid over to the employee.

[51] The defendant firm will then share the commission with its employee/brokers, but keeps at least 50% of the commission paid over to it. This is specifically provided for in clause 12.6 of the contract of employment.

[52] As mentioned in the contract of employment, commission is 'payable' at the end of the month in which the payment of the commission was made into the bank account of the employer.

[53] In this regard it was the evidence of the plaintiff that albeit that the contract of employment for commission earned was set to be 50% on the successful completion of a transaction that an agreement was reached between herself and Mr Cooper that in circumstances where she had met

her target for 2017, that she would be paid a 60-40% split of the commission paid by the landlord to the defendant firm.

[54] Mr Cooper's testimony in this regard as mentioned was that this was entirely at his discretion and that this incentive could be revoked at any time.

[55] The agreement of a 60-40% split in commission is not specifically provided for in the contract of employment. This the parties were in agreement with.

[56] On behalf of the defendant the argument on point that was presented by counsel, was that in order for the plaintiff to be awarded a 60-40% split she should have pleaded either a rectification or variation to the wording of clause 12.9.1 in order to succeed with her claims, as clause 27.1 specifically permits an amendment or variation to be in writing.

[57] This argument I agree with as the contract of employment does not contain a clause where a percentage of more than 50% commission was ever agreed upon between the parties.

[58] In the absence thereof, the plaintiff at best will be entitled to received 50% of the commission paid in respect of the Blue Array and Liberty Food transactions.

[59] In the decision SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) 766D-H the following was stated: "An employment contract specifically provides that any variation of the employment contract is not valid and binding unless agreed to in writing and signed by both parties."

[60] This argument is further supported by the reasoning employed in *Brisley v Drotzky* where the SCA held:¹⁹

'.... parties may validly agree in writing to an enumeration of their rights, duties and powers in relation to the subject-matter of a contract, which they may alter only by again resorting to writing....'

[61] Given the conspectus of evidence presented before this Court, I must therefore conclude as follows:

61.1 That the contract of employment concluded between the parties provided for the employee/broker to be paid 50% for every successfully brokered transaction;

¹⁹ 2002 (4) SA 1 (SCA) at para 89 – 90.

61.2 that the plaintiff prior to her termination date had successfully brokered the Blue Array and Liberty Food transactions, which 50% commission fell due to her;

61.3 that the defendant's firm was paid its commission, in respect of these two transactions and that upon payment into the account of the defendant firm that this commission then became payable to the plaintiff, irrespective of her having left the employment of the defendant prior thereto.

[62] To hold otherwise would be absurd as it will mean that any employee who would have successfully brokered a transaction and has not yet been paid his commission, would be prevented from terminating their services prior to being paid. Not only would this be against the provisions of section 22 of our Constitution²⁰, but it will also not make commercial sense. What purpose would it otherwise serve for a property broker to work hard on a transaction, only to forfeit the commission to be earned on a successful transaction when they elect to terminate their services.

[63] In this matter as previously mentioned, the plaintiff relied on the contract of employment concluded between herself and the defendant and in the alternative on the settlement agreement concluded between them.

²⁰ Act 108 of 1996.

[64] I am satisfied that she has discharged her onus placing reliance on her contract of employment to be granted judgment for commission due and payable to her on a 50-50% split in respect of claims 2 and 3.

ORDER

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

65.1 The Plaintiff's action in respect of Claims 2 and 3 succeeds.

65.2 In respect of Claim 2: the Blue Array Lease the defendant is ordered to pay the plaintiff 50% commission in the amount of R 86 094.55;

65.3 In respect of Claim 3: The Liberty Food Services Lease Agreement, the defendant is ordered to pay the plaintiff 50% commission in the amount of R 438 118.70;

65.4 In respect of both claims, interest at 10,25 % *a tempore more*;

65.5 with costs, including cost of counsel.



COLLIS
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff	: Adv. S. Maritz
Attorney for the Plaintiff	: Jarvis Jacobs Raubenheimer Inc
Counsel for the Defendant	: Mr. S. Snyman (Attorney)
Attorney for the Defendant	: Snyman Attorneys
Date of Hearing	: 10, 11 and 12 August 2021
Date of Judgment	: 31 January 2022

Judgment transmitted electronically