IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No A 219/2010

In the matter between:

C G DU PLESSIS	First Appellant
C G SENTRUM BK	Second Appellant

and

BASSON & PELSER PROKUREURS	Respondent

Court:	Baartman J et Cloete, AJ
Heard:	11 February 2011
Delivered:	17 February 2011

JUDGMENT

CLOETE AJ:

[1] This is an appeal from a decision in the magistrates court in terms whereof judgment was granted against the appellants for payment of the sums of R 6691. 80 and R 50 000, with interest thereon *a tempore morae* and costs on a scale as between attorney and client.

INTRODUCTION

[2] Respondent is a firm of attorneys which issued summons against (a) the first appellant (as second defendant) in his personal capacity and as surety and co-principal debtor of the second appellant; and (b) second appellant, a close corporation (as first defendant).

[3] The respondent advanced two claims against the appellants which are set out in its amended particulars of claim. Both of the respondent's claims are based on a deed of sale entered into on 7 November 2006 between one Gideon Christoffel Lourens ("Lourens") as seller and the appellants as purchaser(s). The subject matter of the sale was an immovable property situated at erf 2581 Robertson, Western Cape.

[4] The first claim for payment of the sum of R 6691.80 was in respect of wasted legal costs allegedly incurred by the respondent in relation to the sale. The second claim was for payment of the sum of R 50 000 in respect of estate agent's commission to which the respondent alleges it was entitled. The respondent averred that the appellants were liable to effect payment of these amounts because they unilaterally cancelled the deed of sale.

[5] In support of the first claim, the respondent relied upon the provisions of clauses 8.1 and 16 of the deed of sale.

[6] Clause 8.1 provides that: "*Die Koper sal verantwoordelik wees vir die betaling van die koste van transport op sy naam, insluitende die oordragkoste, hereregte en seëlregte wat betaalbaar mag wees ten einde transport op sy naam oor te dra. Die Koper sal verplig wees om by die Prokureurs wie belas is met die oordrag van transport; 'n bedrag te deponeer wat sal gelykstaan aan hul beraming van die bedrag van die koste voormeld, sodra genoemde prokureurs hom skriftelik versoek om dit te doen.*"

[7] Clause 16 provides that: "*Die Verkoper stel hiermee aan as sy prokureurs, BASSON PROKUREUR van Napier wie namens hom sal optree vir die doeleindes van die uitreiking van enige kennisgewing of advies waarvoor in die Wet of in hierdie Koopooreenkoms voorsiening gemaak word en wat die eiendom op die naam van die Koper sal oordra so spoedig as wat die Koper aan die vereistes hiervan voldoen het of wanneer hy regtens geregtig is om oordrag aan te vra.*" It is to be noted that there is no allegation on the pleadings, nor any indication in the record, that "*BASSON PROKUREUR van Napier*" is the same firm of attorneys as the respondent, which practises as such in Robertson.

[8] In support of the second claim, the respondent relied on the provisions of clause 9.2 of the deed of sale, which state that: "*Indien die Koopooreenkoms gekanselleer word as gevolg van die kontrakbreuk van die Koper sal die eiendomsagent geregtig wees om sy kommissie van die Koper te verhaal.*"

[9] I will deal hereunder with whether it is necessary for me to determine if it was competent for the respondent to cite, and sue, the appellants in the manner in which it did. However, for sake of convenience only, I will refer in this judgement to the first and second appellants as 'the appellants'.

THE FIRST CLAIM FOR PAYMENT OF WASTED COSTS

[10] The magistrate accepted that the provisions of clause 8.1 of the deed of sale conferred the necessary *locus standi* upon the respondent to recover any costs relating to the transfer of the immovable property directly from the purchaser. In his judgment the magistrate found that: "*Die eiser het gevolglik 'n regsgeldige eis teen die verweerder. Die eiser is geregtig op betaling vir die werk wat hy gedoen het.*"

[11] It is common cause between the parties that the respondent was not a

party to the deed of sale. Accordingly, the respondent could only have recovered wasted costs (assuming it was entitled in law to do so) directly from the appellants on the basis of a *stipulatio alteri*. This was neither pleaded, nor relied upon in the evidence before the court *a quo*.

[12] In *Barnett and Another v Abe Swersky and Associates* 1986 (4) 406 CPD, which came on appeal before the Full Bench of this division, the respondent firm of attorneys had been granted judgment in a magistrate's court against the first appellant for an amount which it was alleged was payable in terms of an agreement of sale of a company. Clause 17 of the agreement read as follows: "*The purchaser undertakes and agrees to effect payment to Abe Swersky and Associates of all their costs as between attorney and client relating to the drafting and drawing of these presents and the implementation of the terms and conditions thereof as also stamp duty on this agreement.*" The respondent contended that it had expressly or impliedly or tacitly accepted the benefits conferred upon it by the agreement and that the first appellant (the purchaser) was accordingly liable for the costs of the agreement. A *stipulatio alteri* was accordingly specifically pleaded. The appellants denied that, in concluding the agreement, they had intended to enter into a contractual relationship with the respondent or to confer upon the respondent any benefit which it was entitled to accept. The magistrate found that clause 17 created a *stipulatio alteri* in favour of the respondent and that, by its acceptance, respondent had become a party to the agreement and first appellant was accordingly liable for the payment of the legal costs.

[13] At pages 411 D – 412 A the court stated as follows: "*Mr Gauntlett furthermore correctly stated that the onus was on plaintiff to establish that clause 17 displayed a common intention by the contracting parties that plaintiff by accepting the benefit of the contract, could become a party thereto and be entitled to claim his fees directly from appellant. That this is the correct approach appears from the case of Crookes NO and Another v Watson and Others 1956 (1) SA 277 (A) where SCHREINER JA at 291 pointed out that a contract for the benefit of a third party was not simply a*

contract designed to benefit a third party by two contracting parties thereto but a contract designed to enable a third person to come in as a party to a contract with one of the other two. This approach was approved of in Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd 1984 (3) SA 155 (A). The mere fact that a third party may gain an advantage from an agreement does not necessarily point to the existence of a stipulation in his favour because there is a material difference between the case where the parties to an agreement intend that an obligation be created in favour of a third person and that where the parties agree, purely for their own convenience, that one of them will render performance to a third party, without the intention to create a claim for the third party. The test whether the contract is made for the benefit of a third party is whether that third party, by adopting the contract can become a party to it – see Jankelow v Binder, Gering & Co 1927 TPD 36. Clause 17 must accordingly be considered in the light of the complete contract of which it is part, to ascertain whether the parties to annexure A intended to confer a benefit upon plaintiff which by mere acceptance could make plaintiff a party to the contract. The fact that the name of plaintiff is inserted in the contract does not make it a contract for his benefit. On a proper construction against the background that plaintiff acted as the seller's attorneys it amounts to a contractual undertaking given by the purchaser to and in favour of the seller that the purchaser will pay the seller's attorney's fees for which the seller is liable in terms of the relationship of attorney and client existing between it and its attorneys, the name of the attorneys being merely inserted for identification purposes. Nor does the fact that payment is to be made direct to the attorneys alter the position. This was probably stipulated as a matter of convenience to the parties and amounts to no more than that the purchaser by paying plaintiff direct would render a performance in which the seller had a "personal and appreciable interest in its being done" – Pothier on Contracts section 58."

[14] To my mind, *Barnett supra* is of clear application in the instant matter, and the magistrate was wrong in finding that the respondent had "'*n*

regsgeldige eis teen die verweerder". Further, as indicated above, the respondent is not even mentioned in the deed of sale and there is no indication either on the pleadings or in the record that "BASSON PROKUREUR van Napier" is indeed the respondent.

THE SECOND CLAIM FOR PAYMENT OF ESTATE AGENT'S COMMISSION

[15] In his judgment, the magistrate found that the respondent was entitled to the payment of estate agents commission since "*Die kontrak bepaal uitdruklik dat die koper agentekommissie moet betaal in geval van kontrakbreuk deur die koper. Die kontrak is 'n regsgeldige dokument en gevolglik slaag die eiser in sy eis.*"

[16] The first issue which must thus be determined is whether the appellants breached the agreement of sale. It was specifically pleaded, and a substantial portion of the evidence before the court *a quo* dealt with whether or not the deed of sale should be rectified to include a suspensive condition, namely that the sale was subject to the purchaser obtaining confirmation of a loan for the full purchase price within 30 days from date of signature thereof. The appellants accept that they bear the onus to show that the deed of sale should be rectified in this manner.

[17] A Mr Cohen was called as a witness on behalf of respondent. He is the husband of a Mrs Cohen, who was employed by the respondent at the time. It is common cause that Mr Cohen acted as the duly authorised agent of the seller, Lourens. It appears from the record that Mr Cohen was directly instrumental in bringing about the conclusion of the agreement of sale between Lourens (whom he represented) and the appellants. Although initially evasive, he eventually conceded that he represented to the appellants that the sale of the immovable property in question was indeed subject to the suspensive condition outlined above.

[18] It was put to Mr Cohen in cross-examination that the first appellant had made it clear to him that in order to purchase the immovable property, he required a loan, and that Mr Cohen had assured him that the provisions of clause 1.2 of the deed of sale (which *inter alia* provided that the purchase price was payable against registration of transfer and that a bank guarantee had to be furnished by the purchaser within 30 days of date of signature of the deed of sale) was sufficient protection for the appellants.

[19] The relevant portion of the record reads as follows: "*Mnr Du Plessis sal getuig en Mev. Du Plessis sal dit ook kom getuig dat Mnr Du Plessis toe vir u gevra het en trouens Mev. Du Plessis ook: Jong, maar wat gaan gebeur as ons nie 'n lening kry nie? Kan u dit onthou dat hulle dit vir u gevra het? --- (Pouse) Ja…. En wat was toe u antwoord? Of kan ek vir u sê wat my instruksies is? My instruksies is dat u toe gesê het nee maar dan is die transaksie, dan val die transaksie mos net weg. Kan u dit onthou? --- Ja kyk jy het 30 dae, ek neem aan dit was 30 dae ek kan nie presies die… Maar jy beskryf dit in die kontrak dat sekere waarborge moet gelewer word binne 'n sekere tydperk, as jy dit nie lewer nie… Nou my instruksies is dat toe hy vir u sê ja maar wat gaan gebeur as ek nou nie 'n lening kry nie toe het u vir hom gesê maar daar staan die 30 dae, klousule mos in die kontrak dan val die transaksie net weg. Is dit waarna u verwys het, is dit wat u sê? Stem u saam daarmee? --- Ek stem saam, dit staan daar geskryf. En toe was hy gerusgestel en tevrede daarmee dat hy kan die kontrak so teken. --- Korrek. My instruksies is dat dit dan nou Mnr. Du Plessis se begrip was daarvan dat dit veilig vir hom is om so 'n kontrak te teken stem u saam? --- Ek stem saam. Want as hy nie in 30 dae die waarborg kan lewer nie dan val die transaksie mos nou net weg?-- Korrek…."*

[20] Further, the evidence of the first appellant to the effect that application had been made for the mortgage bond which was not granted was not seriously challenged by the respondent, and, to my mind, must be accepted.

[21] I accordingly find that the deed of sale does not correctly reflect the agreement between the parties due to their common mistake, and falls to be rectified in the terms sought by the appellants. The provisions of clause 10 of the deed of sale (which is the standard 'non-variation clause') have no application as the mistake was common to both parties, and one of the parties cannot now rely on these provisions to avoid rectification. The magistrate was wrong in finding that the appellants had breached the deed of sale.

[22] The question which now arises is whether the respondent in these circumstances is entitled to payment of the commission claimed.

[23] In Joubert: *The Law of South Africa* ('LAWSA'), 2nd edition, volume 9 at paragraph 580, the learned author sets out the applicable legal principle as follows: "*An estate agent who sues for commission can succeed only if he or she proves that an enforceable sale has been completed. If the sale entered into is subject to a suspensive condition and that condition has not been performed, there is no enforceable sale and the estate agent is not entitled to commission.*" The court in *Naidu v Naidoo* 1967 (2) SA 223 (NPD) at 227 E – F put it thus: "*It is clear that the plaintiff can only succeed if he can establish that an enforceable sale had been completed. If the sale entered into was subject to a suspensive condition and that condition had not been completed, there was no enforceable sale. Therefore, the question of whether there was a completed sale is a matter which directly concerned the plaintiff and, until he was able to establish this fact, he could not succeed in his claim. This being so, it seems to me that the magistrate was obliged to consider the whole question of whether there was a suspensive condition in the deed of sale or not.*"

[24] As the respondent has failed to prove that "*an enforceable sale has been completed*", it is not entitled to any commission, and the magistrate was wrong in finding in favour of the respondent.

OTHER ISSUES ARISING

[25] In light of the conclusions reached, I do not believe that it is necessary to consider any of the remaining grounds of appeal. It accordingly also follows that it is not necessary for me to make any findings regarding the manner in which the first and second appellants were cited, and sued, by the respondent. What should however be mentioned is that there does not appear to be any basis, either in fact or in law, upon which the magistrate concluded that the respondent was entitled to costs on a scale as between attorney and client.

[26] As to costs, appellants' counsel submitted that this court should exercise its discretion in terms of rule 33(9) of the magistrate's court rules. I am of the view that it was indeed reasonable, in the circumstances of this matter, for the appellants to have employed the services of an attorney other than a local attorney to represent them.

[27] **I accordingly propose that the appeal is allowed with costs and the magistrate's judgement is altered to read: "Plaintiff's claim against both defendants is dismissed with costs; such costs to include the reasonable travelling time, travelling expenses and subsistence expenses of their attorney, including a refresher fee for each resumed day of the trial, provided that the determination of such costs shall be done on taxation by the clerk of the court."**

J I CLOETE

I agree. It is so ordered

E D BAARTMAN