



THE REPUBLIC OF SOUTH AFRICA

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

CASE NO: 6327/2008

In the matter between:

RUSKING REAL ESTATE

Plaintiff

and

GAUSSIAN RESOURCES (PTY) LTD

Defendant

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL: 26 MAY 2011

Koen, AJ

1. This is an application for leave to appeal the whole of the judgment and order handed down by me in this matter on 1 April 2011. For the sake of convenience I

propose to refer to the parties as the Plaintiff (the Respondent in this application) and the Defendant (the applicant) in what follows.

2. It is trite that for the application to succeed the Court must be satisfied that the applicant enjoys reasonable prospects of success on appeal.
3. Until the day the trial commenced the Defendant contended that it had contracted with either Little Swift Investments 338 (Pty) Ltd (Little Swift), or with Midnight Storm Investments 256 (Pty) Ltd, and not with the Plaintiff. Implicit in the defence put up is the fact that the Defendant did not know with whom it had contracted. It was only on the day the trial began that the Defendant pinned its colours, for the first time, to Little Swift's mast.
4. It was common cause that the Plaintiff had done the work required to earn the commission, and that at the time the contract was concluded, at least, it was of no moment to the Defendant with whom it had contracted.
5. With the exception of the draft agreement of mandate, which it is clear from the evidence was intended to serve only as a precedent, none of the documents which came into existence at the time of the conclusion of the contract suggested that Little Swift was a contracting party. On the contrary, the documents which were contemporaneous with the conclusion of the agreement indicate that the Defendant dealt with the Plaintiff at that time.

6. It is true that a number of documents came into existence some time after the contract had been concluded. These indicated that Little Swift claimed payment of the commission, and not the Plaintiff. In his evidence, which was not cast into doubt in spite of thorough cross examination, the Plaintiff satisfactorily (in my view) explained this feature of the case.
7. Moreover, even if the Defendant had erred at the time about the identity of the Plaintiff this fact would not avail it. Where it makes no difference to a party with whom it contracts, and that party is mistaken about the identity of the other party, the contract is still valid and enforceable¹. As stated above it was apparent from the evidence presented by the Defendant that it did not matter to the Defendant at the time when the contract was concluded with whom it contracted. The reason for this is evident - the work had already been done.
8. I am therefore driven to the conclusion that there are no reasonable prospects of an appeal court concluding that the plaintiff's claim should be dismissed.
9. In the result I make the following order:

The application is dismissed with costs.


S. J. Koen AJ

¹ See Du Bois et al *Wille's Principles of South African Law* 9th edition at 747