



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

In the matter between

Case No: A313/2014

**LODEWIKUS BARTHOLOMEUS VORSTER NO
as trustee of the ELMA VORSTER KINDERTRUST**

APPELLANT

And

**PM SECURITY AND CRIME PREVENTION (PTY)
LTD t/a CHAS EVERITT HERMANUS**

RESPONDENT

Coram: ERASMUS & ROGERS JJ

Heard: 8 MAY 2015

Delivered: 20 MAY 2015

JUDGMENT

ROGERS J (ERASMUS J concurring):

[1] The appellant ('the Trust') is the first defendant and the respondent ('CEH') the plaintiff in an action pending in the Hermanus Magistrate's Court in which CEH claims estate agent's commission. The second defendant ('Vorster') is an attorney and the sole trustee of the Trust. The Trust raised two special pleas which by agreement were determined separately from the merits. The court a quo dismissed the special pleas. The Trust appeals against the dismissal. Mr Ulyate appears for the Trust and Mr AM Heunis for CEH.

[2] The summons was issued in June 2010. CEH, which conducts business as an estate agency under the name Chas Everitt Hermanus, alleges in its particulars of claim that during 2008 the Trust appointed CEH to find a buyer for a property in Hermanus. On 8 July 2008 a deed of sale was concluded between the Trust and a Mr JI van der Merwe ('Van der Merwe') in terms whereof the Trust sold the property to Van der Merwe for a price of R1,905 million. The sale was unconditional. CEH alleges that it was the effective cause of the sale.

[3] The particulars of claim summarise the provisions of clauses 9(a), 9(b), 9(c) and 10(a) of the deed of sale, a copy of which was annexed to the particulars of claim. The deed of sale is a standard document bearing the Chas Everitt logo. It is convenient to quote clauses 9, 10 and 11 in full:

'AGENTEKOMMISSIE

- 9 a) Die verkoper sal die agentekommissie van 4,83%¹ (plus BTW) van die koopprys betaal aan die agent;
- b) Die agentekommissie is verdien en betaalbaar by nakoming van enige opskortende voorwaarde waaraan hierdie ooreenkoms onderhewig is (of teen ondertekening van hierdie ooreenkoms as hierdie ooreenkoms nie onderhewig is aan enige opskortende voorwaarde nie);

¹ The standard contract made provision for 7,5%. In the signed deed of sale this was scratched out and replaced first with 5% and then with 4,83%. The final handwritten figure is partially cut off in the copy attached to the particulars of claim and was thus thought to be 4,85%. It appears, however, from clause 21 that the figure must be 4,83%.

- c) Indien hierdie ooreenkoms regtens gekanselleer word as gevolg van die kontrakbreuk van die koper sal die koper verantwoordelik wees vir die betaling van die agentekommissie;
- d) Indien die deposit gehou word deur die agent sal die agent geregtig wees om die kommissie van sodanige deposito af te trek onmiddellik wanneer die verkoper geregtig word op die opbrengs van sodanige deposito (hetsy as gevolg van die feit dat die eiendom oorgedra is aan die koper of dat hierdie ooreenkoms regtens gekanselleer is of om enige ander rede). Die agent sal geregtig wees op sy kommissie indien hierdie ooreenkoms gekanselleer word as gevolg van onderlinge ooreenkoms tussen die koper en die verkoper en dit word op rekord gestel dat in sodanige geval sal die verkoper en die koper gesamentlik en afsonderlik verantwoordelik wees vir die betaling van sodanige kommissie.
- e) Die partye gee hiermee onherroeplik opdrag aan die verkoper se aktevervaardigers:
 - i) om die kommissie aan die agent te betaal uit enige deposito gehou deur die aktevervaardiger onmiddellik nadat sodanige kommissie verdien is;
 - ii) om teen registrasie van oordrag van die eiendom enige kommissie wat verdien is deur die agent wat nie reeds aan die agent oorbetaal is uit sodanige deposito aan die agent te betaal.
- f) Die bepalings van hierdie kommissie is bedoel as 'n kontrak vir die voordeel van die agent en mag afgedwing word deur die agent. Die agent aanvaar hiermee enige voordele aan hom toegeken in terme van hierdie ooreenkoms.

VERSUIM DEUR KOPER

- 10. Indien die koper versuim om te voldoen aan enige van sy/haar verpligtinge ingevolge hierdie ooreenkoms, insluitende versuim om enige deposito te betaal of waarborge te lewer binne die voorgeskrewe tydperk en in versuim bly vir 'n periode van 10 (tien) dae na die per versending geregistreerde pos van 'n kennisgewing waarin die koper versoek word om sodanige versuim reg te stel, sal die verkoper geregtig wees, sonder benadeling van enige ander regte, ingevolge die wet en sonder verdere kennisgewing:
 - a) om hierdie ooreenkoms te kanselleer en die deposito betaal ingevolge klousule 2 hiervan te weerhou minus agentekommissie en BTW daarop sowel as enige ander bedrae wat deur die koper betaal is hetsy as "rouwkoop" of boete of as gelikwideerde skadevergoeding of as ... [illegible] ten opsigte van die benadeling wat deur die verkoper gely is soos ooreengekom, as gevolg van die koper se versuim of,

- b) sodanige skadevergoeding te verhaal as wat die verkoper kan bewys deur hom gely is, in welke geval die verkoper geregtig sal wees om die deposito en betalings soos na verwys in klousule 10(a) hierbo in trust te hou totdat die werklike bedrag van skadevergoeding vasgestel is en die verkoper sal daarna geregtig wees om enige skadevergoeding af te trek van sodanige bedrae gehou in trust;
- c) om nakoming van die bepalings hiervan te eis insluitende betaling van die volle balans van die koopprys uitstaande op datum van die koper se versuim soos bovermeld.

ALGEMENE DISPUUTOPLOSSING

11. Indien enige dispuut of klagte voortspruit uit of ten opsigte van hierdie aanbod om te koop insluitende die geldigheid daarvan, uitleg daarvan, kontrakbreuk, beëindiging of voorgestelde kanselasie daarvan, kom alle partye hiertoe ooreen om deel te neem aan mediasieversigtigings voor aanvangs van litigasie of die lê van 'n klag by enige regulerende liggaam. Dispute sal insluit enige voorstelle gemaak deur enige party ten opsigte van die verkoop, koop, finansieringvoorwaardes of ander aspek van die eiendom insluitende enige aantuigings van versteking, wanvoorstelling of nalatigheid. Die bemiddelaar sal 'n persoon wees soos ooreengekom tussen die partye hiertoe of by gebrek aan sodanige ooreenkoms 'n persoon genomineer deur die Instituut van Eiendomsagente van Suid-Afrika. Die kostes van sodanige mediasie sal gedra word deur die partye in gelyke dele.'

[4] Clause 21 states that the commission shall be R92 105,26 plus VAT of R12 894,74, totalling R105 000. It appears likely that, in order to clinch the sale at a figure yielding R1,8 million net of commission for the Trust, CEH agreed to limit its commission, inclusive of VAT, to R105 000, which generated an ex-VAT commission of R92 105,26. This was then expressed in clause 9(a) as a percentage of the purchase price, rounded down to two decimal points (4,83%).

[5] On the last page of the deed of sale provision is made for signature by the buyer, the seller and the agent. Immediately above the space for the agent's signature are the words:

'Die voordele ten gunste van en wat toekom aan die agent in hierdie ooreenkoms word hiermee aanvaar.'

The deed was duly signed by Van der Merwe and on behalf of the Trust. There was no signature on behalf of CEH.

[6] CEH alleges that Van der Merwe paid the deposit of R190 500 to Vorster, who was the conveyancer nominated in the deed of sale. On 14 November 2008 the Trust cancelled the sale because of Van der Merwe's failure to perform. CEH requested Vorster to pay CEH's commission of R105 000, to which it was entitled in terms of clause 9, from the deposit. Van der Merwe gave written authority for this to be done and gave instructions that on no account should his deposit be paid over to the Trust. By letters dated 18 November 2008 and 2 December 2008 CEH's attorneys requested an undertaking from Vorster that he retain the deposit pending further agreement or a court order. In a letter dated 3 December 2008 Vorster stated that he would reply in full in due course, adding

'In the meantime and probably for at least the next month or two, the amount that your client lays claim to will be retained on investment in trust as part of the deposit for the purpose as provided for in the deed of sale and not at the instance of your client or in terms of the purchaser's instructions'.

Without there apparently having been any further developments, Vorster on 15 January 2009 notified CEH's attorneys that he had released the full deposit to the Trust. CEH alleges that his conduct in so doing was unlawful.

[7] On these grounds CEH seeks payment from the Trust and Vorster jointly and severally in the sum of R100 000. (CEH abandoned R5000 of its claim in order to bring the matter within the jurisdiction of the magistrate's court.)

[8] Following an unsuccessful application for summary judgment, requests for further particulars and amendments to the particulars of claim, the Trust delivered its plea on 30 November 2011.² The two special pleas are in summary the following: (a) CEH does not have locus standi because it failed to accept the benefits conferred on it by the deed of sale and thus did not become a party to the agreement. CEH's reliance on the agreement can therefore not be sustained. (b) Alternatively, CEH failed to refer the dispute to mediation as required by clause

² Vorster as second defendant delivered his plea in June 2011. He did not advance any special pleas.

11 or to invite the defendants to mediation. Its action is thus premature. On these alternative bases the Trust prayed for the dismissal of CEH's claim with costs.

[9] The special pleas were argued on 29 November 2013. Why it took so long does not appear. The magistrate delivered an *ex tempore* judgment on 4 April 2014. After summarising the two special pleas, the magistrate said that it was of cardinal importance that before the deed of sale was signed an oral agreement of mandate was concluded between CEH and the Trust and that pursuant to the oral agreement CEH brought the Trust and Van Der Merwe together. The oral mandate, he said, was partially incorporated into the deed of sale. The oral agreement and deed of sale were nevertheless separate contracts. In terms of the oral mandate CEH was entitled to commission by bringing about a successful sale. The fact that CEH did not sign the deed of sale did not have the effect of depriving CEH of its agreed commission. It also followed that CEH was not bound by any of the terms of the deed of sale apart from the term relating to commission. The magistrate accordingly dismissed the special pleas.

[10] The special pleas were argued without any evidence being led, presumably on the basis that the facts pleaded by CEH had to be assumed as correct for purposes of the special pleas. I do not think that this was an altogether satisfactory process. The question whether CEH accepted the benefits of clause 9 is a factual one. Although the deed of sale made provision for the agent to indicate acceptance by way of signature, I do not think the deed on a proper interpretation stipulates that this is the only way in which the benefits of clause 9 could validly be accepted.

[11] CEH did not expressly plead that it accepted the benefits of clause 9. However, CEH's invocation of clause 9 of the deed of sale necessarily implied that it had accepted the benefits thereof. On 15 November 2010 the Trust requested further particulars to CEH's particulars of claim for purposes of pleading thereto. Although the Magistrates' Court Rules were substituted with effect from 15 October 2010 in a manner which no longer permits the requesting of such particulars (Rule 16 now contains similar provisions to Rule 21 of the Uniform Rules of Court for the requesting of trial particulars), these further particulars were requested under the old regime, presumably on the assumption that pre-pleading particulars could still be

requested in terms of the old rule 16 in respect of proceedings instituted before 15 October 2010. CEH furnished further particulars on 10 March 2011. These further particulars were, in accordance with the old regime, part of CEH's pleadings (*MacDonald Forman & Co Ltd v Van Aswegen & Another* 1963 (4) SA 735 (O) at 737A-B). Concerning para 10 of the particulars of claim, which summarised the terms of clause 9 of the deed of sale, the Trust asked who the parties to the annexed deed of sale were. CEH replied that the parties were CEH, the Trust and Van Der Merwe. This again necessarily implies that CEH accepted the benefits of clause 9.

[12] If the first special plea had to be adjudicated on CEH's version, which included all allegations necessarily implied by the express allegations, the first special plea was bound to fail. It strikes me as inherently probable that CEH did by conduct accept the benefits of clause 9. The deed of sale was CEH's standard contract. CEH was the agent which brought the parties together and obviously furnished them with the standard deed. The handwritten alteration to the rate of commission in clause 9, and the insertion of the amount of commission in clause 21, must have occurred after discussion between the Trust and CEH. CEH pleaded that it requested Vorster (who was the nominated conveyancer) to deduct the commission of R105 000, to which CEH was entitled in terms of clause 9, from the deposit and that on 10 July 2008 Vorster wrote to CEH thanking it for the instruction to effect transfer and stating that he would make provision for the payment of CEH's commission of R105 000 on date of transfer. This letter was attached to the particulars of claim. Although the deferral of payment to date of transfer was not strictly in accordance with clause 9(b), the amount of the commission accorded with the commission specified in clause 9(a) read with clause 21.

[13] However, and even if one assumes that CEH did not properly allege that it accepted the benefits of clause 9, or if one assumes that a positive finding in that regard could not be made in the absence of evidence, the first special plea was nevertheless in my opinion correctly dismissed. What the Trust sought by way of the first special plea was the dismissal of CEH's claim. This was not an exception on the basis that the particulars of claim were vague and embarrassing or lacked allegations to sustain a cause of action. Had an exception been taken and granted,

CEH would in the ordinary course have been granted leave to amend its particulars of claim so as to make specific allegations regarding the acceptance of the benefits of clause 9 (see *Group Five Building Limited v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D-604A; *Constantaras v BCF Foodservice Equipment (Pty) Limited* 2007 (6) SA 338 (SCA) paras 30-33). The dismissal of CEH's claim could only have followed from the first special plea if CEH had no right to claim commission except by having accepted the benefits of clause 9.

[14] In my view, CEH's particulars of claim, as amplified by its further particulars, sufficiently make out a case for the recovery of the commission even if one assumes in favour of the Trust that CEH at no stage accepted the benefits of clause 9. CEH pleaded the conclusion of an oral mandate and the fulfilment of its mandate by being the effective cause of the sale. The deed of sale as annexed to the particulars of claim was on its face unconditional. In reply to various questions in the request for further particulars, CEH alleged that the mandate had required it to find a willing buyer, that Van der Merwe was a willing and able buyer and was able to pay the purchase price, and that CEH had complied with all its obligations in terms of the mandate.³ In accordance with ordinary principles, these allegations are sufficient to sustain a claim for commission, regardless of the subsequent cancellation of the sale (*Brayshaw v Schoeman & Andere* 1960 (1) SA 625 (A) at 630C-D; *Commercial Business Brokers v Hassen* 1985 (3) SA 583 (N) at 585G-H; *Vesta Estate Agency v Schlom* 1991 (1) SA 593 (C) at 597H-J; *The Law of South Africa* 2nd Ed Vol 9 para 580). As to the amount of commission, it is clearly CEH's case that the rate inserted into clause 9(a) and the amount inserted in clause 21 were agreed with the Trust. The fact that CEH did not accept the benefits of clause 9 does not entitle one to close one's eyes to the obvious fact that the amount of commission recorded in the deed of sale corresponded with what had been agreed between CEH and the Trust. (Of course, whether Van der Merwe was in truth a willing and able buyer, and thus whether CEH fulfilled its mandate, is an issue to be decided when the merits are tried.)

³ See the paras 3.4, 5.1, 5.2, 5.3, 5.8 and 5.9.1 of the request and the corresponding replies.

[15] When the matters set out in the preceding paragraph were put to Mr Ulyate he conceded their force and proceeded to deal with the second plea.

[16] The second plea presupposes that as a fact CEH accepted the benefits of clause 9. From this premise, the Trust argues (i) that clause 11, which requires pre-litigation mediation, is not limited to disputes between buyer and seller but includes disputes between the agent and one or both of the other parties and (ii) that because CEH did not invite the Trust to participate in mediation, the summons was premature.

[17] As already explained, the first special plea can be decided against the Trust without finally determining whether or not CEH accepted the benefits of clause 9. It might thus be said that the premise for the alternative plea has not been established. However, I think it preferable to deal with the matter on the assumption that CEH indeed accepted the benefits of clause 9.

[18] There is force in Mr Ulyate's submission that clause 11 is wide enough to encompass disputes between CEH and the Trust regarding the implementation of clauses 9 and 10. The words 'alle partye' in clause 11 are on their face unlimited in scope and could include an agent to the extent that the latter has acquired rights under the agreement. However it is unnecessary finally to decide this question of construction. I shall assume in favour of the Trust that clause 11 would in the ordinary course have required CEH to propose mediation before instituting action against the Trust.

[19] On this assumption, the question is whether on the facts of this particular case CEH should be non-suited because it failed to act in accordance with clause 11. In my view the answer is no. Prior to the institution of action the Trust and Vorster already adopted the position that CEH had not accepted the benefits of clause 9 and therefore had not become a party to the deed of sale. This was stated in a letter of 12 August 2009 which Vorster attached to his affidavit in opposition to the application for summary judgment and which he wrote in response to letters of demand written by CEH's attorneys to the Trust and Vorster on 31 July 2009.

[20] The position is thus that the Trust was denying that CEH was a party to the very contract which called for mediation. This was a position which the Trust maintained when it filed its plea. In the circumstances, can the Trust be heard to say that CEH should nevertheless have invited the Trust to participate in mediation as a precondition for issuing summons? I think not. When one of the parties to a contract repudiates, the other is not obliged to do things under the repudiated contract which would amount to an exercise in futility or an idle gesture (*Moodley & Another v Moodley* 1990 (1) SA 427 (D) at 431C-I; *Comwezi Security Services (Pty) Ltd & Others v Cape Empowerment Trust Ltd* [2014] ZASCA 22 paras 11-12). Thus, for example, a party who has repudiated a contract cannot, once proceedings have been instituted, take the point that the contract required, as a precondition for the taking of some further step, that a notice to remedy the default should have been given (*Taggart v Green* 1991 (4) SA 121 (W) at 124D-126G; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 37). It would have been an exercise in futility for CEH to have invited the Trust to participate in a mediation procedure prescribed in an agreement in circumstances where the Trust denied that CEH was a party to the agreement.

[21] The magistrate was thus right to dismiss the special pleas. The appeal is dismissed with costs.

ERASMUS J

ROGERS J

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