Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case no: 4698/16

In the matter between:

BROLL AUCTIONS AND SALES (PTY) LTD Applicant

And

GILLIAN THERESA GROBLER
on behalf of CHRISTOS LAMBROU First Respondent

GILLIAN THERESA GROBLER Second Respondent

Judgment delivered 17 November 2016

LE GRANGE, J

[1] In this matter the Applicant seeks judgment against the First and Second Respondents ("the Respondents"), jointly in the amount of R1 600 000, being auctioneer's commission allegedly due and payable to the Applicant as a result of a breach of an agreement between the parties.

[2] The Applicant framed the relief it seeks against the First Respondent in paragraphs 30 and 31 of its founding affidavit as follows:

"*30. As at 12 August 2015, Lambrou became liable to pay Broll's commission on the sale of the Property on the following bases:*

30.1 he had sold the Property to Afristar, who had been introduced to the Property by Broll during the Mandate Period; and

30.2 he had interfered with Broll's efforts to market and sell the Property by engaging with alternative estate agents in relation to the sale and marketing of the Property during the Mandate Period.

31. In the alternative to paragraph 30 above, and to the extent that it is found that Broll was not the effective cause of the sale and/or is not entitled to payment of commission on the bases set out in paragraph 30 above, I am advised that Broll has a claim for the damages suffered by it as a result of Lambrou's material breach of the Agreement, in failing to give effect to the exclusivity provisions thereof."

[3] The Respondents in opposing the relief sought deny the allegations made in paragraph [30] of the founding affidavit. It also disputes that the Applicant was the effective cause of the sale of the Property. The Respondents on the other hand instituted a conditional counter-application. The counter-application is conditional in the event the main application is not dismissed. In the counter–application the Respondents seeks an order to confirm the existence of the Settlement Agreement ("the Settlement Agreement") concluded between the Respondents and the Applicant on 14 August 2015, and secondly, to direct that the Respondents pay the Applicant the sum of R 100 000 pursuant to the terms of the Settlement Agreement.

[4] The defence raised by the Applicant, in respect of the counter-claim, is that its Managing Director lacked the necessary authority to have concluded the Settlement

Agreement on its behalf. Moreover, according to the Applicant, the Settlement Agreement is of no force and effect and invalid as a result of the no waiver and non-variation clause contained in the said agreement.

[5] Mr. A Kantor, appeared for the Applicant and Mr. A M Smalberger, SC appeared for the Respondents.

[6] The factual matrix underpinning the Application, briefly stated, is the following. The Second Respondent is the mother and legal guardian of her son (the First Respondent). The Property forming the subject matter of the dispute is registered in the name of the First Respondent. The Second Respondent was authorised by an order of Court, to dispose of the Property on behalf of the First Respondent. During April 2014, the Second Respondent appointed an estate agent Ms Swanepoel ("Swanepoel") of the Chas Everitt International Property Group ("Chas Everitt") to market the Property which was valued by Chas Everitt to be between R 15 Million – R 16 Million.

[7] Swanepoel, in May 2014 introduced a person named Dan Milner ("Milner") of Afristar Properties Pty Ltd ("Afristar") to the Property. Thereafter, Afristar made an offer to purchase the Property from the First Respondent for the amount of R9.5 Million. The Second Respondent rejected the offer as she wanted to clear an amount of at least R10 Million from the sale of the property, after the deduction of commission. According to the Second Respondent, she anticipated a sale price well in excess of R10 million for the Property.

[8] An agent of the Applicant approached the Second Respondent during the early part of 2015 with the option to sell the Property by auction. The Second Respondent agreed and an agreement to that effect was concluded with the Applicant ("the Agreement"). The material terms of the Agreement were the following:

1.1.1 Broll was granted a sole and exclusive mandate ("the mandate") to offer the Property for sale;

1.1.2 The Reserve Price for the Property was R16 Million; and

1.1.3 The mandate extended from the date of signature of the Agreement on 1 April 2015 until midnight on 13 June 2015.

[9] The Second Respondent, upon signature of the Agreement contacted Swanepoel and advised her of the Agreement with the Applicant. Swanepoel was also advised that if anyone showed any interest in the Property during the currency of the mandate she needs to refer such a person to the Applicant.

[10] According to the Applicant, on 12 May 2015, it engaged with Milner. Discussions took place regarding two properties. The other was termed the Riverview property. Milner was forwarded a bidder's pack in relation to the Property in question. According to the Applicant the bidder's pack was send to Milner on 12 May 2015.

[11] The Respondents and Milner have a different version. According to Milner, on 10 June 2015 he went to the Applicant's offices to discuss the Riverview property. Milner noticed on one of the boards that the Property in question was on auction and merely enquired about it. Later on the same day, an agent of the Applicant, unsolicited sent him a bidder's pack.

[12] The auction took place on 9 June 2015. The Property did not sell at the auction.

[13] The Applicant claims that Milner attended the Auction on 9 June 2015. This is disputed by the Respondents and Milner.

[14] It is not in dispute that after the unsuccessful auction, further discussions took place between Milner and the Applicant during June to July 2015. There is a dispute whether the discussions were specifically about the Property as opposed to the Riverview property.

[15] On the Applicant's version, after the auction and during the period June 2015 and 12 August 2015, it continued to market the Property. Moreover, it continued to engage Milner and the Respondents in an attempt to sell the Property. According to the Applicant as a result of direct discussions between its agent, the Respondents and Afristar, Milner on behalf of Afristar indicated its intention to make an offer to the Respondents in the amount of R 9.5 Million which would be subject to a 60 day due diligence period. According to the Applicant there were also other buyers interested in

the Property. The Applicant further states that despite its efforts, Afristar did not provide the Applicant with a formal offer to purchase the Property. To this end, the Applicant relies on an e-mail send to Milner dated 6 August 2015, wherein it was recorded that Afristar should increase their offer to the Respondents between R 10 – R 10.5 Million (excluding commission and transfer duty) as there are other interested parties at around R 10.5 Million. Attached to the e-mail was also an offer to purchase document for completion by Afristar.

[16] According to the Applicant, on 12 August 2015, its agent contacted Milner to discuss the Property and to advise him and Afristar that the Respondents were considering an offer from another interested party. However on the same day, Milner directed a formal offer to purchase the Property through Swanepoel, a competing estate agent, to the Respondents. The Respondents accepted the offer to purchase and as a result breached the terms of the Agreement by engaging an alternative estate agent during the mandate period, despite having granted the Applicant the sole and exclusive mandate to market and sell the said Property. Moreover, the Applicant claims a sale of the Property would not have eventuated without its agent's efforts.

[17] The Respondents in the answering affidavit denied inter alia that; the property was marketed by another estate agency in the period of the sole mandate; the Applicant introduced Milner to the Property; Milner attended the auction on 9 June 2015 and that the Applicant was the effective cause of the sale of the Property.

[18] According to the Respondents, Swanepoel initially introduced Afristar to the Property in May 2014. Thereafter, Swanepoel presented an offer to purchase from Afristar for R 9.5 Million. This offer was rejected. The Respondents stated that they wanted to clear an amount of R10 Million and furthermore hoped to achieve a selling price well in access of R 10 Million for the Property.

[19] It is not in dispute that the Applicant enjoyed a sole and exclusive mandate between the periods April 2015 to midnight on 13 June 2015. On the Respondents version Swanepoel did not market the property during the sole mandate or for that matter any other estate agent, other than the Applicant. According to the Respondents, Swanepoel was advised to refer any interest in the Property during the currency of the sole mandate to the Applicant. To this end an email dated 7 May 2015 was put up as evidence to support the Respondents' version that Swanepoel indeed referred a potential buyer to the Applicant.

[20] The Respondents further recorded that the Applicant, to the extent that it continued to market the Property, was outside the sole mandate period. Furthermore, the Applicant, despite all the discussions that took place, insisted that Afristar increased the offer it wished to make for the Property, and that the terms proposed by Afristar should be more onerous so as to bring them in line with the auction terms. Moreover, the Applicant refused to discuss the issue of commission with Afristar and never put any offer from Afristar to the Respondents.

[21] The Respondents also state that at the same time the Applicant was pushing the Second Respondent to accept an offer to purchase from an entity known as Pixie Dust Trading 24 (Pty) Limited trading as StandOut Properties. According to the Respondents, it appears that the Applicant was not keen to put the Afristar offer to them because it wished StandOut Properties and Afristar would become involved in a bidding war for the Property.

[22] According to the Respondents, given the Applicant's failure to present any offer from Afristar to the Second Respondent, Milner was left with no alternative but to approach Swanepoel and to ask her to present the offer of Afristar to the Respondents. According to the Respondents, at the time Swanepoel presented the offer, the sole mandate of the Applicant had expired.

[23] Mr. Kantor accepted there are arguably some genuine disputes of facts, but was adamant in his submissions that the main issue, as who the effective cause of the sale was, can be resolved on the undisputed facts. According to Mr. Kantor the undisputed facts clearly established that as a result of the Applicant's efforts and resolve, the parties started to negotiate on a realistic basis which effectively caused the sale of the Property. It was further argued that the valuation of the Property by Chas Everitt was way off the mark, unrealistic and the involvement of Swanepoel was limited and of no causative effect. Reference was also made to the dictum in Gordon v Slotar 1973 (3) SA 765 (A) and Basil Elk Estates (Pty) Ltd v Curzon 1990 (2) SA 1 (T), to advance the argument that the mere first introduction of the Property by an estate agent will not

always suffice to determine who was the most instrumental in securing the sale. In both matters referred to above, it was essentially held that the first introduction by the estate agent had been outweighed by intervening factors as to make the initial introduction relatively unimportant.

[24] The two main contentions by Mr. Smallburger were firstly, that the Application should to be dismissed on procedural grounds. It was argued that the Applicant ought to have realised when launching the Application that the matter could not be determined on paper by reason of the numerous disputes of fact bound to develop and that the disputes of facts in the present instance are sufficiently serious and should have been referred to trial.

[25] Secondly, according to Mr. Smallburger, the parties entered into a Settlement Agreement that is dispositive of the dispute between the parties.

[26] Our Courts have repeatedly acknowledged how difficult it is, when there are competing estate agents, to determine who the effective cause of the sale that eventuates is. Moreover, it was further acknowledge that in certain circumstances the principal may be liable to pay commission to both agents where it is impossible to distinguish between the efforts of one agent and another in terms of causality or degrees of causation. In this regard see Wakefields Real Estate (Pty) Ltd v Attree and Others 2011 (6) SA 557 (SCA) paragraphs [14] and [18], and the cases referred to therein.

[27] The present matter is no different as to its difficulty in determining who the effective cause of the sale that eventuates was. It is trite that in *'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's […] affidavits, which have been admitted by the respondent […], together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.*' (National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para 26. See also *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635*; Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) paras 55 and 56; *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director of Public Prosecutions & others* 2008 (2) SACR 421 (CC) para 8-10.)

[28] In the present instance, there are major areas of dispute having regard to the basis on which the Applicant asserts that it is entitled to the relief it seeks. The first is who introduced Milner to the Property and what was the ultimate result thereof? The Applicant claims the Property was introduced to Milner in May 2015. On the Respondents version it was Swanepoel who introduced the Property to Milner in 2014.

Moreover, Swanepoel not only introduced Milner but also caused Afristar to submit an offer to purchase to the Respondents which was initially rejected for the reasons already advanced by the Respondents. The circumstances under which the Applicant claims it introduced the Property to Milner in 2015 is in itself contentious. According to Milner, the Applicant did not introduce the Property to him but he saw it on a notice board when visiting the Applicant to discuss the Riverview property and merely enquire about it. Thereafter a bidder's pack was forwarded to him unsolicited. According to Milner, the Applicant mostly engaged him in respect of the Riverview property. The claim by the Applicant that the Respondents had sold the Property to Afristar whilst it introduced the Property during the period of the sole mandate is a genuine dispute of fact.

[29] The second major area of dispute is whether the Respondents engaged with alternative agents during the Applicant's sole mandate period. The Respondents denied that they engaged with other agents during the sole mandate period. To this end an email dated 7 May 2015 was put up as evidence to support the Respondents' version that Swanepoel indeed referred a potential buyer to the Applicant. The Respondents also denied that it breached the Agreement by failing to give effect to the exclusivity provisions thereof. According to the Respondents, the extent to which the Applicant continued to market the Property, was outside the sole mandate period. The claim by the Applicant that the Respondents interfered with its efforts to market and sell the Property is therefore a serious disputed fact.

[30] It is indeed not in dispute that the Applicant forwarded a bidder's pack and an e-mail dated 6 August 2015, wherein it was recorded that Afristar should increase their offer to the Respondents to between R 10 – R 10.5 Million (excluding commission and transfer duty) and that there are other interested parties willing to offer around R 10.5 Million and attached an offer to purchase document for completion by Afristar, to Milner.

[31] The Respondent however, denied that these efforts were the causa causans of the sale. According to the Respondents, the Applicant refused to discuss the issue of commission with Afristar and never put any offer from Afristar to the Respondents. According to the Respondents, the Applicant was pushing the Second Respondent to accept an offer from StandOut Properties and as a result was not keen to put the Afristar offer to them because it wished StandOut Properties and Afristar to become involved in a bidding war for the Property.

[32] According to the Respondents, given the Applicant's failure to present any offer from Afristar to the Second Respondent, Milner was left with no alternative but to approach Swanepoel and to ask her to present the offer of Afristar to the Respondents. According to the Respondents at the time Swanepoel presented the offer, the sole mandate of the Applicant had also expired.

[33] Much has been made of the fact that Chas Everitt valued the Property between R 15 - R 16 Million. According to the Applicant this was 'way out' and it was as a result

of its wisdom and business acumen that created the environment for the parties to start its negotiations on a realistic basis which effectively caused the sale of the Property. The contention that the Property was initially over-valued does not withstand scrutiny. On the Applicant's own version, the Agreement recorded that the reserve price of the Property shall be R 16 Million.

[34] I am acutely aware of the caution sound by Van den Heever JA in Webranchek v L K Jacobs & Co, Ltd 1948 (4) SA 671 (A) at 679 where the following was said: *'[A] Judge who has to try the issue must … decide the matter by applying the common sense standards and not according to the notions in regard to the operation of causation which "might satisfy the metaphysician"[…]. The distinction between the concepts causa sine qua non and causa causans is not as crisp and clear as the frequent use of these phrases would suggest; they are relative concepts. […] It stands to reason, therefore, that the cumulative importance of a number of causes attributable to one agent may be such that, although each in itself might have been described as a causa sine qua non, the sum of efforts of that agent may be said to have been the effective cause of the sale.'*

[35] In my view, and contrary to the Applicant's believe, the sum of the undisputed facts in this instance can hardly be regarded as the effective cause of the sale on its own. As was stated in Wakefields Real Estate, supra at 561 I, that 'A commission agent is paid by results and not by good intentions or even hard work'.

[36] A further major dispute between the parties is the question whether the Managing Director of the Applicant had the necessary authority to bind the Applicant that led to the conclusion of the Settlement Agreement.

[37] For all these stated reasons, the Applicant must have foreseen the numerous disputes of facts which have arisen and which could not be resolved by way of motion proceedings. In this instance, the Applicant had knowledge of the disputes of fact but nevertheless persisted to proceed on motion. The main application in my view should never have been brought by way of application and falls to be dismissed.

[38] The counter-application is conditional in the event the main application is not dismissed. As the main application falls to be dismissed it is in my view unnecessary to decide the counter–application.

[39] In the result, the following order is made:

The Main Application is dismissed with costs.

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LE GRANGE, J