

SOUTH AFRICA / JUDGMENT

A & B Herbert CC t/a Herbert Properties v Dick (59/2010) [2012]

ZAWCHC 236 (14 December 2012)

[2012] ZAWCHC 236

COURT

Western Cape High Court, Cape Town

BEFORE

Le Grange

CASE / FILE NUMBER

59/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN GAPE HIGH COURT, CAPE TOWN)

CASE NO: 59/2010

In the matter between:

A AND B HERBERT CC t/a HERBERT PROPERTIESPlaintiff

And

CLIVE WILLIAM DICKFirst Defendant

DENISE JULIETTE JACQUELINE DICKSecond Defendant

JUDGMENT:

14 DECEMBER 2012

LE GRANGE, J

[1] The crisp issue for consideration in this matter is whether the Plaintiff is entitled to its claim for estate agent's commission,

alternatively damages as a result of a breach and or repudiation of an exclusive mandate, in the amount of R335 160 000, against the Defendants.

[2] The attorney, Mr Wagener appeared on behalf of the Plaintiff and Adv C Cutler appeared for the Defendants.

- [3] Three witnesses testified in the Plaintiff's case, namely: Mr Philipson, the Defendants' attorney who assisted with the sale

agreement, conveyancing and transfer of the property to the Purchaser Bernard Schafer ("Bernard") Mrs Brenda Herbert and her son Byron Herbert ("Byron") whom are members of the Plaintiff, also testified.

- [4] In the Defendants' case, three witnesses testified* namely, Mr Schafer Senior, his son, Bernard Schafer ("Bernard"), and the First Defendant, Mr Clive Dick. It needs to be mentioned that the Plaintiff, during the case of the Defendants, applied for an amendment to its Particulars of Claim. Paragraph (11A) was inserted and records the following:-

"Alternatively, the purchaser was introduced to the property by the marketing of the property."

- [5] The common cause facts underpinning this matter can briefly be summarised as follows. It is not in dispute that the Defendants, on 19 April 2009, signed an agreement with the Plaintiff, which agreement incorporated an exclusive mandate for 180 days to sell

their immovable property situated at 14 Rottingdean Road, Camps Bay. The selling price in the agreement was recorded in the amount of R4 750 000. The Defendants, the Herbert's, who are members of the Plaintiff, and the Schafer's lived in close proximity of each other in Camps Bay. In fact, the property in question is in the same street and five doors away from where Bernard and his father reside. Bernard and Byron are also known to each other. Both grew up in Camps Bay and schooled together. It is further not in dispute that the Defendants after the expiry of the 180 days instructed other agents to market their property. Thereafter, the Defendants on 13 November 2009 entered into a written agreement of sale with Bernard whereby the property was for an amount of R 4 200 000 sold to him.

- [6] The Plaintiff, in its Particulars of Claim, has framed the essential averments of its claim as follows:-

"Plaintiff's Claim A

10. On or about 8 October 2009f and prior to the expiry of the mandate, Plaintiff's agent, namely Byron Herbert, verbally discussed the property with Bernard Schafer f'the Purchaser") and his father, who were thereby introduced to the property and the conditions of sale. The purchaser was also invited to visit the house during a show day on 11 October 2009.
11. Prior to this discussion, on or about 23 August 2009, Plaintiff conducted a show day in respect of the property, which was attended by the purchaser's father.
12. During the currency of the agreement, and as a direct result of Plaintiff's introduction of the Purchaser, and/or his agent, to the property, the purchaser purchased the property at a price of R4.2 million.
13. Plaintiff was the effective cause of the aforesaid sale of the property and, in the premises, Plaintiff duly performed its obligations in terms of the mandate."

[7] The relevant paragraphs of Plaintiff's alternative claim were styled as follows:-

"21. During the currency of the agreement, and one day after the expiry of the mandate, during a conversation with Plaintiff's agent, namely Byron Herbert, Defendants claimed to have an "interested private buyer".

22. In subsequent conversations between the same parties, Defendants refused to disclose to Plaintiff who the abovementioned Interested private buyer" was.

23. During a telephonic discussion with an employee of the Defendants' attorneys, the Plaintiff's agent, Byron Herbert, was informed that the Interested private buyer" was the Purchaser.

24. During the currency of the agreement, four weeks after the expiry of the mandate, and as a direct result of Defendants' interactions with the Purchaser and/or his agent, Defendants sold the property to the Purchaser at a purchase price of R4.2 million.

25. In their interaction with the Purchaser during the currency of the mandate, Defendants breached and/or repudiated the mandate.

26. Had it not been for Defendants' breach, Plaintiff would have been in a position to exercise its sole entitlement to effect the sale of the property and/or to receive commission as provided for in the terms of the mandate and calculated in Claim A above."

[8] The Defendants in their plea to the Plaintiff's amended Particulars (as Amended) recorded the following, in response, to the Plaintiff's essential averments:-

"Ad paragraph 10

18. It is denied that the Plaintiff introduced the Purchaser and his father to the property and/or the conditions of sale.

19. The Defendants and the purchaser were already personally acquainted with one another and the Purchaser had already been introduced to the property by the Defendants and was already familiar with the property.

20. During or about November 2008 (i.e. before the exclusive mandate agreement had been concluded) the Defendants and the Purchaser (each acting personally) entered into negotiations in respect of the sale of the property. During the course of the aforesaid negotiations, the Purchaser had in fact verbally offered the Defendants the purchase price of R3, 900,00.00 in respect of the purchase of the property.

21. While the Defendants did not accept the Purchaser's offer at this time, negotiations between the parties were ongoing, and continued:

21.1. during the period before the exclusive mandate agreement was entered into;

21.2. after the termination by effluxion of time of the 180 day exclusive mandate agreement period, which ended on or about 16 October 2009.

22. Insofar as Plaintiff alleges a discussion with the Purchaser and his father, the Defendants were not present during same, cannot admit or deny the content thereof, and accordingly put Plaintiff to the proof thereof."
- [9] The Defendants also denied that they breached or repudiated the exclusive mandate agreement as claimed in the alternative by the Plaintiff. According to them the agreement has terminated due to the effluxion of time.
- [10] The evidence of the Plaintiff's witnesses in summary is the following. Mr Phillipson, the attorney of the Defendant testified in respect of certain notes and entries that were made in his file regarding the transfer of the property. His evidence did not take this matter further in respect of the main issues in dispute.
- [11] Byron testified that he negotiated with the Defendants in signing the exclusive and sole mandate with, the Plaintiff. The Defendants did not mention to him about previous negotiations with a private buyer. It was his impression that there was no previous private buyer. According to him had the Defendants mentioned a private buyer he would have inserted it in the contract under the heading "Special Conditions" in order to give the parties an opportunity and time to conclude their dealings before taking the property to the open market. He further testified that the Plaintiff put up "for sale" sign boards and placed advertisements of the Defendants' property in the local newspapers. According to Byron, early in October 2009, whilst at 6 Comrie Road, Camps Bay, he mentioned to Bernard the property of the Defendants was also on the market and would be perfect for him. He mentioned that if Bernard was interested, there would be a show house of the said property later in the week. He further states that nothing was mentioned during this conversation by Bernard that he did not wish to discuss or talk about the said property. He confirmed that Bernard's father was with him on the day in questioned. He further testified that he was stonewalled when he approached the Defendants to extend the Plaintiffs mandate. According to him, the main reason why no written offers were obtained during the mandate was the Defendants' refusal to reduce the selling price. It need to mentioned that despite the amendment of the pleadings, there was no evidence led as to what type of marketing the Plaintiff did in respect of the Defendants' property.
- [12] In cross-examination, Byron was questioned as to how the Plaintiff introduced * the property to Bernard. It was highlighted by the Defendants' counsel that the Plaintiff's attorney, in his opening statement, placed reliance on a "for sale" sign board outside the immovable property as constituting the introduction. It was also pointed out that in the pleadings it was alleged that the introduction occurred on the 8th of October 2009 at a discussion in Comrie Road. His response was It was a conglomeration of things. On the same point in cross-examination, he testified later that

it was not the "for sale" sign board or the advertising that caused the Plaintiff to introduce the property to Bernard. He was also questioned about his impression that there was no previous private buyer. In reply he conceded that he did not discuss this topic with the Defendants and

there was no oral agreement that the Defendants were under an obligation or duty to disclose the existence of previous negotiations and or a previous private buyer. He further admitted that at the discussion in Comrie Road, Bernard did mention that he was already familiar with the property. He also had some difficulty in answering the question how he introduced the conditions of sale (which is the Plaintiff's case in the pleadings) to Bernard,

- [13] The sum total of Mrs Herbert's evidence is that she was present at a show house of the Defendants' property when Mr Schafer Senior came to view the property. According to her, he took a pamphlet with the information of the house and mentioned that he was looking for a property for his son, Bernard. She also testified regarding a comment that was made by the Second Defendant expressing her wish that the sole mandate period must now come to an end as they have a private buyer.
- [14] The evidence on behalf of the Defendants, in brief, was as follows: Mr Schafer Senior testified that as a family, they have been living in Camps Bay for over 40 years. He stated that he goes to show houses in the area of Camps Bay frequently. He admitted that he visited the house of the Defendants whilst on show by the Plaintiff as one of his sons stays in London and was at a time looking for property in Cape Town to relocate back home. He was adamant that his son Bernard never gave him a mandate to look for a house. According to him he never discussed his visit to the show house to Bernard and it only came up when the Plaintiff raised this issue in this matter. He further confirmed that he was present in October 2009 with his son at 6 Comrie Road. He testified it was a cold and miserable evening and that, whilst at the car, Byron mentioned to his son about the Defendants' house. His son informed Byron that he was not interested as he has knowledge of the place. In cross-examination, it was put to him that his version that he had no mandate from Bernard is improbable and untrue. He denied this. He conceded that he may have taken a pamphlet of the show house but cannot as a fact recall it.
- [15] Bernard testified that he works as the head of security and safety in Camps Bay. He lives for the past 41 years in the area and stays with his father. The property is well known to him. He visited the property on certain occasions when he was a child. He testified that in the last quarter of 2008, he was talking to the First Defendant at a neighbourhood-watch function. It was at this function the First Defendant mentioned that they were considering moving to Sea Point. He then suggested that if the Defendants were going to sell that they should bear him in mind. Later that same year or early 2009 he and his girlfriend did neighbourhood watch patrolling with the First Defendant. During the 3 hour patrol they drove past the Defendants' house. The subject of selling the house was again discussed and at that time he made an offer of between 3.7, 3.75 or 3.8 million rand. This offer was, at a later stage again raised to 3.9 million before the Defendants decided to place the property on the open market. According to him there were various discussions with the Defendants where they were together or alone about the sale of the property. He also indicated he understood the reasons why the Defendants decided to place the property on the open market through an agent. According to him they wanted to try and realise the best price possible for their

property.

- [16] After the expiry of the exclusive mandate with the Plaintiff, Bernard and the Defendants continued with their previous discussions which resulted in the sale of the property.
- [17] He further testified that Byron was well aware of the fact that he was looking to buy property in the area. According to him none of the Plaintiff's members' or staff contacted him during the early stages of the Plaintiff's exclusive mandate period. He confirmed he met Byron on 8 October 2009 and that his father was with him. The meeting was arranged as a result of him calling Byron for a second time in order to follow up on a previous conversation requesting information on a house in Comrie Road, Camps Bay. It was during this conversation that he realised that Byron did not remember or did not take his enquiry seriously. He viewed the property in Comrie Road and discussed it in detail with Byron.
- [18] Upon returning to their vehicles outside the Comrie house, just before leaving, Byron mentioned in passing whether he considered 14 Rottingdean as an option to buy. He immediately told Byron that he was familiar with the property and did not want to discuss it with him. The weather conditions that evening were also unpleasant for his father who wanted to return to the ehicle. When the conversation took place about 14 Rottingdean Road, his fatherthe vehicle or already in it. He did not go to any of the show houses relating to the Defendants' property that were presented by the Plaintiff. According to him, he was not aware that his father had viewed a show house of the property.
- [19] He further testified that he was never introduced to 14 Rottingdean Road by the Plaintiff, or any of its members or agents. According to him he was aware of the property and at one time outside the exclusive mandate period had a brief look inside the house. He also knew the Defendants and the fact that the property was on sale due to multiple discussions with them that started back in 2008. He stated that most estate agents in the area knew that he was looking for a property in the 3 million to low 4 million price brackets. The agents called him regularly to look at properties and he made it clear to them that there were other properties that he was privately interested in including 14 Rottingdean Road. He further stated that none of the Plaintiff's members or agents called him to say that they had a property to show to him. According to him, numerous properties in the area came on the market and the Plaintiff made no attempt to sell any of these properties to him.
- [20] The witness was extensively cross-examined and is it unnecessary to deal with each of the questions put to the witness in detail. The cross-examination also concentrated largely around the various discussions the witness had v&h the Defendants either alone or together. It was put to the witness that there are inconsistencies in his version of events and the Defendants, such as the fact that the discussions in the patrolling car during 2008 were not disclosed or recorded in the Defendants pleading. The witness was adamant that the discussions in the patrolling vehicle did take place. He was questioned about the various verbal offers he made and the periods in which they were made. He was referred to the Defendants' pleadings that only recorded a verbal offer of R 3, 900, 000. In reply, the witness

stated that he made more than one verbal offer to the Defendants and does not know if the other lower offers did not impress the Defendants. He was also confronted with a statement he made to the Plaintiff's attorney on 29 November 2012, as a potential witness for the Plaintiff. There was some debate around this statement as Mr Wagener attempted to hand in his written notes to show some or other form of inconsistency on the part of the witness. When it was pointed by counsel for the Defendants that no evidence was led on behalf of the Plaintiff on this issue, Mr Wagener indicated that he was prepared to testify under oath in this regard. The matter stood down for Mr Wagener to take further instructions on this issue and perhaps obtain a second opinion on his willingness to testify. On resumption he did not persist with testifying in the matter and proceeded with his cross-examination. The witness pointed out certain inaccuracies in the statement.

- [21] The evidence of the First Defendant to a large extent corresponds with that of Bernard in respect of the periods and times they had met and discussed the sale of the property. He testified that there were no negotiations between Bernard and the Defendants during the period of the exclusive mandate. He further confirmed that he was at the neighborhood-watch function in the latter part of 2008. It was during this function that he indicated to Bernard that he would not become an active member of the neighbourhood watch as he and his wife were considering selling their property and moving to Sea Point. He also confirmed the conversation with Bernard in the patrolling vehicle and of the verbal offer he made. He testified that the offer of 3.9 million of Bernard did not excite his wife and him. They were of the view that their property may be sold in the region of 4,5 million excluding any estate agent's commission. He stated that they (the Defendants) were extremely unhappy with the service they received from the Plaintiff. According to him no written offers during the 180 period of the exclusive mandate were received by them and it was only after the expiry thereof and the property was opened to other agents that there was a flurry of activity. He further stated on the same evening that the the final offer of Bernard was accepted and before signing the agreement of sale another estate agent arrived at the door with a written offer. He decided, as he already indicated to Bernard that he was accepting his offer, not to entertain the other offer. According to him, the fact that Bernard offered to purchase the property in cash was also a deciding factor.
- [22] In cross-examination, he disputed with contempt the suggestion that there were some underhand dealings between Bernard and them as Defendants. He was also questioned in respect of the pleadings of the Defendants as amended where, before the amendment there was an admission that some form of negotiations took place between the Defendants and Bernard in the period of the exclusive mandate. He denied this and indicated the moment he became aware of it, their court was alerted to it and an amendment of the pleadings took place. He conceded that Bernard did not extensively inspect their property and the Defendants's pleading in this regard is incorrect. He further testified that he could not remember at what juncture in the negotiations Bernard mentioned the figure of 4 million rand, but that the figure was indeed mentioned during their negotiations.

- [23] The principal argument advanced by Mr Wagener is that on a conspectus of all the evidence, the most probable inference that can be drawn from the proven facts is that the version put up by the Defendants is manifestly false and was fabricated in order to avoid paying the commission fees that are due and payable to the Plaintiff. Mr Wagener further contended that the inconsistencies in the evidence of the witnesses for the Defendants further demonstrate that the Plaintiff's version is more plausible and should be accepted.
- [24] Mr Cutler argued that the Plaintiff dismally failed to prove on a balance of probabilities that Byron introduced the property to Bernard or had introduced Bernard to the Defendants. Moreover, the Plaintiff failed to provide any shred of evidence that it was the effective cause of the sale concluded between the Defendants and Bernard. He further argued that in the circumstances of this case, a punitive costs order against the Plaintiff should be considered as the Plaintiff was since June 2012 aware what the Defendants' case was.
- [25] The law with regard to a matter of this kind was discussed in the case of *Aida Real Estate v Lipschitz* 1971
- (3) SA 871 (W) at 873H - 874A where Marais, J set out of the following principle:- "The duty of the estate agent, if he is to earn remuneration by way of commission for selling property, is to introduce to his principal (the seller) a purchaser who is willing and financially able to buy the property, and he earns the commission if a sale is concluded with that purchaser at the stipulated price or a price ultimately proved to have been acceptable to the seller. A proviso has been added to the effect that the introduction of the able and willing buyer must have been the effective cause or the *causa causans* of the sale. If a new factor intervenes causing or contributing to the conclusion of the sale and the new factor is not of the making of the agent, the final decision depends on the result of a further inquiry - viz did the new factor outweigh the effect of the introduction by being more than or equally conducive to the bringing about of the sale as the introduction was or was the introduction still overridingly operative?". This approach was recently reiterated by the Supreme Court of Appeal in the matter of *Wakefields Real Estate (Pty) Ltd v Attree and Others* 2011 (6) SA 557 (SCA) at p 561 para [18].
- [26] Furthermore, it is trite that a Plaintiff who relies on inferential reasoning must prove that the inference sought to be drawn must also be consistent with all the proven facts, but it need not be the only reasonable inference; it is sufficient if it is the most probable inference. See *Katz v Katz* 2004 4 All SA 545 (C) at [95] and *AA Onderlinae Assuransie Bok v De Beer* 1982 (2) SA 603 (A).
- [27] On a conspectus of all the evidence, and in applying the aforestated legal principles to the facts, the Plaintiff, in my view, has failed to prove on a balance of probabilities that it introduced the Purchaser to the Defendants or the immovable property, the Plaintiff has also failed to prove that it was the *causa causans* or the effective cause of the sale between the Defendants and the Purchaser. There is also no evidence to the alternative claim that the Defendants have breached their exclusive mandate agreement.

[28] The evidence of Byron was far from satisfactory. He was utterly unconvincing and did not impress as a credible and reliable witness in this instance. He was vague and not forthcoming with his answers. He appeared to be more interested in where the line of questioning was going when questions were put to him. He could also not give a plausible explanation as to how the Plaintiff introduced the immovable property to Bernard. He confirmed that it was not the for sale sign board outside the house, nor was it the advertising, and only mentioned it was a conglomeration of different things. There was also no evidence tendered regarding the marketing that was done by the Plaintiff in order to introduce the property to Bernard.

[29] Insofar as the discussion at Comrie Road on 8 October 2009 is concerned, the bulk of the evidence does not support the version

advanced by the witness. If indeed, Bernard did not express his unwillingness to discuss the property with him. It is rather surprising that the witness or any one of the Plaintiff's agents did not pursue or follow-up with Bernard whether he would like to view the house. It is also surprising that he never mentioned a word to the Defendants that Bernard had shown an interest, or that the Plaintiff has introduced the property to him. Moreover, he could not explain how he introduced the conditions of sale as relied upon in the pleadings of the Plaintiff, to Bernard. He further admitted that during the discussion in Comrie Road, Bernard did mention that he was already familiar with the immovable property of the Defendants. There is also no evidence provided that the Defendants frustrated the performance of the exclusive mandate or services of the Plaintiff that entitles it to payment of commission.

[30] In his evidence, Byron tried to suggest that the Plaintiff's failure to obtain a single written offer during the mandate period was as a result of the Defendants' refusal to reduce the selling price of the house. In cross-examination, when confronted with the version that the First Defendant suggested to him they should consider dropping the asking price, he was rather vague and indicated he could not remember such an incident.

[31] In respect of Mrs Herbert's evidence, little weight can be attached to her version of events. She could not even remember when the show house took place. Furthermore, the fact that the Second Defendant, according to her mentioned a private buyer, is rather indicative that the version of the Defendants is not a surreptitious plan or a fabrication.

[32] Bernard was an impressive witness. He gave a detailed narrative of how events unfolded between him and the Defendants that led to the conclusion of the sale agreement to purchase the property. He was cross-examined at length as to the particular details of these events. He was open and forthcoming with his answers and did not deviate from his testimony. The apparent inconsistencies, if any alluded to by the attorney for the Plaintiff can hardly be regarded as material, taking into account the totality of the evidence. In contrast, it is in my view rather indicative that the version of the Defendants was not a concoction or a fabrication.

- [33] The First Defendant was equally impressive as a witness. He gave a reasonable and acceptable explanation as to the reason why their pleadings were amended. He also conceded that it was incorrectly stated on the pleadings that Bernard thoroughly inspected their house before signing the deed of sale. The First Defendant did also not try to aggravate his evidence.
- [34] Having regard to the totality of the evidence, I am driven to the conclusion that the most probable inference consistent with the proven facts is that the version of events as testified by the First Defendant and Bernard are more plausible and is accepted. Mr Schafer Senior's evidence is also above reproach and is accepted. It follows that the Plaintiffs version is rejected and can its main and alternative claim in this instance not succeed.
- [35] Insofar as costs are concerned, an argument was advanced by the Defendants' counsel that an appropriate punitive costs order should be considered as the Plaintiffs were well aware in advance as to what their case was. I am however not convinced on the facts before me that a punitive costs order in the circumstances of this case will be appropriate. The normal result should follow the event.
- [36] In the result, the following order is made:-

The Plaintiff's claim A and the alternative claim B, is dismissed with costs.

LE DRANGE, J

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Prepared on 10 October 2026 · Esheria