

SOUTH AFRICA / JUDGMENT

Beijers v Harlequin Duck Properties 231 (Pty) Ltd t/a Office Space Online (1216/2017) [2019] ZASCA 89 (31 May 2019) [2019] ZASCA 89

COURT

Supreme Court of Appeal

BEFORE

Cachalia, Majiedt, Zondi, Mocumie, Gorven

CASE / FILE NUMBER

1216/2017

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non-Reportable

Case no: 1216/2017

In the matter between:

DANIELLE BEIJERS APPELLANT

and

HARLEQUIN DUCK PROPERTIES 231 (PTY) LTD

t/a OFFICE SPACE ONLINE RESPONDENT

Neutral citation: Beijers v Harlequin Duck Properties 231 (Pty) Ltd t/a Office Space Online
(1216/2017)

[2019] ZASCA 89 (31 May 2019)

Coram: Cachalia, Majiedt, Zondi and Mocumie JJA and Gorven AJA

Heard: 03 May 2019

Delivered: 31 May 2019

Summary: Contract – interpretation of non-variation clause – alleged oral agreement – estate agent's entitlement to commission – evidence to contradict express terms of a contract inadmissible.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Modiba J and Mia AJ sitting as a court of appeal):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following order:

‘The appeal is dismissed with costs.’

Mocumie JA (Cachalia, Majiedt and Zondi JJA and Gorven AJA concurring):

- [1] This is an appeal against the judgment and order of a full bench of the Gauteng Local Division of the High Court, Johannesburg (Mia AJ with Modiba J concurring) (the full bench), upholding an appeal against the regional court’s judgment and order, and remitting the matter to the regional court to consider further evidence. The regional court had upheld the plaintiff’s (Ms Danielle Beijers) claim against the defendant, Harlequin Duck Properties 231 (Pty) Ltd t/a Office Space Online, for the payment of the amount of R205 000 plus interest and costs. It shall be convenient to refer to the parties as they were referred to in the regional court, as plaintiff and defendant.
- [2] The material facts and issues can briefly be stated as follows. On 17 October 2011, the plaintiff and the defendant, an estate agency in Gauteng, entered into a written contract in terms of which the defendant employed the plaintiff as a commercial property broker on commission only. It was agreed, that in the event that the plaintiff was the ‘effective cause’ of a sale of any property, the defendant would pay the plaintiff commission on the terms set out in clause 5.1 of the contract which clause reads as follows:

‘You will be remunerated on a commission only basis. Commission shall include any remuneration directly or indirectly earned in the course of business and will be calculated as follows:

50% of total commission earned by the Company from Completed Deals effected by yourself (hereinafter referred to as “Broker’s Commission”). A “Completed Deal” is deemed to be a property transaction which has been invoiced by The Company AND payment for said invoice has been received by the Company.’

- [3] The contract also includes a non-variation clause, clause 20, which provides as follows:

‘No variation of this contract shall have any effect unless reduced to writing and signed by both parties thereto. Any indulgence or waiver of the any of the terms of this contract will in no way affect the right of any party thereto in enforcing any provision thereof.’

There are other clauses which bear on this matter. These include clause 21 which provides:

‘This contract constitutes the sole agreement between the parties and no representation which is not contained in this agreement shall be of any force or effect between the parties.’

And clause 23 provides:

‘Prior drafts of this contract shall not be admissible in any proceedings as evidence in any matter relating to any negotiation preceding the signature of this contract.’

[4] There are two transactions in issue. The parties refer to these as the Woodmead and Chislehurst transactions. It is common cause that the plaintiff had been involved in the transactions concerned and they were both completed deals within the meaning of those words in clause 5.1. The plaintiff was not paid her commission in full. In consequence, during December 2013 the plaintiff instituted action against the defendant in which she claimed payment of the remaining commission. The plaintiff relied on clause 5.1 (set out in paragraph 2). It alleged that she was the effective cause of both transactions. In the counterclaim, the defendant alleged that an oral agreement was subsequently concluded between the defendant and the plaintiff in terms of which the plaintiff agreed not to be paid 50 per cent of the commission earned in respect of the two transactions concerned, but 25 per cent of the commission on each of the two transactions. In the counterclaim the defendant claimed that it had overpaid the plaintiff by an amount of R30 750 which she was paid in respect of both transactions. It claimed payment of the amount of R30 750 on the basis of unjustified enrichment. It should be mentioned that the counterclaim was abandoned in argument before the regional court. In

its heads of argument, the defendant sought to clarify what its real defence was. It stated that it denied that the plaintiff effected

certain completed deals. But this defence contradicts the agreed statement of issues by the parties in the regional court.

[5] The plaintiff, in her evidence, maintained that she was the ‘effective cause’ of both transactions. She had known the buyer previously and had started negotiations with him. The buyer had been interested in buying property in Woodmead. He also wanted to sell his own property in Chislehurst. These were back-to-back transactions, meaning the success of one depended on the success of the other. The plaintiff stated that she had done virtually everything to complete the deals and that Mr Bosman had, upon his insistence, attended one or two meetings with the client. Mr Bosman, she stated, had also communicated with the client contemporaneously with her. She was adamant that without her efforts, the transactions would not have been concluded successfully. Although Mr Bosman assisted with one transaction when she was overseas, that transaction had already been concluded between the parties. Ultimately, it was conceded by the defendant that she was at least one of the effective causes of the completed deals. Mr Bosman made this concession in evidence. He conceded that it had never been put to the plaintiff that he was the effective cause of both transactions. After a number of questions and answers he agreed that he was not the only effective cause. He testified that he was not saying that the plaintiff was not effective in concluding the transactions. He only claimed that she was ‘not the effective cause on her own.’

[6] The only issue remaining for determination in the regional court was, therefore, whether the words ‘effected by yourself’ in clause 5.1 meant the sole or only ‘effective cause’ of the transactions.

[7] The regional court accepted the evidence of the plaintiff regarding her role in the transactions together with Mr Bosman’s

concession. Importantly, the regional court disallowed evidence on the oral agreement contended for by the defendant. It dismissed the defendant’s counterclaim, which had not been persisted with in argument. The full bench set aside the judgment and order of the regional court and remitted the matter to it ‘to consider further evidence the parties may lead’. In the absence of specificity on the nature of the evidence to be led, it must be accepted that the evidence referred to by the full bench related to the evidence regarding the alleged prevailing practice of ‘commission splitting’ outside of the written contract which, according to the defendant, the parties had agreed to, in the meeting of 11 April 2013.

[8] Before us, the following arguments were advanced. First, that on construction of clause 5.1, unless the plaintiff was the sole

effective cause of a transaction, she would not be entitled to full commission. In that instance, the practice of the defendant would govern how much commission would be paid by way of a tacit term. Secondly, if that was not successful, that an oral agreement

concerning commission in those circumstances was admissible and had been wrongly excluded by the magistrate. An aspect of this was that an agent would share her 50 per cent commission with an agent who provided assistance. We were urged to accept that evidence as part of the admissible ‘context’ or ‘surrounding circumstances’ when interpreting a contract in line with decisions of this court.[1]

[9] The parties agreed that clause 5.1, read in its plain language, is not ambiguous. This calls for an interpretation of the relevant

clauses of the contract, being clause 5.1 which must be read in conjunction with clauses 20 and 21. As to the point of interpretation, the defendant relied on the words in clause 5.1 ‘effected by yourself’ to submit that this meant ‘effected by you alone’. The clause cannot bear that construction. The plain meaning of the clause is that commission is paid on all transactions effected by the plaintiff. As for the importation of a tacit term, this relates to the payment of commission. In the first place, no such term was pleaded. Secondly, the entitlement to commission is expressly dealt with. Any additional term amounts to a variation of the express terms. This is excluded by clause 20 of the contract. The question of whether evidence of an oral agreement can be led is dealt with in *KPMG Chartered Accountants (SA) v Securefin Ltd & another*: [2]

‘First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning . . .’

It cannot be said that such evidence amounts to evidence of context or surrounding circumstances. It is evidence which is at odds with the written contract. It is quite clear that the magistrate was correct to exclude any such evidence. It is equally clear that the full bench erred in finding that such evidence should have been allowed and referring the matter back for it to be led. This is even clearer in the present matter when clause 23 expressly excludes any prior drafts.

[10] The only way in which evidence contrary to the terms of the contract could have been led was in support of a claim for rectification of the written contract. Rectification is a well-established common-law right that provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It thereby enables effect to be given to the parties' actual agreement.[3] However, the defendant did not invoke rectification.

[11] Over and above this, in light of clause 21 of the contract, which provides that ‘this contract constitutes the sole agreement

between the parties and no representation which is not contained in this agreement shall be of any force or effect between the parties’, the rhetorical question to ask would be, if splitting of commission was such an integral part of the business of the defendant, why would it not include it in the clear terms of the contract of employment? This is so that employees of the defendant, the property brokers, know without any doubt or recourse to extraneous evidence what they are signing up for, in the event of a dispute.

[12] In the light of the evidence that both the plaintiff and Mr Bosman were involved in securing both transactions, and that the plaintiff effected both transactions, the magistrate was correct. The full bench misconceived the position. In the circumstances, the appeal ought to succeed.

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

B C Mocumie

Judge of Appeal

APPEARANCES:

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[1] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA); Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk (802/2012)

[2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA); Novartis v Maphil (20229/2014)

[2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA).

[2] KPMG Chartered Accountants (SA) v Securefin Ltd & another [2009] ZASCA 7, 2009 (4) SA 399 (SCA), [2009] 2 All SA 523 (SCA) para 39.

[3] GB Bradfield Christie's Law of Contract in South Africa 7 ed (2016) at 383. See also Intercontinental Exports (Pty) Ltd v Fowles [1999] ZASCA 15; [1999] 2 All SA 304 (A) para 11.

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Prepared on 11 October 2026 · Esheria