

SOUTH AFRICA / JUDGMENT

Edelstein Farber Grobler INC v Neumann (66161/2012) [2025] ZAGPPHC 335 (28 March 2025) [2025] ZAGPPHC 335

COURT

North Gauteng High Court, Pretoria

BEFORE

L.G. Curlewis

CASE / FILE NUMBER

66161/2012

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
Case No: 66161/2012
Reportable: No
Of interest to other
Judges: No Revised: No
SIGNATURE
Date: 28/03/ 2025

In the matter between: EDELSTEIN FARBER GROBLER
INC. Applicant
/ Defendant
and
WILLIAM MARTIN
NEUMANN Respondent
/ Plaintiff

JUDGEMENT**– APPLICATION FOR LEAVE TO APPEAL**

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CURLEWIS, AJ:

- [1] This is an opposed application for Leave to Appeal against the judgment that I handed down on 5 February 2025. The Applicant seeks Leave to Appeal to a Full Bench. The Applicant in the application for Leave to Appeal was the Defendant in the underlying action and original judgment of the court a quo.
- [2] The application for Leave to Appeal was brought within the prescribed time period and I therefore do not need to consider a condonation application at all and I will subsequently exclusively deal with the application on its merits.
- [3] The background of the matter at hand is common cause and has been properly dealt with in my judgment. I will not unnecessarily repeat it here. Safe to say that in essence, the Respondent in casu (Plaintiff in the action) instituted action against the Applicant (Defendant in the action) on 18 June 2007, seeking damages for alleged professional negligence. The Respondent's (Plaintiff's) claim for damages is based, inter alia, on the Applicant's (Defendant's) alleged failure to obtain proper instructions, or for acting without instructions, while representing the Respondent (Plaintiff) in a commission claim against Broll Gauteng (Pty) Ltd and/or Broll Property Management (Pty) Ltd (hereinafter collectively merely referred to as "Broll").
- [4] The parties agreed to the separation of issues in terms of Rule 33(4) of the Uniform Rules of Court.
- [5] The relevant portions of the pleadings that were to be considered by the trial Court were clearly circumscribed and are available on CaseLines, inter alia, 001-9 to 001-10 at paras 5 and 6. The trial Court was as a result called upon to determine the separated issues as recorded in the pleadings, being whether the Respondent (Plaintiff) is entitled to commission and how this amount must be calculated, alternatively how much commission the Respondent (Plaintiff) was entitled to.
- [6] On the merits, counsel who appeared for the Applicant (Defendant), submitted that the entitlement to commission depended on basically three factors, namely whether the Respondent (Plaintiff) held a valid Fidelity Fund Certificate at the relevant times when he carried out his duties as a property broker or estate agent in respect of the relevant mandate; the Respondent's (Plaintiff's) cause of action and finally, whether the Respondent (Plaintiff) was the effective cause of the conclusion of the relevant lease agreement. Counsel for the

Applicant (Defendant) submitted that the Respondent (Plaintiff) failed to discharge the onus of proving any one of the factors mentioned on a balance of probabilities and was as a result not entitled to the commission or damages claim. I rejected these arguments in my judgment in the action. This culminated in the current application.

- [7] The Applicant's (Defendant's) various grounds of appeal set out in its application for Leave to Appeal are thankfully not unduly prolix, do not lack clarity and succinctly sets out the 5 (five) grounds of appeal. In summary form, they are essentially the following, namely:

[7.1] that the Court erred by granting an award which was not pleaded nor canvassed in evidence. On Monday 10 March 2025, the Respondent (Plaintiff) delivered a Notice in terms of Rule 41(2) (see CaseLines 032-1) abandoning that part of the judgment awarding him damages in excess of what had apparently been claimed in the action. The Applicant (Defendant) submits that the Respondent's (Plaintiff's)

abandonment of this part of the award of damages is an acknowledgement that there was no basis in fact and/or in law for a commission split as articulated by the trial Court. Even if this was a valid argument in my mind, it became totally moot and indeed now non-existent the moment the Respondent (Plaintiff) delivered the Notice in terms of Rule 41(2) mentioned supra. As correctly submitted by Mr. Klopper (counsel for the Respondent/Plaintiff) there is simply no point in attempting to cause any court to adjudicate matters or aspects that are no more in existence or which have absolutely no further consequence. The attempted ground of appeal has ex lege fallen away. That then disposes of this possible ground for Leave to Appeal.

[7.2] that the trial Court erred by finding that the Respondent (Plaintiff) was the effective cause of the lease agreement which was ultimately concluded between SARS and Eskom[1]. The submission advanced by the Applicant (Defendant) in this regard is that the Respondent (Plaintiff) woefully did not satisfy his onus of proof on a balance of probabilities in the evidence before the trial Court to conclude that he was directly and/or indirectly the effective cause in the final analysis. The authorities cited in support of this submission in my view do not take the matter any further and merely confirms what is trite law in civil litigation.[2] I disagree with this submission by Mr. Ras. In any event most of the arguments stipulated in the Notice regarding this possible ground of appeal were dealt with in detail in the main judgment and do not bear repetition here. Be that as it may, shorn of its verbiage and possible repetition, the real issue is the correctness or otherwise of the findings relating to whether the Court erred in finding that the Respondent (Plaintiff) discharged the evidentiary burden upon him. I am not persuaded by this ground which seems to be the gravamen of the submissions by counsel for the Applicant (Defendant). In the end I concluded that the one consistent or common thread running through the various interactions of all the parties involved in this matter, was the efforts of the Respondent (Plaintiff) that ultimately culminated in a "successful deal". To say that the Respondent (Plaintiff) was not the effective cause, cannot be correct seeing that all evidence demonstrates otherwise. The Respondent (Plaintiff) was constantly and directly involved, participated, was instrumental and, as submitted, was "partaking" in steps that eventually lead to the relevant lease agreement being concluded (as were other brokers of the team as well). The

Respondent's (Plaintiff's) roll in the "teamwork" was rightly conceded by the witness Ms. Elsa Human. Broll, Ms. Elsa Human and Ms. Fran Teagle acknowledged the role played by the Respondent (Plaintiff) towards the conclusion of the final lease agreement. It is not in dispute that they themselves proposed a "split" of commission and subsequently paid an amount to the Respondent (Plaintiff) in acknowledgement thereof. This is uncontested evidence. The explanation provided in respect of the payment made by the Applicant (Defendant) to the Respondent (Plaintiff) been a mere token out of the goodness of its heart, is unconvincing. Up to the stage that the Respondent (Plaintiff) went to collect the relevant documentation (RFI) from SARS, Ms. Elsa Human was not even aware of

the existence of any requirement by SARS for any leased premises. As a result of the initial work done by the Respondent (Plaintiff) the parameters of "deal" became wider. That is the bottom-line. Without the Respondent (Plaintiff) the ultimate deal

between Eskom and SARS would probably never have come to fruition. The Respondent's (Plaintiff's) contributions as is evident from his testimony and the undisputed supporting documentary evidence is self-explanatory.

[7.3] that the Court erred by finding that the Respondent (Plaintiff) had a valid Fidelity Fund Certificate at the relevant time for him to be entitled to receive commission. The evidence and documentary proof, however, demonstrates that the plaintiff was registered as agent with the Estate Agency Affairs

Board (EAAB) during 2003 (and during 2006) and therefore the Plaintiff is entitled to receive commission arising from the relevant

lease agreement. The affidavit by Mr. Clive Martin Ashpol (representative employee of the EAAB) dated 28 January 2010 (CaseLines 002-74) corroborates this fact. The Registration Supervisor of the EAAB, Ms. Lisbeth Phalane, deposed to an affidavit on 19 June 2017 (CaseLines 003-143 to 003-145) stating that that upon inspection of the EAAB records and membership roll, the Respondent (Plaintiff) was registered with the EAAB and his name appears on the EAAB membership roll and records. Ms. Lisbeth Phalane later also corroborated this when she testified in person. The records show that Respondent (Plaintiff) held Fidelity Fund Certificate for the years 2002-2006. The dates of the issue of the respective certificates are indicated as 03/07/2002, 18/10/2003, 03/03/2003, 09/05/2005 and 12/06/2006. Ms. Lisbeth Phalane's evidence regarding the records of the EAAB stands undisputed. The witness confirmed the certificates record a date of issue and are valid until 31 December of that calendar year. Taking cognisance of the earlier judgment by my learned brother Boruchowitz[3] directly relevant and relating to this very same matter in casu, the invoice issued and the relevant Fidelity Fund Certificates for the period(s) under consideration, it is clear that this ground of appeal also must fail. This very ground that the Applicant (Defendant) attempts to rely on in this application for Leave to Appeal was stillborn the moment money was paid over by Broll to the Respondent (Plaintiff). An indisputable indication that the Respondent (Plaintiff) was indeed enrolled as an agent and in possession of the required valid Fidelity Fund Certificate issued by the EAAB is common-cause. This was correctly argued by

Mr. Klopper. Broll indeed on 13 February 2007 paid commission to the Respondent (Plaintiff) arising from the Eskom/SARS lease agreement. It is either the one or the other, both versions cannot stand.

[7.4] that no cause of action exists for the Respondent (Plaintiff). The Applicant (Defendant) relied on, inter alia, McKenzie v Farmers' Cooperative Meat Industries Ltd[4] in advancing this possible ground of appeal. The Respondent (Plaintiff) sued the Applicant (Defendant) for damages by instituting action proceedings due to alleged negligence regarding the handling of the Respondent's (Plaintiff's) claim against Broll. This as a result of and following unsuccessful litigation against the Respondent's (Plaintiff's) former employer, being action proceedings instituted against Broll by the Respondent (Plaintiff) in the Gauteng Division, Johannesburg, under case number 13114/2007, wherein the Applicant (Defendant) represented the Respondent (Plaintiff) as attorney of record. As correctly submitted by counsel for the Respondent (Plaintiff) the relationship between an attorney and client is a contractual one. This necessitates the attorney upholding his/her duty of exercising due skill and care in the conduct of the client's affairs[5]. An attorney must act with the highest integrity at the level and with the skill and diligence that can be expected of a reasonable

attorney, possessed and exercised by professional attorneys. The basis of the Respondent's (Plaintiff's) claim against the Applicant (Defendant) is that the Applicant (Defendant) in case number 13114/2007 allegedly made wrongful and negligent concession(s)

on behalf of the Respondent (Plaintiff) that were allegedly not factual and ultimately placed the Respondent (Plaintiff) in dire

straits. As the Respondent's (Plaintiff's) previous litigation attorney of record, the Applicant (Defendant) gave advice

to the Respondent (Plaintiff) and subsequently drove the litigation by preparing a summons, particulars of claim and the like,

stipulating the claim by its former client. Mr. Klopper submitted that when the Applicant (Defendant) prepared the claim on behalf of the Respondent (Plaintiff), the Applicant (Defendant) must have known the essential legal elements which make up each cause of action, and by implication also the material facts to be pleaded and proved in each case. This, he submitted is a matter of substantive law. I agree. I was duly and aptly referred to the citation by Hiemstra J in Makgae v SentraBoer[6]: '[This] case ... vividly illustrates the truth of what the late Prof. Wille used to say: "Before you can draw a pleading you've got to know the law"'. The Applicant (Defendant) must have acted with diligence and in a proper and professional manner and without negligence, advising its client on merits, procedure and evidence etcetera. The Applicant (Defendant) allegedly obstinately did not do so. Wrongfulness is founded not on the conduct itself, but on the consequences of the conduct, with consideration to reasonable foreseeability[7]. The Respondent's (Plaintiff's) action is therefore in the final analysis grounded in the alleged wrongful act of the Applicant (Defendant) and the alleged causing of damage

resulting from its conduct. The Applicant (Defendant) allegedly failed in its duty as the attorney representing the Respondent (Plaintiff). Only time will tell if this is correct. Regarding this ground of appeal, I am once again not in agreement with the Applicant (Defendant) and as a result this ground also fails.

[7.5] that the Court erred in not finding that a reasonable inference is to be drawn from the evidence, namely that there was no agreement on the “commission split”. Once again the arguments stipulated in the Notice regarding this possible ground of appeal were dealt with in detail in the main judgment and do not require repetition here. At the risk of sounding like a stuck gramophone record, this ground of appeal also fails. It is a pointless and fruitless exercise to regurgitate the adequate reasons already advanced in my judgment in this regard. As pointed out in the judgment, to my mind, the evidentiary burden was discharged by the Respondent (Plaintiff).

[8] Lastly, regarding costs, both parties agreed that this Court will be warranted to award costs and that the appropriate scale for an order of costs, was scale C.

[9] The test and threshold for Leave to Appeal is neither novel, nor controversial and is indeed trite. The Applicant (Defendant)

correctly referenced *Caratco (Pty) Ltd v Independent Advisory Ltd*[8] and *Nova Property Holdings Limited v Cobbett & Others*[9] as authorities. I do not per se have to decide whether my own judgment was right or wrong[10].

[10] There is no basis for the arguments advanced by the Applicant (Defendant). The authorities cited by the Applicant (Defendant) fall short of convincing me that the required threshold for an application of this nature has been met. The authorities in question essentially concerned the need for a court to favour an Applicant (Defendant) when a Court is considering an application of this nature. This Court is not convinced that another Court would reach a different result.

[11] Counsel for the Applicant (Defendant) had no answer to the argument advanced by the Respondent (Plaintiff) that the evidence before the Court clearly indicates that the heart of the matter was whether there was a possible claim for damages based on professional negligence. The Applicant (Defendant) could not refer the Court to any precedents to persuade otherwise.

[12] The Applicant (Defendant) seeks Leave to Appeal based on section 17(1) (a) of the Superior Courts Act, 10 of 2013. The Applicant (Defendant) has not met the requirements for the relief being sought. I am not persuaded that the appeal would have a reasonable prospect of success and therefore the application must fail. I am not persuaded that some other compelling reason exists why the appeal should be heard (including any possible conflicting judgments on the matter under consideration that exist).

[13] I make the following order:

- (1) The application for Leave to Appeal is dismissed with costs.
- (2) The Applicant (Defendant) is ordered to pay costs, on the High Court scale C.

L.G. Curlewis

Acting Judge of the High Court Gauteng Division, Pretoria

Counsel for the Applicant: Adv.R.S. Shepstone & Adv. N. Mncube

Bridge Group of Advocates, Sandown

Instructed by: Eversheds Sutherland South Africa Inc., Johannesburg C/O Jacobson & Levy, Pretoria

Counsel for the Respondent: Adv. J.C.Klopper

Instructed by: Tiaan Joubert Attorneys, Pretoria.

- [1] Judgment, dated 5 February 2025 at para 38.
- [2] Mashego Dumisani Promise v Passenger Rail Agency of South Africa [2023] ZAGPPHC 14 and the cases cited therein. See also Maitland and Kensington Bus Co (Pty) Ltd v Jennings ZAGPPHC, Case no 61756/2018- revised 20 January 2023.
- [3] Boruchowitz J, Judgment in case 13965/04, page 10 line 3-4, CaseLines 08-293.
- [4] 1922 AD 16.
- [5] Bruce NO v Berman 1963(3) SA 21 (T).
- [6] 1981 (4) SA 239 (T). See also Minister of Safety and Security v Van Duivenboven 2002 (6) SA 431 (SCA) at [12] as well as Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA) and other authorities cited in these judgments.
- [6] 1981 (4) SA 239 (T). See also Minister of Safety and Security v Van Duivenboven 2002 (6) SA 431 (SCA) at [12] as well as Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA) and other authorities cited in these judgments.
- [7] Premier, Western Cape v Faircape Property Developers (Pty) Ltd 2003 (6) SA 13 (SCA).
- [8] 2020 (5) SA 35 (SCA). The Respondent (Plaintiff) also referred this Court to Nannen & others v Momentum & others (6796/05 & 2275/05) [2017] ZAGPPHC 43 (14 June 2014), MEC Health, Eastern Cape v Mkhitha (1221/15) [2016] ZASCA 176 (25 November 2016) and other cases cited in those judgments.

[9] 2016

- (4) SA 317 (SCA) para 8. See also the authoritatively established test for Leave to Appeal in *Ramakatsa and Others v African National Congress and Another* [2021] JOL 49993 (SCA) March 2021 where the previous different views and findings in this regard were considered and, in my view, essentially

are now moot.

- [10] *Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and Another* (2023/001585) [2023] ZAGPJHC 1082 (28 September 2023).

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