

SOUTH AFRICA / JUDGMENT

**Eileen Louvert Real Estate (Pty) Ltd. v
AFC Property Development Co (Pty)
Ltd. (462/1987) [1989] ZASCA 22;
[1989] 2 All SA 290 (A) (23 March 1989)
[1989] ZASCA 22**

COURT

Supreme Court of Appeal

BEFORE

Van Heerden, Grosskopf, Nicholas

CASE / FILE NUMBER

462/1987

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LL Case No 462/1987

IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between:

EILEEN LOUVET REAL ESTATE (PTY) LTD Appellant

and

A F C PROPERTY DEVELOPMENT CO (PTY) LTD Respondent

CORAM: VAN HEERDEN, E.M. GROSSKOPF JJA et

NICHOLAS AJA

HEARD: 10 MARCH 1989

DELIVERED: 23 MARCH 1989

JUDGMENT VAN HEERDEN JA:

2.The appellant is a company carrying on

business as an estate agent. On 31 August 1982 the parties entered into a written agreement. At that stage the respondent was the owner of portion 191 of the farm Rietfontein and portion 60 of the farm Waterval. The material part of the agreement provided as follows:

"MANDATE TO SELL

I, the undersigned, DAVID MACGREGOR MUNRO duly authorized hereto in terms of a resolution passed by the shareholders of A F C Property Development Company (Pty.) Limited, being the owners of:

Portion 191 (a portion of portion 64) of the farm Rietfontein No. 2 I R measuring 13,0252 hectares;

Portion 60 (a portion of portion 35) of the farm Waterval No. 5 I R measuring 3,1637 hectares, do hereby grant Eileen Louvet Real Estate (Pty) Limited, the sole and exclusive right to sell the above property, being 26 stands measuring approximately 2,000 M² each, and the remaining land to be developed into townhouses/group houses/cluster houses, at a

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prescribed price to be approved by A F C Property Development Company (Pty.) Limited, as and when the Company wishes to sell the development and at a cost to be determined at that time. Payment to be in cash against registration of transfer, to be secured by a Banker's or other approved guarantee. Upon the sale of each stand and/or unit A F C Property Development Company (Pty.) Limited, will be liable for commission in accordance with the tariff of the Institute of Estate Agents (Southern Transvaal" Branch). I further agree that I shall not allow any other Estate Agents to view the property with or without prospective purchasers during the operation of this sole mandate. Further-more, if during the period of this sole mandate the property/stand/units is/are sold by me or any other person, then A F C Property Development Company (Pty.) Limited, shall be liable to pay Eileen Louvet Real Estate (Pty.) Limited, commission at the rates referred to above and calculated on the price at which the property/stands/units is/are sold."

Subsequently the respondent sold three stands

to purchasers introduced by the appellant. On 11 March 1983 the remainder of the two properties was sold by the respondent for R1,8 million. Although the appellant did not introduce the purchaser, it claimed⁴ to be entitled to commission on this amount calculated in accordance with the tariff of the Institute of Estate Agents (Southern Transvaal branch). This claim was based upon the final sentence of the above excerpt from the written agreement. When the respondent repudiated liability, the appellant instituted action against it in the Witwatersrand Local Division. Two claims were preferred, only one of which is material to this appeal. That claim was for payment of the sum of R64 750, being the commission allegedly payable on the sale of the remainder of the properties. The respondent raised three separate defences, two of which were rejected by the court *quo*. On appeal the respondent no longer relied upon those two defences. The third defence, which was introduced at a late stage by way of amendment of the plea, read as follows:

"... prior to the sale of the portion of the⁵.

property referred to [i.e. the remainder of the properties], the defendant represented by Munro and/or Fynn terminated the Plaintiff's mandate as it was entitled to do."

Munro and Fynn were directors of the

respondent. As appears from the portion of the written agreement quoted above, Munro represented the respondent in entering into that agreement. Both testified at the trial. The court a quo found that Munro was an unsatisfactory and indeed lying witness and on appeal the respondent did not seek to rely on his evidence. Fynn's version of the alleged termina-

tion of the mandate was, however, accepted by the court a quo. (The appellant did not seek to controvert that version by rebutting evidence.) In the result the

court held that the mandate had indeed been revoked by

Fynn, on behalf of the respondent, before the remainder

of the properties was sold by the respondent. This

finding led to a dismissal, with costs, of the

appellant's first claim. With the leave of the

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court a quo the present appeal is directed against that order.

The defence under consideration arose out of

a meeting which took place on 10 February 1983. Present were inter alios Fynn, Munro and Delfanta, and the appellant's Mrs Louvet. Delfanta had apparently submitted an offer for the remainder of the properties through Mrs Louvet. This offer involved an exchange of land. Fynn said that at that stage he was desperate to find a purchaser for the remainder but that the respondent needed ready cash. This he conveyed in no uncertain terms to Mrs Louvet. When she attempted to persuade Fynn that Delfanta's offer was acceptable, Fynn said:

"... we are desperate to sell the property, we must sell the property because we have to make a payment to African Finance Corporation and I said to her Eileen, I am afraid at this stage there is nothing I can do about it, we have to get rid of the property, the first person who brings an acceptable offer of R1.8 Million to me is going to get the property, it is definitely, it is first come, first

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serve."

Fynn also testified that at that stage he was under the impression that the written mandate applied to individual stands into which the remainder had been or could be subdivided, as opposed to the whole of the unsold properties, but that the respondent had prior to the end of 1982 been instructed orally by Munro to find a purchaser for the whole of the remainder. In

consequence he did not subjectively intend to terminate the written mandate. It remains to point out that according to Fynn's information the oral agreement did not create a sole "agency" in favour of the appellant.

The reasoning of the court a quo appears from

the following extract from the judgment:

"I need not refer to authority for the statement that the mandate in question could be withdrawn by defendant. A mandate may be withdrawn explicitly but also tacitly or impliedly. The withdrawal has to be brought to the notice of the agent.

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In my view the attitude that the first person who brings an acceptable offer is going to get the property cannot coexist with a sole mandate nor can it coexist with the undertaking in the mandate not to allow any other estate agent to view the property with or without prospective purchasers. By implication therefore the sole mandate was terminated despite the fact that Fynn did not know about the sole mandate and that he did not intend to terminate it."

It has, of course, often been held that, save

for certain exceptions, an agent's mandate may be summarily revoked by the principal, even if it is expressed to be irrevocable. A mandate in this sense is an authority, derived from an agreement of agency, to perform a juristic act on behalf of the principal. But in law an ordinary estate agent (to whom, for convenience, I shall refer as a realtor) is not appointed by virtue of such an agreement. He cannot

sell the property on behalf of the owner, nor can he perform any juristic act binding the owner. The

latter merely undertakes to compensate him should a

certain eventuality occur; usually if he introduces a willing and able purchaser as a result of which the property is sold to the person thus introduced. The contract between the owner and the realtor is therefore also not an agreement of mandate; the realtor is not obliged to perform his mandate. Hence the contract is *sui generis* (cf *Gluckman v Landau and Co* 1944 TPD 261, 274-5). For the sake of convenience I shall, nevertheless, use the word mandate to denote the realtor's authority. It has been said that a realtor's mandate may at any time be revoked by the owner. See, e.g., *Boose v Zeederberg and Duncan* 1918 TPD 283, 290. It is, however, necessary to distinguish between a revocation of the mandate - whatever its import may be - and a termination of the agreement giving rise thereto. Even if a mandate may be revoked at will, the contract may still be extant with the result that the realtor may prefer a claim for damages against the owner. This could be the position if the owner was not

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entitled to summarily terminate the contract.

Generally speaking, however, the question of revocation does not arise in the case of an ordinary realtor. Apart from the fact that he cannot in law bind the owner to a third party, the owner may with impunity refuse to accept any offer made by a would-be purchaser introduced by the realtor (unless, of course, the agency agreement provides that the realtor will be entitled to commission on the mere introduction of a willing and able buyer). The owner also retains the right to sell directly, or through the offices of other realtors, to a third party. From a practical point of view there is consequently no need to revoke the mandate or to terminate the agreement giving rise to it. Indeed, there can be no revocation of the mandate divorced from a termination of the underlying contract. It is only when termination takes place that the realtor is no longer entitled to commission on performance of the services stipulated in the

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agreement. The question whether such an agreement may be terminated at will by the owner, becomes important, however, in cases of so-called sole agencies. In *Tony Morgan Estates v Pinto* 1982 (4) SA 171 (W) 174, Nestadt J, assumed, without deciding, that a sole agency, and specifically the one conferred in that case, could be "revoked" at any time. I agree, however, with the submission of counsel for the appellant that the answer to the above question depends on the terms of the contract of mandate. If the mandate was conferred for a specific period, the agreement of mandate may obviously not be terminated during its currency. Should the owner in such a case purport to revoke the mandate, the agreement will not be terminated, and should the agent perform the agreed services, or show that, but for an act of the owner frustrating the performance of the services entitling him to payment of commission, he would have earned the12. same, the realtor will be entitled to commission or damages as the case may be. Of course, the mere conferment of a sole agency does not give rise to such a claim should the owner sell the property without the intervention of any agent. The position may be different if a sole authority is created: *The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* [1984] ZASCA 1; 1984 (2) SA 868 (A) at 886. Although the appellant was authorised to "sell" the property, it was rightly common cause that it was not an agent with authority to sell on behalf of the respondent; on the contrary, the appellant's "right to sell" was intended to confer a "right" to introduce prospective purchasers. The written agree-ment was consequently not a contract of agency but of mandate in the sense outlined above. That mandate was not granted for a specific period. The agreement did, however, confer upon the appellant "the sole and exclusive right" to sell the properties, and13. furthermore provided that "if during the period of this sole mandate" the properties were to be sold by the respondent or any other person the appellant would be entitled to commission calculated with reference to the purchase price. If the agreement is construed as entitling the respondent to terminate it summarily, it would be, practically speaking, virtually worthless. The right to commission preserved in the last paragraph could be frustrated by unilateral termination on the part of respondent before the conclusion of a sale. This it would be entitled to do even if appellant had gone to considerable expense in procuring the prospective purchaser, and even if the appellant was on the point of introducing such a purchaser. It therefore appears to me that in

accordance with the general rule applicable to agreements having efficacy for an unspecified period, the agreement under consideration could only have been terminated by the respondent on reasonable notice.

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The respondent did not plead that the agreement had been terminated by reasonable notice. Nor did the evidence establish that such notice was given. Indeed, if what Fynn said during the discussions set out above is taken to be in law a notice of termination, it was not stated to take effect at a future date. And it has not been suggested that a summary termination of the agreement in this case could be regarded as reasonable. Hence the respondent failed to allege or prove that the agreement was validly terminated. There is a further reason why the appeal should succeed. I cannot agree with the view of the court a quo that what Fynn said was irreconcilable with the continued existence of the agreement. Fynn indicated no more than that the property would be sold if another agent submitted an acceptable offer. Although the agreement conferred "a sole and exclusive right" upon the appellant, and although the respondent¹⁵ agreed not to allow any other estate agent to view the properties with or without prospective purchasers, the appellant's ultimate protection was to be found in the provision that, should the respondent in breach of its obligations sell otherwise than through the appellant, it would still be obliged to pay commission to the respondent. At most, therefore, the respondent, through Fynn, threatened to commit a breach which would in terms of the agreement, still entitle the appellant to payment of commission. And nothing said by Fynn can be construed as a notice to terminate that provision. In short, at most Fynn conveyed that the respondent might not honour all the obligations created by the agreement. It is also to be noted that Fynn did not intend or purport to terminate the appellant's mandate to find a purchaser, as opposed to its sole right to sell the property. That much was conceded by counsel for the respondent. It therefore appears to me that

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the respondent in effect sought to rely upon an unilateral amendment, as distinguished from an unilateral termination, of the agreement. In view of my above findings I consider it unnecessary, however, to decide whether, even with reasonable notice, such an amendment could validly have been achieved.

The appeal succeeds with costs and the

following is substituted for the first sentence of the order of the court a quo.

"The defendant is ordered to pay to the plaintiff the sum of R64 750-00, interest on that sum at the rate of 11% per annum, and costs of suit."

H.J.O. VAN HEERDEN JA

GROSSKOPF JA CONCUR NICHOLAS AJA

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