

SOUTH AFRICA / JUDGMENT

Elbie Eiendomme CC t/a El Madre Properties v Ryton Estates (Pty) Ltd (51863/08) [2011] ZAGPPHC 58 (15 April 2011)

[2011] ZAGPPHC 58

COURT

North Gauteng High Court, Pretoria

BEFORE

N Ranchod

CASE / FILE NUMBER

51863/08

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REPORTABLE

IN THE HIGH COURT OF

SOUTH AFRICA

(NORTH GAUTENG HIGH

COURT, PRETORIA)

CASE NR: 51863/08

DATE: 15 APRIL 2011

In

the matter between:

ELBIE

EIENDOMME CC t/a EL MADRE

PROPERTIES.....

PLAINTIFF

and

RYTON

ESTATES (PTY)

LTD.....

DEFENDANT

JUDGMENT

Ranchod J,

[1] In this matter the plaintiff claims payment of R2 000, 000.00 plus VAT from the defendant, together with interest and costs. The claim is based on contract, in terms of which the plaintiff was mandated to market and sell the defendants property (a group of properties collectively called Ryton Estates (and referred to herein as 'the property')). The property was sold in 2008.

[2] Plaintiff is a close corporation trading under the name and style of EL MADRE PROPERTIES, the sole member of which is Mr LB. Odendaal. Prior to the coming into existence of the plaintiff close corporation, Odendaal had personally traded as EL MADRE PROPERTIES.

Before and after that, he was employed by REALTY 1 [ELK] White River (which, notwithstanding its name, in fact traded at Nelspruit).

[3] The essential disputes between the parties are two-fold, firstly whether the plaintiff had a mandate to market and sell the property and secondly, whether plaintiff was the effective cause of the sale of the property.

[4] Odendaal gave his evidence on commission because he was ill at the time. The commission heard his evidence on 13 April and 7 June, 2010 and the transcript of the record of the commission was handed in at Court on the first day of trial on 3 August, 2010 by the Commissioner, Advocate G.D. Lubbe.

[5] The defendant then requested that the matter stand down to the following day to afford its legal representatives the opportunity to peruse the commission's transcript. The costs of the day were reserved. I will revert to the costs issue presently.

[6] A number of facts appear to be common cause or not in dispute: That Odendaal is the only member of the plaintiff; During the period 2000-2005 Odendaal was employed as an estate agent by Realty 1 until he resigned at the end of 2005;

During 2006 Odendaal was incapacitated by ill health and was therefore not active as an estate agent for the entire year;

In 2007 Odendaal began trading as an estate agent again but this time for his own account; In the same year -2007- the plaintiff close corporation was incorporated with Odendaal as the only member; During the time when Odendaal was employed by Realty 1 (before

2007) two or three Black Economic Empowerment ventures expressed interest in buying the property but ultimately none of them came to fruition; After the period of inaction during 2006, in January 2007 a co-employee of Odendaal at Realty 1, Mr Mark Flewin, introduced one Nick Elliot. Odendaal testified that Elliot had told him he was going to buy the property together with the government;

The property was ultimately sold to the South African Government, acting through the Department of Land Affairs (DLA), in May, 2008;

Shortly thereafter the property was transferred to the purchaser, in June, 2008.

THE MANDATE

[7] I turn then to the question of the mandate. The defendant disputes that the plaintiff (or, for that matter, Odendaal personally) had the mandate to market and sell the property for defendant. It was put to Odendaal that the mandate was given to Realty 1 at a time when Odendaal was in the former's employ. Odendaal confirmed that the mandate was originally given to Realty 1 but that during February, 2007 the mandate was confirmed as being between himself personally and the defendant. In support of this contention, Odendaal relies on letters A and B to the particulars of claim. Letter A headed 'ELMADRE EIENDOMME - PROPERTIES' reads as follows:

"7 Februarie 2007

MNR. G. WATSON

RYTON ESTATES

NGODWANA

FAKS NO: 011 728 9005

IS: VERKOOP VAN RYTON ESTATES - KOMMISSIE

HIERMEE WENS ONS U MEE TE DEEL DAT DIE KOMMISSIE BETAALBAAR OP DIE BOGENOEMDE TRANSAKSIE R 2 000 000.00 (TWEЕ MILJOEN RAND) BTW UITGESLUIT, SAL BELOOP SOOS MET U BESPREEK.

WEEREENS WIL ONS U BEDANK VIR U SAMEWERKING EN TYD WATU AAN ONS AFGESTAAN MET. BYVOORBAAT DANKIE

(Signed)

LB ODENDAAL PRINSIPAAL"

Letter B headed 'RYTON ESTATES (PTY) LTD' read as follows: "El Madre Eindomme Posbus 19711 Nelspruit 1200

Per Faks-013-7551613

8 Februarie 2007

Geagte Mr Odendaal,

IS. VERKOOP VAN RYTON ESTATES - KOMMISSIE

U Skrywe van 1 Februarie 2007 verwys;

Let wel die kommissie op begenoemde transaksie sal slegs aan betaal word as u maatskappy die plaas verkoop.

Byvoorbaat dank,

Marc Watson Ryton Estates"

- [8] Odendaal testified that when he resumed trading as an estate agent in January, 2007 he had informed Mr Garry Watson, who was a director of the defendant of that fact. Mr Watson, he said, informed him that he (Watson) wanted to have nothing to do with estate agencies and other persons and that he wanted him (Odendaal) to do his work.
- [9] Whilst I did not have the benefit of observing Odendaal when he was testifying (his evidence having been taken on commission by Adv. Lubbe) a perusal of the record shows that he was an honest witness and readily conceded, where necessary points, put to him in cross-examination. An aspect of his evidence that may be criticized was that relating to the issue of VAT registration and the issuing of a VAT invoice and whether the transaction included or excluded VAT. I do not think that even then he was being deliberately dishonest. A lengthy cross-examination took place on the VAT issue and whether the VAT invoice was submitted to the conveyancing attorney. I agree with plaintiff's counsel that it is the proverbial red herring and does not, in my view, affect the credibility of Odendaal on the mandate issue, nor for that matter as regards the question of who was the effective cause of the sale of the property.
- [10] In my view it is important to note that whatever may have preceded it, the mandate in favour of EL MADRE PROPERTIES was confirmed by the letters A and B. The contents of these letters were not challenged; nor was their authenticity. Importantly, such mandate was confirmed by Mr Watson, who testified for the defendant, in his own testimony. In the light thereof, the whole question of the mandate having initially been given to Realty 1 is beside the point.
- [11] In my view, the existence of the mandate in 2007 was confirmed by all the evidence. Odendaal testified that Watson wanted the mandate to follow him no matter where he went. This was not challenged either. Odendaal created the plaintiff as a business vehicle on the advice of his accountant, Mr Dunn. Odendaal said the mandate was ceded to the plaintiff which traded as EL MADRE PROPERTIES. It was argued by defence counsel that Dunn should have been called as a witness by the plaintiff to testify on these points. In my view, it was not necessary to call Dunn to provide details of the mechanics by which this was done. (Odendaal also testified that it was a requirement by the Estate Agencies regulator that a close corporation or company must be utilised as a vehicle through which an estate agent must conduct his business.)

- [12] The defendant submitted that Odendaal testified that the mandate given to Realty 1 was in fact the same mandate as the one in terms of which the plaintiff earned the commission in 2008 and that Odendaal was not responsible for or involved in the termination of the Realty 1 mandate.
- [13] The original instruction to Odendaal whilst he was still with Realty 1 came to naught; so too the efforts to conclude a sale with a BEE group and Golden Citrus Estates (previously TSB). In my view, the letters A and B clearly indicate that it was the intention and effect of the mandate that EL MADRE PROPERTIES would continue efforts to market the property. As I said, such continued mandate was confirmed by Watson in his testimony. The letters confirm the existence of the mandate in favour of EL MADRE PROPERTIES. That Odendaal was not involved in or responsible for the termination of the mandate of Realty 1 is in the circumstances not of consequence. The letters, as explained by and viewed against the background of the evidence of Odendaal, Watson, Flewin and Elliot confirm that EL MADRE PROPERTIES was mandated by the defendant to find a purchaser at an agreed commission.
- [14] I accept, on a balance of probabilities, Odendaal's evidence of the mandate following him, in light of the letters A and B as well as the cession of the mandate to the plaintiff.

EFFECTIVE CAUSE OF THE SALE

- [15] The principle that emerges from case law is that enquiries relating to effective cause of a sale are factual and each case must accordingly be dealt with on its own unique set of facts. While previous cases may be helpful they are not decisive because generally speaking, no two cases are identical on the facts. I turn then to the facts of the case before me.
- [16] It is clear from the evidence that Odendaal put a considerable amount of time and effort during 2003 in preparing a brochure for the purpose of marketing the property. He enlisted the help of several individuals where necessary to properly value the property and draw up various tables. Odendaal says he incurred considerable amount of travel expenses and the taking of photographs of the property as well.
- [17] Flewin testified that he introduced Elliot to Odendaal about three to four years before the transfer to the government was registered in 2008.
- [18] During the period 2004-2005 Elliot was instrumental in introducing certain potential BEE purchasers. Two of three potential purchasers made offers which were put to Gary Watson of the defendant by Odendaal but they could not secure the necessary finance and, in any event, Watson rejected the offers as being too low. A third group of purchasers, says Odendaal, also did not qualify to purchase the property. Odendaal himself agreed with Watson that the two offers that were made were too low.

[19] Flewin said Elliot came back to him in early 2007 in connection with the sale of the property. Odendaal had kept him informed about Elliot's negotiations with, this time, the Government as a potential purchaser. (Elliot testified that he was a facilitator of business transactions and in this case his intention was to lease the property from the Government if the latter would purchase it.) Odendaal arranged a meeting where Gary Watson, his son

Marc Watson, Elliot and himself were present. Odendaal introduced Elliot as a potential buyer and it was at this meeting that he also informed Gary Watson that he was now on his own and no longer with Realty 1. Watson had responded, as stated earlier, by saying he wanted to have nothing to do with estate agencies or other persons and that Odendaal should do his (Watson's) work as he had all his information and that he had done Watson's work properly until then.

[20] Importantly, Odendaal's evidence is that Elliot had said he, together with the Government ('in samewerking met die regering')

wanted to buy the property. Elliot testified that the project was brought to him by Odendaal and they facilitated the sale of the

property to the government. Under cross-examination he said it was Odendaal who introduced the property to him, that he was not an agent of the Government nor did he represent Ryton Estates. He also confirmed under cross-examination that at the time of the BEE negotiations Odendaal was involved and that it was Odendaal (and Flewin) who presented the project at the time at the premises of Realty 1. While Elliot could not recall whether he introduced Odendaal to any Government officials he did recall that he received

the marketing brochure from Odendaal which he in turn passed on to the Government. He had later passed on additional copies of the brochures from Odendaal to the Government. Odendaal testified that he had several additional copies. Elliot also said because the Government wanted to make the farm workers shareholders in the farm it must have interacted with Watson in 1999.

[21] The essence of defendant's case as I understand it is that Odendaal's interaction with Elliot was in the context of Elliot as a potential purchaser. That the Government ultimately purchased it was due to its prior dealings with Watson in 1999. Furthermore, it was argued, Odendaal had no dealings whatsoever with the DLA or with the transferring attorneys. Nor was he involved with contractual

negotiations and he had not even seen the contract of sale before he issued summons and the defendant discovered it as part of the discovery procedure. Defendant further contends that even if it is accepted for purposes of argument that had Elliot not been introduced to the defendant, the government would never have purchased the property; the plaintiff is nevertheless not entitled to the judgment it seeks. The reason, so it was argued, is that the plaintiff bears the onus of proving that its introduction was the direct and effective cause of the sale and the purchaser was induced to buy as a result of his introduction. Accordingly, the estate agent has to prove that he was the *causa causans* and not the *causa sine qua non*, in other words, that the agent was not a cause but the case of the sale. I was referred in this regard by defence counsel to AIDA REAL

ESTATE LTD v LIPSCHITZ 1971(3) SA 871 at 873-874A where it was stated as follows:

"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 proven to be acceptable to the seller. A proviso has been added to the effect that the introduction of the willing and able buyer must have been the effective cause or 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 enquiry - 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 overwhelmingly operative? Only in the latter instance is the commission said to have been earned."

[22] The initial interest by the Department of Land Affairs was in a completely different context and for a different purpose altogether,

i.e. Labour Tenant Tenure and Reform. That had, as Mr Watson conceded, nothing to do with the eventual sale. Moreover, the evidence of Mr Moloi was that nothing ever came of that, due to financial constraints. There is, in my view no evidential basis for the suggestion that the Government was interested in Ryton Estates as a buyer, as ultimately evidenced in the concluded agreement of sale, long before Odendaal became involved. Mr Moloi did not explain his own position within the Department of Land Affairs save for creating and leaving the impression that he was concerned with the issue of Labour Tenants and their problems. No other Government official was called to substantiate the propositions put in cross-examination with a view to place a question mark over or undermining the plaintiff's evidence demonstrating that EL MADRE PROPERTIES was the effective cause of the eventual transaction, being principally the evidence of Mr Elliot and Odendaal (as well as the corroborating testimony of Mr Watson that it was the Government that subsequently contacted him) and also Mr Flewin; or to indicate that the involvement of EL MADRE PROPERTIES was superfluous.

[23] Given that a successful sale was concluded, the plaintiff's case does not depend upon the details of the negotiations between the purchaser and the seller as contended for by defendant.

[24] The sale transaction came about after Mr Watson was contacted much later by the Government, as he himself confirmed. On the

probabilities, that fresh interest by the Government was due to the efforts of EL MADRE PROPERTIES. That is the direct evidence of Mr Elliot. It was Odendaal who had originally introduced Mr Elliot to Mr Watson and there can be no dispute that EL MADRE PROPERTIES rekindled the interest in or about 2007. In the light of the obviously continuing mandate to EL MADRE PROPERTIES, as stated earlier the fact that Odendaal had originally been with Realty 1 is of no consequence in this regard. The deal moved with Odendaal. The defendant cannot escape the consequence of the evidence of Mr Elliot. On a common sense approach EL MADRE

PROPERTIES did all that was required of it. A successful transaction ensued. On the evidence of Mr Elliot and Mr Flewin (the latter in particular describing the revival of interest by Mr Elliot preceding the ultimate transaction), the chain of causation between the input of EL MADRE PROPERTIES and the ultimate sale was never ruptured by any new or intervening cause. On that evidence (of Mr Elliot as supported by Odendaal and Mr Flewin) the requisite nexus is inescapable. The plaintiff

referred to *WEBRANCHEK v LK JACOBS & CO LTD* 1984(4) SA 671 (A) at 678-9 where it was held:

"It was agreed therefore that 'effective cause' means something more than that which causes in a mechanical sense. If I may use a figure: counsel were at one that if plaintiff brought about a super-saturated solution and a stranger merely jarred it into crystallization, defendant could not lawfully withhold plaintiff's commission. That admission immediately brings into play moral causes and moral effects, and it is difficult, if not impossible, to track and define causation in such a transcendental field. Accordingly a Judge who has to try the issue must needs 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' (*Yorkshire Dale Steamship Co v Minister of War Transport* (1942, A.C. (H.L.) 691, 706)). 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. Where a *causa sine qua non* emerges as the only known causative factor, one is easily persuaded that it was also the *causa causans*;"

And

"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."

[25] In my view the plaintiff falls within the ambit of such principles. It was primarily the efforts of EL MADRE PROPERTIES that lead to the ultimate purchaser and the seller coming together. The defendant criticizes the lack of involvement of EL MADRE PROPERTIES in the negotiations and the finalization of the ultimate contract. However, it is no requisite that the agent be involved therein or perhaps even be aware thereof at the time (*MANO ET MANO LTD v NATIONWIDE AIRLINES (PTY) LTD AND OTHERS* 2007(2) SA 512 (SCA) par [13] at 517). Clearly, no new cause ever intervened in this case. The efforts of EL MADRE PROPERTIES were still overridingly operative: the *causa sine qua non* herein is indeed the *causa causans*. Defendant's quotation from *LAWSA*, in which one purchaser went out and found another of his own accord, is not helpful as that is not the case here. It was apparent that it was EL MADRE PROPERTIES that initiated the efforts of Mr Elliot. Mr Elliot was never a purchaser.

[26] In the more recent case of *KNIGHT FRANK SA (PTY) LTD v NACH INTERNATIONAL INVESTMENTS (PTY) LTD* 1999(3) SA 891 (W) the headnote

reads as follows:

"The applicant applied for an order that the respondent pay to it an amount owing as a result of the applicant's having complied with a mandate given to it by the respondent to sell the respondent's property. The main issue in dispute was whether the applicant's

activities in fulfilling the mandate could be regarded as having been the effective cause of the eventual sale of the property.

Prior to the sale, the property had been leased by F (Pty) Ltd and the lease agreement had conferred a right of first refusal in favour of F (Pty) Ltd. The applicant had been aware of both the lease agreement and the right of first refusal conferred in terms thereof when it had concluded the mandate. The applicant had failed to effect the sale of the property within the stipulated period allowed for by the exclusive mandate and the mandate had been extended, albeit that it was no longer exclusive in character. Subsequently, the applicant had introduced a prospective purchaser to the property and submitted a written offer to purchase to the respondent. F (Pty) Ltd had been advised of the offer to purchase and had exercised its right of first refusal by appointing a nominee and purchasing the property through the nominee. Neither F (Pty) Ltd nor its nominee had at any stage been introduced to the property by the applicant. The respondent submitted that, although the exercise of the right of first refusal had been triggered by the offer produced by the applicant, the applicant had not been involved in the continuous relationship which had existed between it and F (Pty) Ltd which had led to F (Pty) Ltd finally purchasing the property.

Held, that knowledge was a circumstance which could change an assessment of the effective cause of a sale. Both parties had had knowledge of F (Pty) Ltd's right of first refusal and that right had clearly triggered F (Pty) Ltd into purchasing the property through its nominee. According to the evidence the sale had eventuated on the day it had and at the price it had as a result of the production of an offer to purchase by the applicant. It was the production of the offer, and therefore the activities of the applicant, which had been the effective cause of the particular sale. (At895J, 894D/E-E/F and H-I)"

[27] In MANO ET MANO Supra at 517-519, which the defendant in its written submissions at least acknowledges is factually "vaguely"

similar to the present case, the SCA expressly distinguished the sale of an aircraft (described as a consumer durable) from the sale of immovable property and it is readily apparent that had that case concerned immovable property the outcome would have been different.

[28] VAN ASWEGEN v DE CLERCQ 1960(4) SA 875 (A) at 880-1 is an important decision on this point because it dealt with the removal of financial obstacles, not by a rival agent but by the purchaser himself and held that in such a case the fact that another agent assisted the purchaser to implement a money-raising scheme which the purchaser had propounded did not prevent the introduction of the property by the original agent from being the effective cause although the second agent's part, 'although in a sense necessary, (was) subordinate'. The judgment continues: 'In the present case if the plaintiffs introduction was still persisting in influencing du Bruyn (the purchaser) to proceed to the point of purchasing, it was not

prevented from being the effective cause of the sale merely because Niemann and Loubser (the other agents) helped to put through du Bruyn's scheme for him.'

[29] In *EDWARDS v WYNBERG CLUB* 1990(2) SA 429 (C) it was held (I quote again from the headnote:

"Whether in a particular case the estate agent's introduction of a person to the 'seller' of property can properly be said to be the effective cause of the sale must depend on the particular facts and circumstances of the case. In a case where the eventual purchaser is not the person whom the agent has introduced, the agent's entitlement to commission cannot depend solely on whether the relation between the eventual purchaser and the person introduced is such that the sale can be regarded as virtually one to the person whom the agent has introduced. That this cannot be the decisive factor is evident from the decision of the Appellate Division in *Nelson v Hirschhorn* 1927 AD 190 in which the agent's claim for commission was upheld even though the eventual purchaser was not the person whom the agent had introduced, but a party who became involved as a result of the efforts of that person. There was no suggestion, nor could there have been on the facts of that case, that the sale to the eventual purchaser could be regarded as being in substance a sale to the person whom the agent had introduced."

[30] Much was made of the fact that the deed of sale states that no commission is payable to anyone. This was inserted at the request of the purchaser. Apart from anything else, the plaintiff was not a party to such agreement. The plaintiff was mandated by the defendant, not by the Government. From the latter's point of view there certainly was no commission payable.

[31] If the defendant had honestly believed that the plaintiff had had absolutely nothing to do with this transaction (as it now contends) it is highly unlikely that an offer of an ex gratia settlement would ever have been made to plaintiff. It is obvious from the evidence of Odendaal and Messrs Elliot and Flewin that EL MADRE PROPERTIES was indeed actively involved in ensuring that a deal was concluded, which in the end, it was.

[32] There remains the question of the reserved costs of the first day of trial. The standing down of the matter to the next day was at the request of the defendant. Its ostensible reason was that it did not have the opportunity to peruse the transcribed record of the evidence taken on commission, a copy of which its legal representatives received only on the morning of the trial. Further, that there were outstanding matters relating to security for costs and finally, the pre-trial minute. There are no merits in the reasons proffered. The evidence taken on commission was akin to evidence being led in a court. The parties invariably take notes of the evidence led and, unless there are cogent reasons (and I dare say that would be a very rare occasion) a court would not accede to a party's request for a postponement on the grounds that it wishes to see if the recorded evidence was properly transcribed. The party concerned could peruse the record outside of court time and bring to the attention of the court any errors or omissions it may find before judgment is given.

- [33] A further ground for requesting that the matter stand down was the so-called outstanding matters relating to security for costs. However, counsel concedes in the written heads of argument relating to the reserved costs that those outstanding matters were already resolved on the morning of the first day of trial. That could not be a ground for requesting the matter to stand down for an entire day.
- [34] The argument for a postponement on the grounds that the signed pre-trial minute was presented by plaintiff's attorneys only on the previous Friday the 30th of July, 2010 is not understood. The fact remains that at the commencement of trial the signed pre-trial minute was available. In the event, the wasted costs should be borne by the defendant.
- [35] In view of the large amount involved, the importance of the matter for the plaintiff and its alter ego Odendaal it was reasonable and prudent of the plaintiff to have instructed two counsel.
- [36] I make the following order:
1. The defendant is ordered to pay plaintiff the sum of R2 000, 000.00 plus VAT.
 2. The defendant is ordered to pay interest on the aforesaid amount at 15.5% per annum from 29 May, 2008 to date of payment.
 3. The defendant is ordered to pay plaintiff's costs of suit including the costs attendant upon the evidence on commission and the costs of two counsel where two counsel were employed and the reserved costs pertaining to the standing down of the trial from 3 August, 2010 to 4 August, 2010.

N RANCHOD

JUDGE OF THE NORTH GAUTENG HIGH COURT

Representation for the applicant:

Counsel: Adv. BP. Geach (S.C) Adv. Van Ryneveldt

Instructed by Attorneys: Nell Kotze & Van Dyk - Pretoria

Representation for the respondent:

Counsel: Adv. J. Daniels

Instructed by Attorneys: Eversheds - Co:Friedland Hart Solomon & Nicolson

.....- Pretoria

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