

SOUTH AFRICA / JUDGMENT

Evans v Tony de Jong Properties (7937/09) [2012] ZAKZPHC 25 (24 April 2012)

[2012] ZAKZPHC 25**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Koen

CASE / FILE NUMBER

7937/09

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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO. 7937/09

In the matter between:

GLYN EVANSPlaintiff

and

TONY DE JONG PROPERTIESDefendant

J U D G M E N T

KOEN J:

INTRODUCTION:

- [1] The plaintiff claims payment of the sum of R690 700,90 together with mora interest thereon and costs, being a share of estate agent's commission alleged to be due to him on the sale of certain properties owned by the De Billot Family Trust ('the trust') to the Department of Land Affairs ('the DLA').¹

THE PLAINTIFF'S CONTENTIONS:

- [2] The plaintiff avers that:

- (a) on or about 24 November 2008 he and Mr De Jong, the sole proprietor of the defendant,² concluded a partly written partly oral agreement in terms of which they agreed to share commission earned from the sale of the properties by the trust to the DLA equally between them,³
- (b) by virtue of the sale of the properties of the trust to the DLA and the terms of the agreement concluded between them, commission in the sum of R690 700,90 accordingly became payable to him.

THE DEFENDANT'S DEFENCE:

- [3] The defendant admits the aforesaid terms of the agreement relied upon by the plaintiff. The defendant however pleads that he is excused from making payment of the amount claimed because of the following:
- (a) Prior to the conclusion of the agreement, the plaintiff, with the intention of inducing the defendant to conclude the agreement on the terms that he did, orally represented to him that the plaintiff had a sole mandate to sell the trust's properties which were sold to the DLA, and relying on the truth of that representation, the defendant concluded the agreement. As the representation was false, it being alleged that the plaintiff had no mandate to sell the trust's properties or that the plaintiff did not have a sole mandate to sell the trust's properties, the defendant claims that it was entitled to cancel the agreement, which it did on 10 June 2009; alternatively;
 - (b) Prior to the sale of the trust's properties, the plaintiff informed the defendant that he had a sole mandate to sell one of the trust's properties, at the same time authorizing the defendant to attempt to find a buyer for that property. A number of the trust's properties (not only the one referred to above) were subsequently sold to the DLA with the defendant being the effective cause thereof. After the trust's properties had been sold, the agreement relied upon by the plaintiff was concluded. At the time that the agreement was concluded, the plaintiff was aware that the defendant was still under the impression that the plaintiff had a sole mandate to sell the trust's property. Accordingly, the plaintiff had a duty to inform the defendant that the representation previously made by him was false, but despite this duty, the plaintiff intentionally failed so to inform the defendant. Thus the defendant became entitled to cancel the agreement and did so on 10 June 2009.
 - (c) Alternatively, the defendant relied on an alleged repudiation of the agreement by the plaintiff having on 25 November 2008 advised the defendant, represented by his wife Joanita De Jong, that the agreement regarding the split in commission was null and void, which repudiation the defendant accepted and pursuant to which it cancelled the agreement on 10 June 2009.

DUTY TO BEGIN AND ONUS OF PROOF:

- [4] Based on the aforesaid respective contentions, the defendant rightly assumed the duty to begin and the onus of proof.

CHRONOLOGY OF MATERIAL EVENTS IN THE EVIDENCE:

- [5] I do not intend summarizing all the evidence, but will only refer to the evidence relevant to material events. These events must be viewed against the facts which became common cause, or which were not disputed. They include:
- (a) The plaintiff did not have a sole mandate in respect of any of the trust's properties;
 - (b) The defendant indeed received the commission payable to it on the sale of the trust's properties;
 - (c) One half of the commission received by the defendant amounts to R690 700,90.
- [6] The plaintiff met Mr de Jong for the first time during or about October 2006 at the Argyle Hotel, in Mooi River when he was introduced by a Mr John Summerfield who had told the plaintiff that Mr de Jong had experience in dealing with sales of land to the DLA, and that he 'would do deals on a 50:50 commission split', which the plaintiff understood to mean, that to facilitate a smooth sale by ensuring compliance with the requirements of the DLA and liaising with its relevant officials, the defendant would require payment of 50 percent of the commission on the transaction. The plaintiff maintains that he and Mr De Jong

there agreed that on all such future transactions involving sales to the DLA and referred by the plaintiff to the defendant, the

commission would be shared equally. It is of course not the agreement relied upon by the plaintiff in his pleadings. This allegation is furthermore disputed by the defendant, who contends that he agreed to the 50:50 split on the basis of that being the norm in the industry where an agent who holds a sole mandate in respect of property, refers it to another agent for sale and a sale is concluded.

- [7] During November 2006 the plaintiff and Mr De Jong met in the Hilton Remax offices. The plaintiff places this meeting later, somewhere during December 2006. The defendant maintains that it was at this meeting that the plaintiff offered the trust's properties to him to sell. It seems clear that this could however not have related to all the trust's properties, as at that stage, and this is not disputed, only one farm of the trust was for sale, namely the one commonly referred to as Sugar Haven. The defendant states that the plaintiff said that he had a sole mandate in respect of the trust's properties. On probability, as it was only the farm Sugar Haven that was for sale at that time, the misrepresentation, if it was in fact made, could at best extend to that farm only. The plaintiff denies that he said that he held a sole mandate. The plaintiff's version that he did not hold a sole mandate in respect of any of the trust's properties is supported by the 'Detailed listing'

which appears at exhibit 'A' page 14, which records the mandate as being an 'open listing'. He states that it was at that meeting that it was confirmed that he would 'bring the farms and Mr De Jong his expertise and the commission would be split 50:50'. According to him the referral of Sugar Haven was not discussed at that meeting. The plaintiff's version is that it was only over the Christmas break that he thought that the trust might sell to the DLA. He phoned Rodger de Billot who represented the trust and told him that he knew of an expert to facilitate such a sale and enquired what he thought about that. Mr De Billot replied that he would talk to the other family members and bring them to a meeting which the plaintiff said occurred mid January 2007.

[8] At that stage the De Billots and their trust were cash strapped and required funds. They were interested only in selling Sugar Haven, as they believed it to be free of land claims, whereas the other properties all had other land claims on them. As it turned out however Sugar Haven also had a land claim on it.

[9] Mr De Jong met the Plaintiff and inter alia some of the De Billot family members during mid January 2007 and it was discussed that attempts would be made to sell Sugar Haven to the DLA. At that stage the De Billot family did not want to sell all the other properties of the trust as well.

[10] On 31 January 2007 inter alia the plaintiff and Mr De Jong and his wife met the De Billots at the offices of the De Billot's attorneys, A P Austen Smith. It is the defendant's case that at this meeting the plaintiff allegedly repeated the statement that he held a sole mandate. In support of this contention the defendant relies on brief notes of that meeting recorded by Mrs De Jong, which records the plaintiff as having explained that 'Remax sole mandate not less than 5%'. The explanation by the plaintiff of this evidence is

that he had said, that in any mandate Remax would try and get not less than 5 percent. He stated that to best of his knowledge there was no discussion regarding any sole mandate. What does however appear as being common cause, arising from that meeting, is that before any sale could proceed to the DLA a 'mandate' of some sorts was required, whether a mandate to sell the property or to proceed with the necessary valuations and other preliminary requirements the DLA might have..

[11] In a letter from the De Billot's attorneys to plaintiff dated 1 February 2007, a Mr Brett Austen Smith records that:

'I confirm that Roger Debillot has indicated that the Debillot group may wish to sell various Properties as follows:

"1. Sugar Haven (as a stand alone farm) – at a gross selling price (including any commissions payable) of R7,5 million. This selling price excludes any equipment.

2. The entire operation, consisting of five farms and all machinery owned by the Debillot group at a price of R43 million including all commissions.

Please be advised that the above information provided by Roger Debillot is merely an indication of the Groups' possible intention to sell the Properties, and the prices mentioned herein, are indications of Rodgers estimates of value. The statements made by Roger Debillot do not constitute a formal mandate.

The members of the De Billot group are meeting at our offices on 2nd February 2007 to discuss the Group structure and possible sale of one or more farms. It is anticipated that a final decision will be made and that we will be in a position to issue a formal mandate after the meeting.'

[12] On 4 February 2007 Mr Austen Smith addressed a letter to the DLA, referring to a telephone conversation allegedly with Mrs Mashoko of that department and recording:

'As discussed, the De Billot Group have offered the following properties for sale to the Department of Land Affairs. Tony de Jong Properties are facilitating the sale on behalf of the De Billot group . The properties offered are described as:

Sub 1 of Springkloof Farm Number 13477, known to us as the farm "Chingford" in extent 366, 8096 hectares.

Sub 2 of Springkloof Farm Number 13477, known to us as the farm "Fairview" in extent 366,8093 hectares.

Sub 3 of Springkloof Farm Number 13477, known to us as the farm "Solitude" in extent 366, 8093 hectares.

Rem of Picklesvale Farm Number 14689, known to us as the farm "Sugar Haven" in extent 328,5010 hectares.

Rem of Springkloof Farm Number 13477, known to as the farm "Spring Valley" in extent 351,1638 hectares.

The nature of my enquiry is to obtain some form of documentation from the DLA addressed to the De Billot Group informing the De Billot Group that the properties have been offered for sale to the DLA and that the DLA is in the process of evaluating the properties. This information is required by the De Billot group to facilitate negotiations with other interested parties.

We are fully aware that any documentation from the DLA does not constitute any form or offer or expression of interest in the properties, but is merely confirmation that the properties have been offered and that the DLA may consider the possibility of purchase.

Equally this letter does not constitute any mandate, instead, the formal mandate has been given to Tony De Jong Properties.'

[13] The contents of the aforesaid letters were not challenged.

[14] From that time the plaintiff's involvement was limited. The reasons therefore are not strictly relevant to this judgment. The plaintiff states that he was asked by the defendant to limit his involvement, whereas the defendant maintains that the plaintiff played no effectual role in concluding the sales of the trust's properties thereafter. The plaintiff accepts that the defendant thereafter did the bulk of the work relating to procuring valuers being sent out to undertake valuations etc.

[15] In a letter dated 20 February 2007, the trustees of the trust instructed the defendant as follows:

'We, the undersigned, hereby instruct Tony De Jong Properties as the selling agent to offer the following properties for sale to the Department of Land Affairs.

The property described as:

Rem of Picklesvale Farm number 14689, known to us as the farm "Sugar Haven" in extent 328,5010 hectares.

The property has been offered to the Department of Land Affairs at an asking price of R6 950 000,00 (Six million nine hundred and fifty thousand rand), excluding VAT. This price does not include any equipment or machinery. Any agent's commission payable to Tony De Jong or any other agent will be paid by the Department of Land Affairs over and above the asking price.

We acknowledge that the buyer, in the event of the Tony De Jong Properties effecting a sale, will be the Department of Land Affairs Pietermaritzburg, who will undertake to process any land claims after the sale.

We acknowledge that a successful sale will involve a valuation of the property...

We undertake not to introduce the property to the Department of Land Affairs through any other agent or agency, however, we reserve the right to the farm privately or through an agent to any other party, until such date as a formal agreement of sale is concluded through your agency on terms and conditions acceptable to us.'

[16] Although the evidence was not clear on this, a decision was subsequently taken that the entire farming operation of the trust and its properties would be sold.

[17] On 22 July 2008 an agreement was concluded recorded which was on the De Billot Trust letterhead addressed to the defendant stating the following:

'22 July 2008

Tony De Jong Properties

This letter is an agreement between the De Billot Trust and Tony de Jong Properties in regard to the commission to be paid to them for the sale of the De Billot Trust properties.

The De Billot Trust agrees to pay Tony De Jong a commission of 2.8% plus vat on the sale price of R43 277 000,00.

Signed on behalf of the De Billot Trust

Roger De Billot

Paul De Billot

Signed on behalf of Tony De Jong Properties

Tony De Jong

Juanita De Jong’.

Mr De Jong testified that he was at the time still under the impression that the sole mandate which he contends the plaintiff said he had, was still valid.

[18] During September 2008 a meeting was held attended by Mr John Humphries, the office manager of Remax, the plaintiff and Mr de Jong. The purpose of the meeting, according to Mr De Jong, was to ‘get an agreement put together in respect of the sole mandate which the plaintiff had raised’. He said that at that meeting the 50:50 percent split was agreed. There were also other splits in commission that were agreed to relating to other properties referred to as Jennings, Hilton Moor and Arlington. Mr Humphries in his evidence stated that at that meeting Mr De Jong objected to the 50:50 percent split because of the amount of the work that had been done by the defendant, compared to that done by the plaintiff. These concerns were allegedly addressed by the defendant being included in other deals which the plaintiff was working on. Mr Humphries confirmed the 50:50 apportionment of commission, but said he did not know what motivated that split.

[19] On 24 November 2008 a written agreement was concluded between the plaintiff and the defendant recorded in the following terms:

‘Agreement between Glynn Evans and Tony De Jong

On the above sales, we the above mentioned have agreed the following commission splits: -

De Billot to Land Affairs 50% to Glynn Evans (Incl Bill Hasleau R60000,00)

50% to Tony De Jong

Jennings 75% to Glynn Evans

25% to Tony De Jong

Hilton Moore 75% to Glynn Evans

Arlington 80% to Glynn Evans

20% to Tony De Jong.’

The defendant testified that he at that time still thought that the plaintiff held a sole mandate.

[20] By then the sales in respect of the various properties of the trust to the DLA had been finalized and the plaintiff congratulated Mr De Jong on achieving these sales. This evidence was not disputed.

[21] It was also on the 24th November 2008, or the next day, that the plaintiff allegedly told the defendant's wife that their deal on commission was null and void and would have to be renegotiated. The plaintiff's version on this is different. He testified that he did telephone on the 24th November 2008 but stated that he would have to check with Remax, specifically Mr John Humphries whether the agreement was valid insofar as it might impact on the rights of Remax, as he had not discussed the matter with him before concluding the agreement with the defendant. He went and saw Mr John Humphries, who however told him that as their agents worked for themselves, the plaintiff was at liberty to conclude such an agreement. He maintained that he thereafter conveyed this to the De Jongs.

THE MERITS:

[22] Mr Rall SC for the defendant, quite correctly, states that in order to succeed with his defence to the plaintiff's claim, the defendant must prove:

- (a) That there was a statement by the plaintiff about a sole mandate in respect of the De Billot properties when the introduction to the defendant took place;
- (b) That by November 2008, the defendant was still under that belief and that it applied to all the properties of the trust.

[23] It is improbable that the plaintiff would have offered all the trust's properties to the defendant for sale, as a referral, as a sole agent, during November 2006, as the trust was at that stage not interested in selling all the trust's properties, but was only looking at the possible sale of Sugar Haven. Indeed, until the letter from AP Austen Smith dated 20 February 2007, although consideration had by then been given to possibly selling the other properties of the trust as well, any mandate could only have been in respect of Sugar Haven. The misrepresentation relied upon by the defendant set out in paragraph 3(a) above accordingly cannot be sustained.

[24] Even if the plaintiff, due to inexperience or mistaken impression of what the 'exclusive mandate' granted by Panache to Mr Bill Haselau of Remax might have entailed, possibly referred to his mandate as a 'sole mandate', and accepting in favour of the defendant that there was a reference to 'sole mandate' at the meeting held at the offices of A P Austen Smith on 31 January 2007, the defendant could not, either because of the meeting with the De Billots during mid January 2007 to discuss the sale of all the properties, or in the light of what was discussed at the meeting on 31 January 2007, or the correspondence received thereafter granting a mandate to the defendant as agent and referring to commission payable,⁴ have continued labouring under any belief on 24 November 2008 that there was a sole mandate granted by the trust to the plaintiff in respect of all its properties.

- [25] It follows that the defence of a misrepresentation referred to in paragraph 3(b) above also cannot be sustained.
- [26] At best for the defendant, and accepting the defendant's evidence, there might have been a misrepresentation⁵ in respect of Sugar Haven.
- [27] However, by November 2008, it cannot be said on the probabilities that the defendant was still laboring under that belief. If the defendant still believed that there was a sole mandate, based on what was allegedly represented during November 2006 to January 2007, then in concluding the commission deal with the trust dated 22 July 2008, the defendant would expose his principal, the trust, to a potential double commission claim, at least in so far as Sugar Haven is concerned, namely the commission payable to the defendant in terms of the agreement of 22 July 2008 and the commission which would be payable to the plaintiff based on the alleged sole mandate which the defendant believed existed. It seems improbable that the defendant would have acted in such a manner, if it believed that a sole mandate existed in respect of Sugar Haven.
- [28] The defendant's experience that a 50:50 percent commission split generally applies in respect of sole agencies, this being the basis upon which the commission on the sale of his parent's property was dealt with, would at first appear to support his contention that his belief throughout was that there was a sole mandate. However, although disputed by Mr De Jong as being an arrangement that would apply in the future to all sales, the plaintiff's version does offer an alternative and more probable basis on which the 50:50 percent commission split is explained. Indeed Mrs De Jong testified that the defendant was brought in to conclude the deals with the DLA, as the expert in that field.
- [29] In the light of the mandate at page 64 of exhibit 'A', granted, initially in respect of Sugar Haven to the defendant to sell that property to the DLA, being really in the nature of a sole mandate (although it reserved to the sellers the right to sell to a private buyer), the defendant could, in my view, have been left in no doubt that it was now mandated to conclude the deal with the DLA, and that this would be in conflict with any sole mandate which might have existed in respect of the property or properties in favour of the plaintiff/Remax. Hence, the defendant was no longer induced by and could not rely on any suggestion that he laboured under the belief that there was a sole mandate in respect of the properties. The conduct by the defendant thereafter in negotiating commission directly with the De Billots is also inconsistent with any notion of a continued belief that the plaintiff held a sole mandate.
- [30] The defendant's defence that the reason for the 50:50 percent split in commission was based on an alleged misrepresentation, cannot be sustained. While the final deal was concluded through the efforts of the defendant, the fact remains that the defendant was initially introduced to the De Billots and the property the trust had for sale through the referral by the plaintiff. This was in any event not an issue in the trial. That the defendant thereafter did the bulk of the work is irrelevant to the issue of the commission split.

- [31] The defendant has failed to discharge the onus of showing that any alleged misrepresentation as to a sole mandate initially made, was still relied upon by him, and in fact induced the conclusion of the agreement of 24 November 2008. In reaching that conclusion, I have given careful consideration to certain aspects of evidence of Mr De Jong and Mrs De Jong not having been challenged by the plaintiff and being raised by the plaintiff for the first time when he gave evidence. These however in my view relate mainly to peripheral issues, but even to the extent that they might not, they are not such as to disturb the probabilities emerging on a conspectus of all the evidence.
- [32] The defence of an alleged repudiation of the agreement by the plaintiff was not pursued with much vigour, in my view correctly so. The evidence on this issue is, at best for the defendant, ambivalent. The probabilities favour the explanation by the plaintiff that he was concerned as to whether the agreement he concluded was in order and whether it might, or might not, carry the approval of his principal, Remax. In those circumstances one would have expected him to have indicated that he wanted to clear it with Remax, which on his version he did.

THE ORDER:

Judgment is granted in favour of the Plaintiff against the defendant for:

Payment of the sum of R690 700,90;

Interest thereon at the rate of 15,5% p.a. a tempora morae from date of demand to date of payment;

Costs of suit.

DATE OF HEARING: 15 - FEBRUARY 2012

DATE OF JUDGMENT: 24 April 2012

PLAINTIFF'S COUNSEL: ADV. R VAN ROOYEN

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¹The DLA was acquiring the property on behalf of the Masibuyela Emakhaya Community Trust.

2Mr De Jong, the proprietor of the defendant and his firm, the defendant, will for the sake of convenience both be referred to

simply as ‘the defendant’.

3A payment of R60 000 owing to one Bill Haselau would come out of the Plaintiff’s share.

4which would go beyond merely a mandate to obtain valuations of properties for possible sale to the DLA

5Even an innocent misrepresentation would suffice.

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Prepared on 10 October 2026 · Esheria