

SOUTH AFRICA / JUDGMENT

Furman and Another v Batha (10044/07) [2010] ZAGPJHC 85 (23 September 2010)

[2010] ZAGPJHC 85**COURT**

South Gauteng High Court, Johannesburg

BEFORE

C G Lamont

CASE / FILE NUMBER

10044/07

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SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10044/07

DATE:23/09/2010

In the matter between:

FURMAN, ASHLEY.....First Plaintiff

FURMAN, BELINDA

(formerly FAWELL).....Second Plaintiff

and

BATHA, PETA (KIM).....Defendant

J U D G M E N T

LAMONT, J:

- [1] On 4 November 2004 the parties signed a written agreement in terms whereof the plaintiffs agreed to sell and deliver certain immovable property to the defendant at a price of R1,95 million. It was a term of the contract that:

“9. AGENT’S COMMISSION

The seller and the purchaser acknowledge that they have dealt directly with each other and that no agent was responsible for introducing the purchaser to the seller in respect of the transaction recorded herein. Should any claim be made against the seller by any agent for the payment of agent's commission in respect of the transaction recorded herein, the purchaser indemnifies and holds the seller harmless in respect of any such claim."

- [2] During 2005 Vered Estates (Pty) Ltd (hereafter the estate agent) instituted action against the two plaintiffs claiming payment of R100 000,00 and other relief on the basis that the estate agent had on 31 August 2004 concluded a mandate to find a purchaser for the property forming the subject-matter of the sale between the plaintiffs and defendant, that it had performed its mandate and was entitled to payment in that it had introduced the defendant to the property.
- [3] After the estate agent sued the plaintiffs, the plaintiffs approached the defendant. They notified the defendant that the action had been instituted and requested the defendant to provide evidence to enable them to defend the action. They also informed the defendant of her obligation to them under and in terms of clause 9 quoted above. The defendant attended a consultation with the plaintiff's attorneys and thereafter signed a document (to be used to oppose a summary judgment application) supporting the plaintiffs in their defence of the action. The basis of the defence was that the agent had not introduced the defendant to the property and was neither the direct nor indirect cause of the sale. The claim was made that the defendant had become aware of the property some time prior to the plaintiffs having signed the mandate with the agent and that she had contacted the plaintiffs after the mandate had expired and was not introduced to the property by the agent.
- [4] The plaintiffs subpoenaed the defendant to attend trial and prior to the trial the defendant consulted with the plaintiffs' attorneys and also at a stage went to the plaintiffs' house with a list containing a set of facts which she wished to discuss. There she discussed the list with the second plaintiff.
- [5] The parties attended the trial instituted by the agent. At that trial inter alia the first plaintiff and defendant gave evidence.
- [6] The record of proceedings has been lost.
- [7] All that remains is the judgment of the magistrate who heard the matter. The parties gave evidence at the hearing before me of certain of the events which had transpired at the Magistrate's Court during the trial.
- [8] At the trial an expert was called to give evidence as to what an appropriate fair and reasonable charge would have been for the work performed by the agent. During the course of the cross-examination of the first plaintiff he conceded that the amount claimed was a fair and reasonable charge. By reason of this concession the magistrate found that the parties were in agreement as to the quantum in the amount of R100 000,00. At the time the first plaintiff made that concession he was an expert in the field and it was his expert view that

the charge which he conceded was fair and reasonable was in fact fair and reasonable.

- [9] On behalf of the estate agent one Bush testified. She testified that she had on 13 September 2004 invited the defendant to view the plaintiff's house by arrangement.
- [10] The next day she phoned to apologise as she had failed to make the necessary arrangements. The defendant told her that she had seen the house and loved it. On 16 September Bush telephoned the defendant and invited her to a show day which was to be held on 19 September. The defendant in fact attended the show day and signed a register reflecting her attendance. On 23 September Bush phoned the defendant to see whether she wanted to buy the property. The defendant informed her that she was unsure. Later the defendant told Bush that she was considering renting. Bush later heard that the defendant had subsequently purchased the property. This evidence was agreed to be true by the defendant.
- [11] The defendant added a series of facts. She had viewed the house during or about 1 to 3 August 2004 by mere chance. On that occasion she had knocked on the door and was met with a domestic servant who allowed her to see inside the house when she opened the door. She was also then told that the house was for sale. Some time later (maybe a week) she returned to the house where she met the second plaintiff who confirmed the house was for sale. She was told that another offer had been signed with another buyer. An appointment arranged with Bush for 13 September to view the house. She was told to wait at a corner near the immovable property in question. She was not told that she was to be shown the property in question. Bush failed to honour the appointment and had failed to tender her apology. She had later attended the show day at the invitation of Bush and had informed Bush she would rather rent a property instead of buying.
- [12] The magistrate considered all the evidence and came to the conclusion that judgment should be granted in favour of the agent and granted an order against the first and second plaintiffs jointly and severally directing them to pay the estate agent R100 000,00 together with interest at the rate of 15,5% per annum from 4 April 2005 to date of payment and costs of suit.
- [13] The plaintiffs lodged an appeal against the order. The appeal was not prosecuted.
- [14] The plaintiffs instituted the present action against the defendant claiming an indemnification.
- [15] The defendant defended the action. The defences were the following:

The defendant was not a party to the Magistrate's Court action and hence was not bound by the order.

The estate agent had not introduced the defendant to the property and was not the effective cause of the sale.

The defendant was not bound by the indemnification clause which had been inserted but should have been removed from the agreement. It was misrepresented to her that the clause was removed. For sake of convenience I refer to this defence as the claim of the defendant that the clause was not binding on her.

- [16] When the matter came before me the claim of the defendant that the clause was not binding on her was abandoned.
- [17] Throughout the period of time until the abandonment of that defence the defendant had relied upon it. The defendant at no time wanted to or would have otherwise than under compulsion have joined in the proceedings between the estate agent and the plaintiffs.
- [18] The first issue to be determined is whether or not it is sufficient for the plaintiffs only to establish that the judgment was granted against them to entitle them to recover from the defendant. The second issue is whether or not in any event the agent was the effective cause of the sale.
- [19] These were the only issues which were before me.
- [20] The defendant throughout the period of the action between the agent and the plaintiffs was aware of the action and participated in it although not as a party. The defendant well knew throughout the period that the plaintiffs regarded her as being a person who would be liable to indemnify them should judgment be granted against them. The plaintiffs did not expressly invite the defendant to join in the litigation and neither did they compel her to join in by taking appropriate steps to join her.
- [21] In the matter of *Executors Estate S.F. Richards v Executors Estate F.I. Jonsson*, Sen [1906] 27 NLR 593 it was held that a person who had given an indemnity was bound to honour it in respect of the costs of the legal proceeding and the amounts claimed in circumstances where they had given the indemnity had been called upon to intervene and to defend the action.
- [22] In the present case the defendant was not expressly called upon to intervene and defend the action. It is apparent that had she been so called upon she would have refused to intervene and defend as her attitude was that the indemnity clause was not binding. The defendant at all times knew of the existence of the action and could have intervened had she wished to do so. In the matter of *Akoon v Jhavary* 1935 NPD 282 it was held that a person who had notice of the action and who wished to become a party had an opportunity to intervene. If he did not intervene this was not fatal to the rights of recovery.
- [23] It appears to me that the position of the plaintiffs in the present case is similar (notwithstanding the jurisprudential differences) to a person who claims on the basis of a breach of a warranty against eviction. There is no doubt in the case of a plaintiff suing for a breach of a warranty against eviction that all that is necessary to be established is a *virilis defensio* where he has given proper notice to the seller. Proper notice in the present circumstances is constituted by notice as to the existence of the action and notice that the

plaintiffs intended to recover from the defendant in the event of their losing the action.

- [24] In the matter of Lammers and Lammers v Giovannoni 1955 (3) SA 385 (A) the following was held at 392F-H:

“Once the seller is called upon to defend the buyer in his possession but washes his hands of the whole matter, it does not seem to me to be open to him to meet the buyer's claim by saying that the latter could or should have resisted the true owner's claim more energetically or skilfully; for it was open to him, the seller, to have taken steps to protect the buyer and himself. What those steps would be in any particular case would depend on the available procedure; including, in appropriate cases, i.e. where it is the right of the buyer and not the right of the seller that may provide the means of resisting the true owner, the taking of a procuratio in rem suam.”

All that is required of the plaintiffs is the taking of reasonable steps to allow the defendant to defend the claim made against the plaintiffs and thereafter the prosecution of the defence in a reasonable manner.

- [25] The submission was made in the present case that additional persons should have been called to give evidence at the trial including one Esther and that the concession concerning quantum should not have been made. The question to be answered is whether the conduct of the plaintiffs constituted a failure to prosecute the defence in a reasonable manner.
- [26] Insofar as the issue of Esther is concerned the claim that Esther should have been called is founded upon an allegation made by the defendant that she had seen the house pursuant to Esther having allowed her to view it. This viewing took place according to the defendant by way of Esther opening the door to the house and the defendant being able to see such portions of the house as satisfied her. There was no viewing in the sense of taking the defendant through the house. These facts were not made known to the plaintiffs otherwise than through a laconic note which was discussed by the defendant on the night prior to the hearing. The plaintiffs knew nothing of the alleged viewing neither did Esther. It is apparent that had Esther been called she would not

have been able to advance the case of the plaintiffs.

- [27] Insofar as the agreement to the quantum is concerned, such was properly conceded at the trial as the first plaintiff accepted that the amount claimed was a reasonable charge in the circumstances. He in any event had no evidence to contradict the evidence given by the plaintiff's expert.
- [28] In these circumstances it appears to me that the defendant was afforded proper notice of the proceedings; had ample opportunity to intervene and take over the conduct of the case herself. She did not do so. While she was not expressly called upon to defend the position of the plaintiffs it is apparent that she was called upon to defend it in the sense of providing evidence for the case to be best conducted. The plaintiffs conducted a virilis defensio and accordingly the defendant is bound by the order made. The plaintiffs needed to do no more than establish existence of the order.

- [29] It is my view accordingly that the defendant is obliged to meet the obligation undertaken in clause 9 and make the payments necessary to indemnify the plaintiffs in respect of the estate agents claims and the cost of defending them.
- [30] To the extent that the second issue was debated before me it is necessary to deal with it. The defendant was in my view a wholly unsatisfactory witness.
- [31] One of the pivotal features of the defendant's claim was that she had been to the house at an early stage. This was not raised by the defendant until the night before the trial and until then was not known to anyone. I accept the evidence of the plaintiffs that they did not know of the visit and find that the defendant's claim to have visited the house at the early stage is untrue.
- [32] The defendant said she had known of the existence of the property for some time. On her own version she told the agent at a critical point in time that she had no interest in it and wished to rent it. There was no reason for the defendant to have said this unless she was designedly misleading the agent and designedly setting up a position where she could negotiate with the plaintiffs for a discount. If she did say it and it was true then the conduct of the agent changed her mind and thus they were the effective cause of the rule.
- [33] The claim was made by the defendant that the indemnification clause was unenforceable as it should have been excluded from the agreement. This claim was abandoned. However, it must not be forgotten that it was made. The defendant must have given her attorneys instructions concerning the claim. Her claim was that she had instructed her original attorneys to remove the clause. It is improbable that the defendant who was legally represented at the time could have given instructions to her legal representative to remove the clause and yet they would have advised her to sign the document with the clause in it.
- [34] The defendant is no newcomer to property transactions; she is familiar with how they take place and the consequences of using an agent. It is in the light of this knowledge that her evidence must be considered. The defendant well knew that she had been to a show day after an invitation by the agent. She in fact signed a document reflecting her attendance at the show day. She had dealings with the estate agent prior to signing the contract. She knew that the agent was marketing the house in question and in fact invited her to go to it. This knowledge notwithstanding, she stated that she had not been introduced by any agent. She concealed the facts concerning the estate agent which must have been fresh in her mind from the plaintiffs. There is no doubt in my mind that had she raised the fact of her attendance at the show day by invitation and her signing of the register that the plaintiffs would not have been prepared to conclude the contract on the basis they did. The probability is accordingly that the plaintiffs did not know of these facts. The defendant concealed them dishonestly. The defendant cannot but have known that the register at the show day is kept to enable the estate agent not only know who had been there but also to track people introduced to the property.

[35] The facts show in my view that the defendant attended upon the property having been introduced to it by the agent. The fact that she may have had prior knowledge of its existence and of the fact that it was for sale is irrelevant. She viewed the whole property for the first time on the show day which she attended at the instance of the agent and only then was she a serious buyer.

[36] It is probable in my view that the defendant so manipulated the facts as to conceal her involvement with the agent with the direct intention of achieving the cheaper purchase price which she did. Her evidence became vague and uncertain on this and many other issues when she was pressed. The reason for this was in my view the fact that her evidence was not true. Apart from the improbabilities referred to above her evidence contained many inconsistencies. For example she conceded she had signed documents which were commissioned

- there was only one such document she could have signed, the affidavit opposing summary judgment, she denied commissioning it. She claimed to have been shown the house by Esther. In common parlance to be shown a house is to enter and see it. The defendant when she realised that her claim was improbable in the light of evidence by the plaintiffs that Esther never lets any one in suddenly claimed to have been shown the house by seeing it through the front door. The defendant claimed that there was no negotiation regarding the purchase price. Later she agreed that there had been negotiation. This may seem an immaterial issue but it impacts on the evidence as to how the price was arrived at. The plaintiffs' evidence was that they had reduced the price by the amount of the commission. The defendant denied this and stated originally there had been no negotiation as evidence corroborating the denial and to show that the plaintiffs had a financial interest in inserting the commission clause. The plaintiffs had said the price was reduced for the defendant's benefit and the nett amount they were to receive remained the same. When the changed evidence is considered in this light the inconsistency is material. There is also a probability which needs to be considered in

this context. If the price was negotiated and commission was discussed as it inevitably must have been one would have expected the commission saving to be shared on some basis. The fact that it was not shared is indicative on the probabilities of the plaintiffs

evidence being true. I accept the evidence of the plaintiffs and reject the defendant's evidence.

[37] The defendant in my view is accordingly on any basis obliged to indemnify the plaintiffs for the amount of their indebtedness to the agent as well as all the costs occurred by the plaintiffs. The amount paid by the plaintiffs to the agent is the sum of R131 056,00. The plaintiffs are indebted to the agent in the amount of the taxed costs which have not yet been taxed. The plaintiffs are indebted to their attorneys for the payments due by them to their own attorneys in defending the action. The plaintiffs are entitled to the costs of the present action.

[38] The amount paid to the agent was paid on 6 April 2007 and the plaintiffs are entitled to interest on that amount at the rate of 15,5% per annum from 6 April 2007 to date of payment.

[39] I would accordingly make the following order:

The defendant is directed to pay to the plaintiffs jointly and severally:

The sum of R131 056,00;

Interest on the sum of R131 056,00 at the rate of 15,5% per annum from 6 April 2007 to date of payment;

The taxed costs of suit of Vered Estates (Pty) Ltd in respect of the action instituted by it against the first and second plaintiffs under Case No. 25866/2005 in the Johannesburg Magistrate's Court;

The plaintiffs' taxed attorney and client costs due to Attorneys Michael Krawitz and Co arising out of its instruction to defend the action instituted by Vered Estates (Pty) Ltd against the first and second plaintiffs under Case No. 25866/2005 in the Johannesburg Magistrate's Court.

Costs of this action.

C G LAMONT

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

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Attorneys for Defendant : Fluxmans Inc

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Date of Judgment : 23 September 2010

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