

SOUTH AFRICA / JUDGMENT

Gwk Properties (Pty) Ltd v Sanchoscope (Pty) Ltd (1832/2015) [2016] ZANCHC 13 (19 February 2016) [2016] ZANCHC 13

COURT

Northern Cape High Court, Kimberley

BEFORE

Olivier

CASE / FILE NUMBER

1832/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape High Court, Kimberley)

Reportable:

NO

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to Judges: YES

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to Magistrates: NO

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to Regional Magistrates: NO

CASE

NO: 1832/2015

DATE

HEARD: 12/02/2016

DATE

DELIVERED: 19/02/2016

In

the matter between: GWK
 PROPERTIES (PTY)
 LTD
 Applicant
 -
 and -
 SANCHOSCOPE
 (PTY)
 LTD
 Respondent

Coram: Olivier J

JUDGMENT

Olivier J:

[1.] This is an opposed application for summary judgment in the amount of R500 000.00, interest thereon and costs.

[2.] The cause of action set out in the particulars of claim is briefly as follows:

2.1 The defendant, Sanchoscope (Pty) Ltd, had granted the plaintiff, GWK Properties (Pty) Ltd, a mandate to sell the defendant's farm Windsor "for at least R11 000 000.00".

2.2 The agreement had furthermore been that, if the plaintiff "duly" performed in terms of the mandate, it would be paid commission in the amount of R500 000.00.

2.3 The plaintiff then introduced Mr Piet Uys to both the defendant and the property.

2.4 The Piet and Elodie Uys Family Trust[1] subsequently purchased the farm for R9 000 000.00.

2.5 It was alleged that the plaintiff had therefore been the effective cause of the sale and that the plaintiff had "duly performed its obligations in terms of the mandate".

[3.] In his opposing affidavit the deponent for the defendant, and the person who had acted on its behalf in granting the mandate, Mr J Badenhorst, denied that the plaintiff had been the effective cause of the sale and he denied the allegations that the plaintiff had introduced the purchaser to the property. He stated that the defendant had never granted the plaintiff a sole mandate[2], that Mr Uys had been his neighbour for years and was well acquainted with the property and that he himself (Mr Badenhorst) had also informed Mr and Mrs Uys of the fact that the farm was for sale.

[4.] Mr Badenhorst went on to state that he had told Mr and Mrs Uys that the plaintiff was also marketing the farm and that, should commission be payable to the plaintiff, they[3] would be liable to pay the commission. He stated that the defendant therefore intends joining the Trust on this basis.

[5.] There is nothing inherently improbable in the denial that the defendant's representative had introduced the purchaser to the farm and to Mr Uys, nor in the allegations that Mr Uys was acquainted with the farm and that Mr Badenhorst himself had discussed the sale of the farm with Mr Uys, and on this basis alone I would be inclined to grant the defendant leave to defend the action.

[6.] Mr Badenhorst's denial and allegations regarding the actual cause of the sale of the farm are in direct conflict with the allegations in this regard in the particulars of claim and "where an issue of fact is in doubt summary judgment should not be granted"[4].

[7.] There is, however, another problem with the cause of the action as set out in the particulars of claim. On the plaintiff's own allegations it in fact did not duly perform in terms of its mandate. The farm was sold for R9 000 000.00, instead of the minimum amount of R11 000 000.00. Ms Stanton, counsel for the plaintiff, conceded that the application for summary judgment should on this basis alone fail.

[8.] At the very least the plaintiff can in any event, and on the allegations in the particulars of claim, not claim commission in an amount which was on the face of it calculated on the basis of a minimum purchase price of R11 000 000.00[5]. It is clear from annexure "A" to the particulars of claim that the amount of commission to which the plaintiff would have been entitled, had it duly executed its mandate, was calculated on the basis of a purchase price of at least R11 000 000.00.

[9.] This makes it unnecessary for me to consider whether the plaintiff has made out a case that this court has jurisdiction in the action, and therefore also in the application for summary judgment. There is no specific allegation in this regard in the particulars of claim. According to the allegation in paragraph 2 of the particulars of claim the defendant's registered address is in the Free State Province.

[10.] It was indeed alleged, in paragraph 3.1 of the particulars of claim, that the mandate agreement was concluded on the farm Windsor, Modderrivier, and the court would normally have been inclined to take judicial notice of the fact that Modderrivier falls within this court's jurisdiction. The problem, however, is that it was alleged, in paragraph 2 of the particulars of claim, that Modderrivier falls in the Free State Province.

[11.] According to the "Search Works print-out" annexed to the particulars of claim the farm is situated in the Northern Cape Province. The fact that the defendant did not in its opposing affidavit raise the issue of jurisdiction would possibly have favoured the plaintiff had it been necessary to decide this issue[6].

[12.] In his heads of argument Mr Rust, the attorney for the defendant, submitted, with reference to the provisions of sub-rule (9)(a) of Uniform Rule 32, that the plaintiff should be ordered to pay the costs of its unsuccessful application for summary judgment[7], and indeed on the punitive scale of attorney and client. He also sought an order that the action be stayed until such costs have been paid.

[13.] On the papers there is no indication that the plaintiff had before lodging the application for summary judgment known what the defendant's defence/s would be. Mr Rust's submission that plaintiff should have realised[8] that the defendant's averments would, if proven, constitute a valid defence, loses sight of the argument advanced on behalf of the plaintiff that those averments are inherently improbable[9]. It may for example be argued that, if Mr Badenhorst knew nothing about the plaintiff's representative having made contact with the Trust and therefore had no reason to believe that the plaintiff could on any basis be entitled to commission in the event of the Trust purchasing the farm, he would have had no reason to warn the representatives of the Trust of a possible liability towards the plaintiff.

[14.] On the other hand the plaintiff chose to bring an application for summary judgment in circumstances where it should have been obvious that it was doomed to fail on the plaintiff's own version, as pleaded in the particulars of claim.

[15.] In my view the plaintiff should because of this alone be liable for the costs of this application. The fact that this issue was not raised in the opposing affidavit makes no difference. The defendant was entitled to raise it at the hearing[10]. In the circumstances it would be unfair if costs were to be costs in the cause, because that would mean that the defendant could later end up paying the costs of the futile application for summary judgment.

[16.] Mr Rust eventually conceded that there is no basis for a punitive costs order, but I think that the action should be stayed pending payment of costs. Ms Stanton did not contend otherwise and it is not for me to speculate on how the plaintiff may attempt to overcome the problem of the farm having been sold at less than the agreed minimum price.

[17.] In the premises therefore the following orders are made:

1. THE APPLICATION FOR SUMMARY JUDGMENT IS DISMISSED.
2. THE DEFENDANT IS GRANTED LEAVE TO DEFEND THE ACTION.
3. FURTHER PLEADINGS AND NOTICES WILL BE FILED AS IF NOTICE OF INTENTION TO DEFEND WAS FILED ON THE DATE OF THE DELIVERY OF THIS JUDGMENT.
4. THE PLAINTIFF IS ORDERED TO PAY THE COSTS OF THE APPLICATION FOR SUMMARY JUDGMENT AND THE ACTION IS STAYED PENDING THE PAYMENT OF SUCH COSTS.

C J OLIVIER

JUDGE

NORTHERN CAPE DIVISION

For the Applicant:

Adv A Stanton

Instructed by:

Duncan & Rothman Inc.

For the Respondents:

Mr J M Rust

Haarhoffs Ing.

[1] Of which the said Mr P Uys had presumably been a representative.

[2] Which may otherwise have deprived the plaintiff of the right to sell the property itself; See
The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd

[1984] ZASCA 20; 1984 (2) SA 881 (A) at 886B - C

[3] Or presumably the Trust represented by them.

[4] Nkungu v Johannesburg City Council 1950

(4) SA 312 (T) at 314E

[5] See Wynland Properties CC v Potgieter and Another 1999 (4) SA 1265 (C) at 1275C-E

[6] Bonugli and Another v Standard Bank of South Africa Ltd 2012

(5) SA 202 (SCA), para's [22] and [23]

[7] Rather than the usual order that the costs be costs in the cause.

[8] Presumably after the opposing affidavit had been filed.

[9] Compare Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) at 228B; Standard Bank of
South Africa Ltd v Panayiotts 2009 (3) SA 363 (W) para [40]

[10] Summary Judgment : A Practical Guide, Van Niekerk et al, para 11.3.2

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Prepared on 8 October 2026 · Esheria