

SOUTH AFRICA / JUDGMENT

Haig Farming (Pty) Ltd v E.G Elliot Estate CC (14175/2013) [2015] ZAKZPHC 47 (2 October 2015)

[2015] ZAKZPHC 47

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mbatha

CASE / FILE NUMBER

14175/2013

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IN

HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, PIETERMARITZBURG

CASE

NO: 14175/2013

DATE:

02 OCTOBER 2015

HAIG

FARMING (PTY)

LTD.....PLAINTIFF

And

E.G.

ELLIOT REAL ESTATE

CC.....DEFENDANT

JUDGEMENT

Delivered: 02 October 2015

MBATHA J

- [1] The Plaintiff is Haigh Farming (PTY) Ltd, a company with limited liability duly incorporated and registered in accordance with the Company Laws of the Republic of South Africa, having its principal place of business at Glendower Farm, Mt Currie District, Kokstad. It is duly represented by Brad Haigh in these proceedings.

- [2] The Defendant is E.G. Elliot Real Estate CC, a Close Corporation registered in accordance with the Close Corporation Act[1], and having its principal place of business at 90 Main Street, Kokstad.
- [3] Mr Brad Haigh gave evidence on behalf of the Plaintiff. The Defendant called Ken Roswell, Mark Errol Elliot and Mr Stoffberg as witnesses on behalf of the Defendant.
- [4] There are two (2) issues which need to be determined by this Court:-
- a) Whether there was a contract between the Plaintiff and the Defendant or not or whether the contract was between Mr Brad Haigh personally and the Defendant; and
 - b) Whether the Plaintiff had rendered consultancy services to the Defendant or as contended to by the Defendant, if Mr Haigh was employed as an estate agent for the Defendant.
- [5] In summary, the Plaintiff's case is as follows:

It had entered into an oral agreement with the Defendant on or about July 2008. The terms of the agreement were that the Plaintiff

would provide consultancy services in respect of various agricultural properties that had been listed with the Defendant. The Defendant would pay the Plaintiff a consultancy fee in respect of any consultancy services rendered by the Plaintiff in respect of such properties. It would also pay a "spotting" or "listing" fee in respect of properties that had been referred by the Plaintiff to the Defendant and in respect of which a successful sale had been concluded.

Pursuant to the said agreement, the Plaintiff rendered the consultancy services in respect of the "Von Pletzen" property and listed the "Stockowners" building with the Defendant. The two (2) properties were subsequently sold by the Defendant and the Defendant received commission in respect of the two (2) sales.

The Defendant, though admitting the conclusion of the oral agreement, contends that such agreement was concluded between the Defendant and Mr Brad Haigh personally, in that Mr Haigh would perform the services of an estate agent. It further contends that Mr Haigh would be remunerated in the event of him being responsible for concluding the sale of a property or listing a property in respect of which a sale was subsequently concluded by the Defendant. It is the Defendant's contention that in the absence of a Fidelity Fund Certificate, Mr Haigh was not entitled to any remuneration; therefore his claim should be dismissed with costs.

- [6] The Plaintiff's evidence is that he has always been involved in various agricultural activities, as a result thereto, Mr Elliot sought to use his expertise in the sale of agricultural properties. His expertise related to beef farming, grain farming, milling, cane farming, dairy farming and other related activities. He assisted whoever was interested in purchasing agricultural properties which are often commercial in nature, in that he had to establish the viability of the property in question, liaise with Eskom or the Municipalities in regulating that person's business and assist in getting them the necessary finance to purchase the property and continue with the business venture. Having done all that, he would refer them to the

Defendant, who would process the sale. As a result of this he would be entitled to a consultancy fee.

Similarly, the same had happened with the Von Pletzen property and the Stockowners property which he had “spotted” for the Defendant. It was his evidence that if he came across a property or somebody who wanted to sell a property he will bring it to the attention of Mr Elliott. Mr Elliot would list the property and if sold, he would be paid the spotting fee.

The relationship lasted a number of years, but it went sour after the Von Pletzen property deal had been finalised and he had listed with the Defendant the Stockowners property. In the Von Pletzen property deal, he had done consultancy work, amongst other things; he assisted with the business plan, arranged quotas with Dairybelle as the purchaser had decided to embark on dairy farming and assisted with getting finance for him from Ithala Bank for funding of the entire venture. Having finalised all that, he emailed both seller and purchaser and stated as follows:

“I must hand the baton over the Mark and withdraw from this matter with immediate effect.”

The sale did not immediately realise, because of Vat issues in respect of the member or director of the company. Later on an addendum to the agreement substituting one of the companies of the purchaser was signed. The Plaintiff contention is that though the addendum was signed when he no longer had a relationship with the Defendant, the consultancy work was done by him and he was still entitled to his consultancy fee of 50%.

7.1 The Defendant has raised a special plea, stating that at all material times, Mr Brad Haigh acted as an estate agent as contemplated in the Estate Agency Affairs Act[2] (the Act), that such services were performed in the absence of a Fidelity Fund Certificate as contemplated in the Act, as a result

thereof, even if the Plaintiff proved that it performed such acts, it was not entitled to a commission.

7.2 The Defendant referred this Court to the definition of the estate agent as stated in Section 1 of the Act and other provisions of the Act that it relies upon. It reads as follows:

Section 1 "estate agent"

“(a) means any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person-

- i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor; or
- ii) lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or

- (b)(ii) any person who is employed by an estate agent as defined in paragraph
- (a) and performs on his behalf any act referred to in subparagraph
- (i) or (ii) of the said paragraph.
- (c) for purposes of sections 7, 8, 9, 12, 15, 16, 18, 19, 21, 26, 27, 30, 33 and 34B, includes--
- i) any director of a company, or a member referred to in paragraph (b),
of a close corporation which is an estate agent as defined in paragraph
(a); and
- ii) any person who is employed by an estate agent as defined in paragraph
- (a) and performs on his behalf any act referred to in subparagraph
- (i) or (ii) of the said paragraph;
- ...”

The Court was also referred to Section 26 of the Act, which reads as follows:-

“(1) No person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him or her and to every person employed by him or her as an estate agent and, if such person is -

- a) a company, to every director of that company; or
- b) a close corporation, to every member referred to in paragraph (b) of the definition of 'estate agent' of that corporation.”

And Section 34A of the Act, which reads as follows:-

“(1) No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of the definition of 'estate agent', unless at the time of the performance of the act a valid fidelity fund certificate has been issued -

- a) to such estate agent; and
- b) if such estate agent is a company, to every director of such company or, if such estate agent is a close corporation, to every member referred to in paragraph (b) of the definition of 'estate agent' of such corporation.
- (2) No person referred to in paragraph (c)(ii) of the definition of 'estate agent', and no estate agent who employs such person, shall be entitled to any remuneration or other payment in respect of or arising from the performance by such person of any act referred to in that paragraph, unless at the time of the performance of the act a valid fidelity fund certificate has been issued to such person.”

7.3 The Defendant contends that the prohibition does not apply only to an estate agent but also to its employees as contemplated in Section 34A and relies also on the full bench decision of the Eastern Cape High Court in *Warren Jack Property Brokers cc t/a Warren Jack Property Group and Another v Rodney David Venter*[3].

7.4 Besides considering whether the Plaintiff was in breach of the provisions of the Act, this Court has to decide whether the Plaintiff

has been successful on a balance of probabilities in proving that he rendered consultancy services to the Respondent. I will look at both these issues conjunctively as they are interlinked to each other.

[8] In dealing with the issue whether the Plaintiff was an estate agent, I have looked at the Warren Jack Property case that I have been referred to by Counsel for the Defendant and found that it has different facts to the case before me. It related to the Plaintiff who had been employed as “a candidate estate agent entitled to earn commission”, who was not in possession of a Fidelity Fund Certificate. He had entered into a fee sharing agreement with the Defendant, which postulated into a partnership

between the parties. In conducting the business, they met at the office each morning where they worked through loads of documents

at their disposal and they planned their day. They travelled together for meetings and appointments with clients, listing new properties in pursuit of their business as estate agents.

In this case, there was no such arrangement at all. There is no evidence before this Court that indicates that Mr Haigh was employed by the Defendant. That he went to their offices to work, used their resources and planned with Mr Elliot. The gist of the matter in the Warren Jack’s case is that the Plaintiff was working under the Defendant without a Fidelity Fund Certificate in his own office. The Plaintiff in that case was a representative of the Defendant.

The Plaintiff in that case fell within the definition of an estate agent as envisaged in paragraph C (ii) of the Act. Therefore in terms of Section 26 of the Act read with Section 34A of the Act, he would not have been entitled to remuneration without being in possession of a Fidelity Fund Certificate. See *Ronstan Investments (PTY) LTD and Another v Littlewood*[4]. Therefore listing in the context of the facts of the Warren decision case, was in breach of the provisions of the Act. In this case the scenario is completely different.

8.1 In this case nothing suggests that Mr Haigh was employed by the Defendant in any capacity. There is no evidence before this Court that indicates that the managing director of the Plaintiff was employed, either in the provision of resources to market the products, like a motor vehicle or motor vehicle expenses, telephone allowance or any other disbursement. It is clear that the Plaintiff bore all costs relating to the consultancy work relating to the property that was sold by the Defendant. The consultancy services rendered by the Plaintiff were not the effective cause of the sale, but were sui generis in nature and ancillary to the sale agreements that followed.

Mr Haigh mentioned a few deals that the Plaintiff had been previously paid for, including the Fondant Investment CC deal, the Chatweel

Milling CC deal, the Venter and Briggs deal, and the Bokkie de Bruyn deal. These deals go back as far as 2008. In each deal a 50% fee would be worked out for the Plaintiff by the daughter of Mr Elliot and he would be requested to invoice them for the agreed fee and Vat. This is not consistent with the contention that Mr Haigh was an employee of the Defendant who operated without a Fidelity Fund Certificate.

8.2 Mr Haigh described to the Court how the Plaintiff got the properties that were listed with the Defendant. It is his evidence that if he came across properties or somebody gave him a property that they wanted to sell, he will bring it to the attention of E.G. Elliott, where they will list it and he would get what is called a “spotters fee”.

8.3 The payments were made to the Plaintiff and they were paid with Vat and not to Mr Haigh. Mr Haigh in his personal capacity was not registered as a Vat vendor, but his company. At no stage, had Mr Haigh been challenged why the invoices were in the name of the Plaintiff and not in his name. At one stage he was told to invoice Fantique Trading CC for the payment of a consultancy fee relating to a listing of the farm of Mr Bokkie de Bruyn. An employee cannot be paid by another consortium that he does not work for. The invoices reflected that they were payments for consultancy fees and not for commission. This was never challenged by the Defendant. The same applied to Ken Roswell, a witness called by the Defendant; his invoices reflected that they were for services rendered not for commission. This is an indication that the Defendant had various contractual relationships with various persons that it was associated with. At all times, the other agents of the Defendant were in possession of the Fidelity Fund Certificates and it cannot be accepted that the Defendant made an exception of the Plaintiff only or as it alleges Mr Haigh to operate without a Fidelity Fund Certificate.

8.4 Now, when the Plaintiff made a demand for fees in respect of the Von Pletzen deal and the Stockowners listing, the Defendant has raised a special plea that he is not entitled to fees as he performed the services of an estate agent without being in possession of a Fidelity Fund Certificate. This has never been raised before by the Defendant, who previously paid the Plaintiff its consultancy fees without fail. It transpired during the trial when Mr Haigh gave evidence that at one stage the Defendant required the Plaintiff to apply for a Fidelity Fund Certificate, as there were certain grey areas that they were not certain of. An application was lodged and the Board requested a certified copy of his identity book. This never came to his attention, as the letter had been sent to the Defendant's address. The issue was never raised again with him, which meant that the Plaintiff was never an agent for the Defendant.

8.5 Mr Elliot has not given any explanation to this Court, why only one person would work for him for so many years without being in possession of a Fidelity Fund Certificate. His evidence was that he introduced him in the East Griqualand Advertiser in 2008, as having joined his employment. He could not provide any explanation why he has not produced any other evidence that would show that Mr Haigh was an employee of his company. Mr Haigh did not put any

advertises in the newspaper, but they were put by the members of the Elliot family, though those adverts made reference to him. He could also not explain why he accepted invoices that reflected that these were consultancy fees, and why they were paid to a company and not Mr Haigh in his personal capacity. Mr Elliot tried to suggest that they could have been forged, as he had not seen them before, but this was not his defence. It is also unlikely that throughout all the past years he never had access to the books of his company.

8.6 It is my view that Mr Elliot found it very convenient for him to rely on this defence having acknowledged that the Plaintiff was entitled to its fee. Mark Elliot had acknowledged that Mr Haigh was entitled to his fee, though he referred to it as commission. This was in response to a letter written to the Defendant on the 18th of December 2009 in the Plaintiff's letterhead. On the Von Pletzen deal, Mr Haigh has shown how he assisted the parties with the business plans, how he arranged quotas with Dairybelle for Mr Mfingwane, how he assisted with finding finance from the Ithala bank and other issues that he assisted with to bring the deal into fruition. Having finalised all that heavy spade work in an email to both seller and purchaser, he categorically stated as follows:-

"I must hand the baton over to Mark and withdraw from this matter with immediate effect."

This says it all. This could not have been written by an agent. It categorically defines the relationship which the Plaintiff had with the Defendant. Whether an addendum to the sale agreement was signed later on, it was still on the same terms as previously negotiated and brought into fruition by the Plaintiff.

8.7 Mark Elliot also stated that he did not pay the Plaintiff for the listing of the Stockowners' property because he did not have a Fidelity Fund Certificate, but he did not explain why he had paid for the previous listings. If he believed that he was acting in his personal capacity, he could have produced some kind of documents relating to employment of Mr Haigh as an employer, or showed that he never claimed any Vat refunds regarding payments made to the Plaintiff.

[9] I accept the submission made on behalf of the Plaintiff that the prohibition on remuneration as envisaged in Section 34A of the Act[5] is not "a blanket prohibition", but one "in respect of or arising from the performance by such person of any act" of selling or purchasing immovable property or letting or hiring of immovable property. The question here being whether the Plaintiff acted as an estate agent in respect of the two (2) properties forming the subject of this action. In far as the Stockowners' property is concerned, as submitted on behalf of the Plaintiff, the supplying of a listing is not defined as an act performed by an estate agent in the definition of an agent and the Plaintiff would therefore not be barred from receiving any remuneration in supplying the identity of the immovable property which was up for sale to the Defendant or referring the seller to the Defendant.

[10] It is clear from the evidence in this trial that at all times, Mr Brad Haigh represented the company. The invoices which were submitted were made with the knowledge of those who represented the Defendant and they were in the name of the Plaintiff. I cannot accept it to be the truth that throughout all these years that Mr Elliot never saw a single invoice from the Plaintiff. The invoices attracted Vat and Mr Haigh's evidence is that he is not registered as a Vat vendor in his personal capacity.

The evidence given by the Plaintiff is not only from Mr Haigh, but the Plaintiff has put up documentary proof by way of invoices and payments made by the Defendant into its bank account. Similarly, the Defendant's witness, Mr Ken Rosewall, has also confirmed that he was paid through a Close Corporation. All this evidence was not disputed by the Defendant. I have attached more weight to the documentary evidence furnished by the Plaintiff in this case, than the lack of such documentary proof from the Defendant. He has not produced any documentary proof substantiating that Mr Brad Haigh was a contracting party with the Defendant. There was only one listing of a residential property, which should be treated as an exception, as it was the only one. It does not indicate that he was involved in the sale of residential properties as well.

[11] The Plaintiff's evidence is supported by the various deals that were previously concluded in the same fashion as the Von Pletzen and Stockowners deals. The Defendant only had to deal with the sale of the properties.

[12] I accept that the Plaintiff knew who it was contracting with and also knew the nature of the services that were rendered by the Plaintiff. The evidence also shows that the Von Pletzen property, which is the subject matter of this action and the listing of the Stockowners' property were concluded before termination of the relationship between the parties, therefore the Plaintiff is entitled to its fees.

[13] Mr Haigh's evidence cannot be challenged on the issue of credibility as his evidence is supported by documentary evidence;

unlike Mr Elliot's which is supported by none. Mr Haigh gave evidence in a clear and forthright manner. Mr Elliot tried to be matter of fact like when giving evidence. He had not acknowledged that he had duty that those working under him as estate agents ought to have been in possession of a Fidelity Fund Certificates. Whilst conceding that the deal had been brought

about through the consultancy efforts of the Plaintiff, his evidence was that he did not pay him since he did not have a Fidelity Fund Certificate. A defence, which I find to be opportunistic but which he could not support with evidence. He could not produce a shred of evidence that Mr Haigh was an employee of his company.

[14] The Plaintiff has successfully proved that it was a contracting party, that Mr Haigh was not in the employment of the Defendant and did not act as an agent of the Defendant. The Plaintiff also succeeds in its claims for fees in the Von Pletzen and the

Stockowners deals. I therefore make the following order.

- a) The Defendant is ordered to pay the Plaintiff the sum of R303 525.00;
- b) Interest a tempora morae from the date of judgment to the date of payment thereof.
- c) Costs are awarded in favour of the Plaintiff.

Date of hearing : 29 July 2015

Date delivered : 02 October 2015

Appearances:

For the Applicant : Adv. I.P Topping SC

Instructed by : Goodrickes Attorneys c/o Venn Nemeth & Hart

Pietermaritzburg

For the Respondents : Adv. A.J. Boulle

Instructed by : Geyser Du Toit Louw & Kitching Inc.

Pinetown

[1] Act 69 f 1984.

[2] Act 112 of 1676.

[3] (CA 156/2011) [2012] ZAECGH 59 (27July 2012) .

[4] 2001

(3) SA 555 (SCA).

[5] Act 112 of 1976.

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