

SOUTH AFRICA / JUDGMENT

K Seven Investments CC v Anchorprops 162 (Pty) Ltd and Others (1783/2022) [2024] ZAWCHC 293 (8 October 2024) [2024] ZAWCHC 293

COURT

Western Cape High Court, Cape Town

BEFORE

E D Wille

CASE / FILE NUMBER

1783/2022

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THE

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 1783/2022

In

the matter between:

K
SEVEN INVESTMENTS
CC
Plaintiff
And
ANCHORPOPS
162 (PTY) LTD
First Defendant
ANCHORPOPS
156 (PTY) LTD
Second Defendant
MEHBOOB
ADAM
Third Defendant
Coram: Wille,
J
Heard: 21
August 2024
Delivered: 8

October 2024

JUDGMENT

WILLE, J:

INTRODUCTION

- [1] This was a short civil trial. I say short because the plaintiff called one witness, and there was no cross-examination of this witness. Thus, the determination of this matter rests on the interpretation of the law concerning the undisputed facts.[1]
- [2] The plaintiff claims payment from the first and third defendants on a joint and several basis, alternatively, from the second defendant, which it alleges to be the balance of a fee payable to it as a result of the performance which it rendered in favour of the first defendant according to a fee agreement.[2]
- [3] The defendants dispute these claims because they say the plaintiff is not entitled to the amounts claimed by it. They say this because neither the plaintiff (nor its sole member) was the holder of a valid fidelity fund certificate when the plaintiff allegedly rendered its performance or services, which underlies and underpins its claims against the defendants. [3]
- [4] All the facts underpinning the shields raised by the defendants on this score seem undisputed. These facts also mostly appeared from the pleadings, the evidence given at trial, and the documents admitted into evidence without requiring proof thereof[4]

CONTEXT

- [5] It started when the plaintiff became aware of a tender invitation to lease commercial property for five years for a government department close to the Union Buildings in Pretoria. Before the closing date of the tender, the plaintiff submitted a set of documents to the relevant government department with several proposals which identified at least nine suitable commercial properties.[5]
- [6] One of these commercial properties was owned by the first defendant. The plaintiff put up the first defendant's property to be included in the tender process without any prior consultation with the first defendant and without the knowledge of the first defendant. The closing date for the tender process was nearly three weeks before the plaintiff first contacted the director of the first defendant about its commercial property, which was suitably located within the governmental precinct.[6]

- [7] After that, the plaintiff represented to the government department that it would (upon its specific request) make suitable arrangements in connection with nine identified properties to facilitate and progress the tender process in a mutually beneficial and financially viable way for both parties. The plaintiff included (in its correspondence with the government department) a summary of the terms and conditions for a potential lease, which was to be opened up for negotiation and possible agreement.[7]
- [8] After that, the plaintiff sent an email to the first defendant's director (the third defendant), in which it confirmed that the first defendant's property had been shortlisted through the tender process for use as commercial office space to be leased by a government department. The third defendant then sent an email indicating that: (a) the first defendant's property was available for inspection; (b) the third defendant hoped that they would meet to finalise specific issues (including a mandate), and (c) that the third defendant wanted to be furnished with a copy of the tender submission.[8]
- [9] In response, the plaintiff somewhat curiously wrote to the government department asserting that it had been prejudiced in its negotiations with the first defendant (concerning the potential lease of the building) because another entity had been made privy to information it alleged to be confidential to it.[9]

THE FEE AGREEMENT

- [10] All this correspondence (and the subsequent negotiations) culminated in the conclusion of a fee agreement between the plaintiff and the first defendant, with the remaining defendants as sureties. The plaintiff thereafter sent a confirmation letter to the government department concerned and stated: (a) that it and the first defendant had concluded a written fee agreement; (b) that the parties confirmed that the first defendant's property was available for occupation by the government department; (c) that a lease agreement may be concluded between the government department and the first defendant should the tender be awarded to the plaintiff, and (d) that upon signature of the lease agreement, an agreed fee would be payable

to the plaintiff by the first defendant.[10]

- [11] Following this, a lease agreement was signed between the government department and the first defendant, and the plaintiff was paid a portion of the fee charged. After the plaintiff had received this payment, the plaintiff's attorney notified the then-first defendant's attorney that neither the plaintiff nor the plaintiff's sole member were in possession of a valid fidelity certificate.[11]

THE

LEGAL FRAMEWORK

- [12] The relevant provisions of the targeted legislation are as follows:

‘...[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 subparagraphs (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 close corporation, to every member referred to in paragraph (b) of the definition of “estate agent” of such corporation...’[12]

[13] Moreover, and for the avoidance of any doubt, the targeted legislation provides for an overarching and expansive definition of an ‘estate agent’ by way of expression in the following terms:

‘...“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 –

(ii) lets or hires immovable property or any interest in 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

(iii) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking...’[13]

[14] Thus, it is against this legal framework that the actual work performed and the core services rendered by the plaintiff to the government department ostensibly on behalf of the first defendant must be scrutinised and measured regarding the detailed and strict provisions in the targeted legislation.[14]

CONSIDERATION

[15] As alluded to earlier, the conclusion of the fee agreement and its terms are not the subject of any dispute. The fee agreement recorded that the plaintiff submitted a proposal to the relevant government department to award the tender for letting the first defendant’s property. The first defendant acknowledged that if the tender was awarded and the lease concluded, then the plaintiff would have been the ‘effective cause’ of the conclusion of the lease. As a consideration for the plaintiff having been the ‘effective cause’ of the conclusion of the lease, the first defendant would be liable to pay a fee to the plaintiff.[15]

[16] Self-evidently, for the plaintiff to be legally entitled to be remunerated with the fee, it would have to have acted in the manner contemplated in the fee agreement to have been the ‘effective cause’ of the conclusion of the lease agreement. Accordingly, by concluding the fee agreement for the acquisition of gain for its account, the plaintiff held itself out as a party

which, on the instruction of or on behalf of any other person, would: (a) publicly exhibit the first defendant's property for hire; or (b) through the tender process, negotiate in addition to that, and (c) through the tender process canvass or offer to canvass a lessee for the property as contemplated following the strict provisions of the targeted legislation.[16]

- [17] It is not disputed that when the plaintiff so acted (or purported to so act), neither it nor its sole member were the holders of the requisite fidelity fund certificates listed as a pre-requisite following the targeted legislation. Put another way, the plaintiff and its sole member could not have acted (on the common cause facts) other than as an 'agent' taking into account the conclusion of the lease agreement and the conclusion of the fee agreement. [17]
- [18] Thus, the defendants submit that the plaintiff, in several respects, held itself out to be a person who, on behalf of another person or entity: (a) publicly exhibited for hire immovable property; or (b) negotiated in connection in addition to that, or; (c) canvassed or undertook or offered to canvass a lessee therefor, or (d) received money payable on account of a lease of immovable property. On this, I agree.[18]
- [19] The plaintiff should have engaged with the fidelity fund certificate issue about why the targeted legislation did not apply or that it never acted as an estate agent. Instead, the plaintiff denied that it acted as an estate agent without any context or pleading in this connection.[19]
- [20] The interpretation of the letters the plaintiff presented before me at the trial remained a question of law involving the application of an objective legal test. Applying this test objectively, the following remains undisputed:
- (a) the plaintiff was not the owner of the property; (b) the plaintiff had no power to let it in its name, and (c) the plaintiff did not purchase the property to enable it to do so. Thus, the only factual, objective conclusion is that the plaintiff acted as an agent.[20]
- [21] The plaintiff's only possible escape avenue was its belated argument that it acted on its 'own' behalf. This argument does not align with the undisputed facts. In addition, it is inconsistent with the contemporaneous written material that formed part of the admitted evidence. The probative weight that falls to be attached to this belated legal argument by the sole member of the plaintiff accordingly falls to be treated as 'unreliable' when measured against the other objective facts. Therefore, this manifestly obviated any need for the defendants to have asked this witness questions after he testified.[21]
- [22] Put another way, the testimony that the plaintiff acted only for itself must be measured against the common cause written material read with the specific terms of the fee agreement. I say this because this is the only contractual basis underpinning the claim by the plaintiff against the defendants. Most importantly, this was the only case the defendants were called upon to meet. Thus, the probabilities of the version offered up by the testimony of the sole member of the plaintiff may be safely rejected as being improbable.[22]

[23] In an endeavour to clarify the legal and factual position, I put it to the plaintiff's witness that, seeing as though he was not the first defendant's property owner, he could only have acted as an agent or broker at the time. The witness declined my invitation to answer this question.
[23]

CONCLUSION

[24] In summary, all the evidence unequivocally demonstrates that the plaintiff, for the acquisition of gain, publicly exhibited the first defendant's property for hire, negotiated in this connection (in addition to that) and canvassed or undertook or offered to canvass a lessee for the subject immovable property owned by the first defendant.[24]

[25] At no time during this process (when the plaintiff so acted) did it or its sole member hold the requisite and mandatory fidelity fund certificates as required by the targeted legislation. Thus, by operation of law, regarding the common cause facts, the plaintiff is not legally entitled to any remuneration or any other payment due to the conclusion of the lease or for the services rendered in terms of the fee agreement. This must be so, failing which it would be a relatively simple exercise to circumvent the targeted legislation. This is and would be impermissible.[25]

ORDER

[26] The following order is granted:

1. The action by the plaintiff is dismissed.
2. The plaintiff shall be liable for the defendants' costs of an incidental to the action proceedings on the scale as between party and party (as taxed or agreed), including the costs of counsel on Scale C.

E. D. WILLE

Cape Town

- [1] Mr "Hylton Keshwar" is the sole member of the plaintiff and testified on the plaintiff's behalf.
- [2] The plaintiff's claims are based squarely on the written fee agreement.
- [3] Section 34 A (1) of the Estate Agency Affairs Act, 12 of 1976.
- [4] The parties agreed that the agreed bundle of documents could be admitted into evidence without proof.
- [5] The Tender Bulletin of the 7th of February 2014, in which the DPME invited tenders (the 'government' department).
- [6] The tender closed on 21 February 2014, and the first contact with the first defendant was on 7 March 2014.

- [7] This was by way of a letter written to the government department.
- [8] The third defendant wanted full knowledge of the details of the tender submission.
- [9] The plaintiff did not engage with the basis for the confidentiality regime it asserted at this time.
- [10] This is in terms of the provisions of the fee agreement which had been concluded.
- [11] This occurred after the initial payment had been made to the plaintiff.
- [12] Section 34 A (1) of the Estate Agency Affairs Act, 112 of 1976.
- [13] Section 1 (a) of the Estate Agency Affairs Act, 112 of 1976.
- [14] The provisions as set out in the Estate Agency Affairs Act, 112 of 1976, cannot be ignored despite the agreement.
- [15] A fee of R4 845 000,00 (plus VAT) would be payable to the plaintiff.
- [16] Section 1(a)(ii) of the Estate Agency Affairs Act, 112 of 1976.
- [17] The plaintiff, on a conspectus of the undisputed facts, could only have acted as an “agent”.
- [18] I cannot think of any alternative conclusion matching the common cause facts.
- [19] It sought to pursue a line of argument which it never pleaded.
- [20] A legal argument was advanced that the plaintiff acted on its “own” behalf, which was challenging to understand.
- [21] Stellenbosch Farmers Winery Group Ltd & Another v Martell et Cie & Others 2003 (1) SA 11 (SCA) at para [5].
- [22] This evidence was unreliable, considering the factual matrix.
- [23] It must be so that the facts unequivocally demonstrate that the plaintiff acted as an estate agent.
- [24] All the objective facts demonstrated that the plaintiff at all times acted as an estate agent.
- [25] Ronstan Investments (Pty) Ltd v Littlewood 2001 (3) SA 555 (SCA) at [21].

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