

SOUTH AFRICA / JUDGMENT

Kitsopoulos v Cherangani Trade & Invest 113 (Pty) Ltd (60/2010) [2011] ZAFSHC 127 (25 August 2011) [2011] ZAFSHC 127

COURT

Free State High Court, Bloemfontein

BEFORE

L J Lekale

CASE / FILE NUMBER

60/2010

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 60/2010

In the review between:

MRS HARALAMBOU KITSOPOULOSPlaintiff

and

CHERANGANI TRADE & INVEST 113 (PTY) LTDDefendant

JUDGMENT:

LEKALE, AJ

HEARD ON: 7 & 8 JUNE 2011

DELIVERED ON: 25th AUGUST 2011

INTRODUCTION:

- [1] This is an action for effective payment of an amount of R275 000-00 in respect of the commission which the plaintiff allegedly earned in her capacity as an estate agent on a sale and ultimate transfer of a commercial property which took place on the 23rd October 2009.

- [2] The defendant resists the claim on the basis that in terms of the contract between the parties as well as the defendant's practices and policies the plaintiff was only entitled to R75 000,00 which was duly paid to her in terms of an order of this court given on the 4th March 2010 pursuant to an agreement between the parties.

BACKGROUND

- [3] The plaintiff was employed by the defendant as an estate agent from the 1st May 2008 to July 2009 when she left unceremoniously following a dispute over commission sharing.
- [4] On the 20th July 2009 the plaintiff finalised a transaction involving the sale of a commercial property which realised a total amount of R500 000,00

in commission. The seller was Jannie Lubbe (Lubbe), the curator bonis of the owner of the property.

- [5] A dispute ensued between the parties over how the commission was to be shared. The plaintiff contends that she is entitled to 70% of the commission excluding Vat in terms of her verbal employment agreement while the defendant, on its part, maintains that the plaintiff is only entitled to 30% of the commission which she, further, has to share equally with one Sechaba Mokoena (Mokoena) who, according to the defendant, was the agent who sourced and listed the relevant property with it.
- [6] Plaintiff, eventually, issued summons against the defendant for recovery of her share of the commission.
- [7] Defendant entered appearance to defend the action, whereupon, the plaintiff launched an application for summary judgment which was eventually settled on the 4th March 2010 with the defendant advancing R75 000,00 to the plaintiff as an interim payment out of the funds kept in trust by the conveyancer who attended to the transfer of the property. In fact the amount in question represents 15% of the total commission

earned.

- [8] Defendant, thereafter, delivered a plea to the effect that the plaintiff was only entitled to market and sell residential properties in terms of her employment contract.
- [9] At the end of the trial on the 8th June 2011 the parties agreed, inter alia, that the defendant shall amend its plea, whereafter, they shall submit heads of arguments no later than the 15th July 2011.
- [10] The parties obliged and the defendant amended its plea to the following effect, among others:

[10.1] that the agreement between the parties was to the effect that the plaintiff may sell property of whatever nature subject to 30/70 commission split in favour of the defendant in respect of commercial property;

[10.2] that the agreement was further to the effect that the plaintiff would join the defendant in order to build and run its residential property unit;

[10.3] that the relevant property was sourced by Mokoena from its owner Mr. Savvas Kyriacou (Kyriacou).

[11] Plaintiff duly replied to the amended plea.

FACTUAL DISPUTE:

[12] The parties are at variance over the following questions of fact:

[12.1] whether or not the oral agreement between the parties provided for 70/30 commission sharing in the plaintiff's favour on a sale of commercial property out of hand; and

[12.2] whether or not Mokoena was a listing agent in respect of the relevant commercial property and is, as such, entitled to half (50%) of the commission payable to the plaintiff.

PLAINTIFF'S VERSION:

[13] The plaintiff testified that she was approached and persuaded by the defendant's managerial employee Botha Barnard (Barnard) to join the defendant and when she eventually gave in, in April 2008, she had eleven years of illustrious career in property market behind her back. She accepted the defendant's offer of 70/30 commission splitting in her favour on sale of any property out of hand and 50/50 on sale by auction. She was motivated by Barnard's assurances that she would get lots of referrals as well as the possibility that she was going to make a lot of sales. Her own business, which she conducted with her partner and from which she was entitled to 100% commission, was not doing well as it was during a recession. The said business was only starting and was not yet on the move when she joined the defendant. She was not aware of Mokoena's alleged role as a sourcing agent in respect of the property in question and when she approached Barnard with information that she had a buyer for the property the latter referred her to the administrator Otto Lessing (Lessing) as the one who had information about the same. Lessing even called Lubbe in her presence to get details about the property. Following the sale Barnard completed the relevant internal form indicating that she was the sole agent involved. On the date on which she left the defendant she attended a meeting and learnt for the first time that from thence onwards commission on the sale of commercial property would be 30/70 in favour of the defendant in all instances. When she objected and pointed out that that was not the agreement when she got employed, Barnard responded that those who did not want to work that way may leave. She thereupon took her bag and left. She never asked Mokoena for any municipal plans for the property in question.

[14] Jannie Lubbe testified that he never gave Kyriacou or his erstwhile attorney any permission to give anyone an instruction to sell the property in question. He further never met Mokoena. He conceded that it was possible that he met the defendant's Johnny Bateman and Lessing early in 2009 when Kyriacou's property was discussed. He furthermore conceded that he would not know if Kyriacou mandated Mokoena to sell the relevant property subject to his (Lubbe) approval as the curator bonis.

DEFENDANT'S VERSION:

[15] John Kenneth Bateman, the defendant's managing director testified that the plaintiff was approached and appointed to build and head the defendant's residential property division because of her reputation and skills in the residential property market. The plaintiff fitted the defendant's plans and profile. Plaintiff was not restricted, in her marketing activities, to residential property and could sell any property subject to applicable commission structures. She was allowed a favourable 70/30 commission split for sale of residential property out of hand while other agents are only entitled to 50% of the commission in such circumstances. The commission structure with regard to commercial property has always been 70/30 in favour of the defendant because sale of such property is its core business. No agent has ever received more than 30% on a sale of commercial property since the inception of the defendant. Not even him or other shareholders of the defendant who also work as agents ever received more than 30%. He cannot speak for Barnard on why he did not list Mokoena as a listing agent in the internal form. He met Lubbe in February 2009 in preparation for an auction scheduled for March 2009 in respect of, inter alia, Maitland Hotel which Mokoena had sourced from Kyriacou. He does not know when Mokoena sourced the property involved in the present dispute and only knows that Mokoena had a sole mandate to sell the same. He probably misunderstood his affidavit in opposition of the application for summary judgment where it states that the plaintiff could only sell residential property and that Mokoena sourced the relevant property from Lubbe. The plaintiff wanted the commission structure in respect of commercial properties to be changed at the meeting which preceded her departure and had an argument with Barnard when he and the latter did not entertain the issue. The plaintiff did not get the support she expected from other agents.

[16] Sechaba Dennis Mokoena testified that he left the defendant's employ after the sale of the property in question and that he had not yet received

his share of the relevant commission as the listing agent because of the present proceedings. He made enquiries from Barnard after the commission in 2009 when he was still in defendant's employ. He was employed as property broker and he could market and sell any property subject to applicable commission structures. Commission on sale of commercial property was always 70/30 in the defendant's favour. He sourced the relevant property before July 2009 from Kyriacou and it was put on auction but it was not sold. Bateman would have been the auctioneer. His first Fidelity Fund Certificate was only issued on 1st June 2009. He had a sole mandate to sell the property although he could not recall the date on which he received the same as well as the

duration of the mandate. The plaintiff was aware of his role as a sourcing agent because she asked him for the plans of the same and further told him that she had succeeded in selling the property. Plaintiff even confirmed that she was going to share the commission with him. At the meeting which led to the plaintiff's departure the latter shouted and had a quarrel with the facilitator of the meeting, Barnard. Prior to the meeting the plaintiff was always talking about the different commission structures and pointed out that she needed more. He conceded that he did not know the terms of the plaintiff's contract with the defendant and the commission structure on which she was appointed.

APPLICABLE LAW:

[17] The parties limited the issues to a factual dispute relating to the terms of the plaintiff's employment contract with regard to commission sharing as well as the question whether or not Mokoena is entitled to share in the commission payable to the plaintiff.

[18] The parties are, further, *ad idem* that the legal technique applicable to resolution of factual disputes requires a court to make findings on the credibility of various factual witnesses, their reliability and the probabilities in order to come to a conclusion on disputed facts.

(see *Stellenbosch Farmers' Winery Group Ltd and Ano. v Martell & Cie SA & others* 2003(1) SA 11 (SCA)).

FINDINGS:

[19] It is clear from available evidence and heads of arguments submitted that the parties are effectively in agreement that:

[19.1] the plaintiff was approached and recruited to take up employment with the defendant because of her impeccable reputation in the property market industry. In this regard it was, therefore, not necessary for the plaintiff to prove her standing in that industry prior to taking up employment with the defendant.

[19.2] Barnard played a pivotal role in the recruitment of the plaintiff and was, further, at the centre stage when the plaintiff walked out of the meeting which preceded the termination of her employment;

[19.3] Barnard further played a prominent role in the identification of the agent involved in the sale of the relevant property insofar as he completed the relevant internal form and he further referred the plaintiff to Lessing for details of the property in question;

[19.4] Mokoena as a property broker was entitled to market and sell property in the same way as the plaintiff was entitled to do so and was, as such, subject to the laws applicable to estate agents.

- [20] I am satisfied from available evidence that the defendant was prepared to and, in fact, did make concessions in favour of the plaintiff in order to secure her services insofar as she was, according to Bateman, allowed 70% commission on the sale of residential property while other agents, such as Mokoena, were only entitled to 50% commission in such circumstances.
- [21] On the terms of the employment contract it is the plaintiff's word against that of Bateman insofar as Barnard's evidence was not tendered. Mokoena's evidence on this issue is of no assistance to the defendant because he effectively contradicted Bateman. Where Bateman testified that the plaintiff sought to introduce commission splitting as an issue for discussion and, when it could not be entertained, she burst out, Mokoena testified that Barnard told everyone present at the meeting that there were different commission structures and that a sale of commercial property results in 70/30 commission split in favour of the defendant. The plaintiff made a good impression as a witness in that she was firm and clear in her testimony on the issue. Bateman, on the other hand, was not reliable on the terms of the contract regard being had to his affidavit delivered in opposition of the application for summary judgment and his viva voce evidence. In this regard it should be noted that in the affidavit he deposed to the effect that the plaintiff was only entitled to sell residential property when she was appointed but in his oral evidence he admitted that she was entitled to sell any property. The explanation proffered by Bateman for the contradiction in question is simply that he

probably misunderstood the affidavit on that issue. This explanation is, with respect, not convincing regard being had to the fact that Bateman testified that he understood Afrikaans and he gave instructions to the lawyers who drafted the affidavit in question.

The issue in question was as important to the summary judgment application as it is to the present proceedings because it had a

bearing on commission splitting. Bateman would, most probably, have discovered the mistake before he signed the affidavit if it was in deed a mistake. The same mistake also permeated the plea which was eventually amended at the end of the proceedings.

- [22] The evidence of Barnard would have been relevant and pertinent to the issue had it been tendered. No explanation was offered for not adducing his evidence when indications are that he was able to testify and was still in the defendant's employ. Mr Pohl contends, on behalf of the plaintiff, that an adverse inference be made against the defendant for failing to call Barnard as a witness. In my view it is irresistible to infer, as a probability, that the arrangement between the parties was that the plaintiff would receive 70% commission on sale of any property out of hand.

(see *Galante v Dickinson* 1950(2) SA 460 (A) @ 465)

[23] The sale of property out of hand does not entail costs on the part of the defendant as the case is with an auction sale. In my judgment the fact that sale of commercial properties forms the core business of the defendant does not per se negate the possibility that the plaintiff was allowed 70% commission on all sales made out of hand as a carrot to lure her into the defendant's fold. The same applies equally to Mr Steyn's argument, on behalf of the defendant, to the effect that not even Bateman who is the defendant's shareholder nor Barnard who occupies a high position within the defendant's structures was and is allowed a percentage higher than 30 % in commission on a sale of commercial property out of hand. In this regard I may only point

out that shareholders stand to benefit from the net profits of the defendant.

[24] It is more probable, in my opinion, that no distinction was made among various properties when the agreement was made and that the commission split on a sale of any property out of hand was agreed to be 70/30 in favour of the plaintiff. It was, most probably, because of that knowledge that Bateman initially denied that the plaintiff was entitled to sell commercial property.

[25] Mr Pohl correctly and effectively concedes in argument that Mokoena sourced the relevant property during or before February 2009 for, if it was not sourced, it would not have been on the defendant's books.

[26] Mokoena testified that his first Fidelity Fund Certificate was issued on the 1st June 2009 and, as such, after the date on which he sourced the property which, according to him, was placed on unsuccessful auction

prior to its actual sale in July 2009.

[27] It is contended for the plaintiff that Mokoena is, in law, not entitled to remuneration because, as at the date on which he sourced the relevant property, he was not in possession of a Fidelity Fund Certificate.

[28] As correctly submitted by Mr Pohl, for a person to perform any act as an estate agent and to be remunerated therefor he must be in possession of a valid Fidelity Fund Certificate.

(see section 34A read with section 26 of Estate Agency Affairs Act No. 112 of 1976 as amended and Rostan Investments (Pty) Ltd & Ano. v Littlewood 2001

(3) SA 555 (SCA))

[29] It is clear from available evidence emanating from the defendant's side that, at the time when Mokoena could reasonably possibly have sourced the relevant property from Kyriacou, he was not in possession of a valid fidelity fund certificate as an employee contemplated in paragraph

(c) (ii) of the definition of 'estate agent' in section 1 of the Estate Agency Affairs Act.

- [30] Mokoena was, therefore, in law not acting as an estate agent contemplated by the definition of 'estate agent' when he sourced the relevant property and is, as such, not entitled to share in the commission payable to the plaintiff.
- [31] Even if the court is wrong in the foregoing finding, I am persuaded by available evidence that, when Kyriacou mandated Mokoena to sell the relevant property, he (Kyriacou) did not have the legal capacity to do so insofar as Lubbe, qua his curator bonis, had not consented to or ratified such a contract. The mandate was, therefore, a nullity for lack of contractual capacity on the part of Kyriacou as correctly contended by Mr Pohl.
- [32] The plaintiff was, therefore, entitled to 70% of the total commission realised excluding VAT as at the 23rd October 2009 when transfer was passed. She received 15% of the total commission or R75 000,00 on the 12th March 2010 and is, as such, entitled to payment of a capital amount of R275 000,00 by the defendant.
- [33] The plaintiff is, thus, further entitled to interest at the rate of 15,5% per annum on R350 000,00 calculated from the 23rd October 2009 to the 12th March 2010 and further interest on R275 000,00 from the 12th March 2010 to date of final payment plus costs.

ORDER:

- [34] In the result the defendant is liable for payment of R275 000-00 to plaintiff together with interest as set out in paragraph
- [33] above.
- [35] Defendant shall, further, pay plaintiff's costs.

L. J. LEKALE, AJ

On behalf of Plaintiff : Adv. L LER. Pohl

Instructed by:

Rossouws – Attorneys Bloemfontein

On behalf of Defendant : Adv. J W Steyn

E.G Cooper Majiedt Inc. Bloemfontein

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Prepared on 10 October 2026 · Esheria