

SOUTH AFRICA / JUDGMENT

**Marder Properties CC v Consilium
Advocates (Pty) Ltd (17544/2010) [2012]
ZAGPJHC 157 (12 September 2012)
[2012] ZAGPJHC 157**

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

17544/2010

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SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 17544/2010

DATE:12/09/2012

In the matter between

MARDER PROPERTIES CC.....PLAINTIFF

and

CONSILIUM ADVOCATES (PTY) LTDDEFENDANT

Practice - Exception against plaintiff's amended particulars of claim on basis that it fails to disclose a cause of action - interpretation of relevant paragraph - defendant's contention not the only possible interpretation - test to be applied

- exception dismissed.

J U D G M E N T

VAN OOSTEN J:

[1] This is an exception noted by the defendant to the plaintiff's amended particulars of claim.

- [2] The plaintiff's claim is against the defendant is for payment of agent's commission following upon the sale of a property pursuant to a mandate given to it by the defendant. For purposes of the exception the defendant accepted that the plaintiff

was the effective cause of the sale of the property in terms of an instalment sale agreement (the agreement) although not was not a party thereto; that the agreement is perfecta and that the agreed commission payable is the amount claimed by the plaintiff in this action. The only issue between the parties, for the purposes of the exception, is the date upon which the commission would become payable. In the original particulars of claim the plaintiff pleaded, as a term of the mandate agreement, that that date would be "upon the date of transfer of the property pursuant to any such sale". The difficulty that arose once the agreement came to light is that it constituted an instalment sale agreement in terms of which transfer of the property would only take place on 1 February 2015. This prompted the plaintiff to amend its particulars of claim which was not opposed by the defendant. In its amended form the relevant paragraph now reads as follows:

"5.3 Commission as aforesaid would be deemed to have been earned and would be payable in respect of any sale procured and/or concluded by the Plaintiff upon the date of transfer of the Property pursuant to any sale concluded on a cash basis or subject to a bond, and in the event of an instalment sale agreement, once the sale is deemed perfecta."

- [3] The defendant contends for an interpretation of the paragraph to mean that in respect of all agreements referred to therein, commission would only become payable upon date of transfer of the property. That date only being on 1 February 2015, so the argument went, results in the plaintiff having failed to plead a sustainable cause of action.

- [4] The defendant's contention is based on a misreading of the amended paragraph quoted above. The best way to illustrate this, without changing the wording, is to read it as follows:

"Commission as aforesaid would be deemed to have been earned and would be payable:

in respect of any sale procured and/or concluded by the Plaintiff upon the date of transfer of the Property pursuant to any sale concluded on a cash basis or subject to a bond, and

in the event of an instalment sale agreement, once the sale is deemed perfecta."

That being a possible, if not the only, interpretation of the paragraph decides the fate of the exception. The test to be applied

is well-established: a pleading will only be excipiable if upon every possible interpretation thereof no cause of action is made out (Erasmus Superior Court Practice B1-151). This is clearly not the case here and it follows that the exception cannot succeed.

- [5] In the result the exception is dismissed with costs.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF : ADV SL RESS

PLAINTIFF'S ATTORNEYS: DU PREEZ AND ASS

COUNSEL FOR DEFENDANT: ADV EP VAN DER HOVEN

DEFENDANT'S ATTORNEYS: NK MAKHAYA ATTORNEYS

DATE OF HEARING: 11 SEPTEMBER 2012

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