

SOUTH AFRICA / JUDGMENT

Marock v Attacq Limited and Another (2015/40044) [2018] ZAGPPHC 260 (17 April 2018)

[2018] ZAGPPHC 260

COURT

North Gauteng High Court, Pretoria

BEFORE

S S Mphahlele

CASE / FILE NUMBER

2015/40044

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

DATE:

17/04/2018

CASE

NO.: 2015/40044

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

In

the matter between:

MAROCK,GM

Applicant

versus

ATTACQ

LIMITED

First Respondent

AS

CENS ION PROPERTIES LI MITE

D

Second Respondent

JUDGMENT**MPHAHLELE J**

1. The applicant claims commission of R1 688 208-00 from the first respondent based on a stipulatio alteri.
2. The applicant (a commercial property broker) had a long standing relationship with one Shaun Louis Rai ("Rai"), an executive director of the second respondent whereby the applicant represented the second respondent in a number of commercial property purchases and/or negotiations.
3. In and during June 2012 the applicant had discussions with one Enzo Kuun ("Kuun") regarding a commercial property owned by the first respondent and located at erf 160462, Atterbury House, corner of Riebeek Street and Lower Burg Street, Cape Town City Centre, Cape Town ("the property"). Kuun represented himself in the marketplace as being an employee alternatively agent of the first respondent. In June 2012 the applicant presented the property to the second respondent pursuant to the brief.
4. In and during July 2012, and as a result of the breakdown in communication with Kuun, the applicant contacted the first respondent

directly in order to enquire as to the first respondent's interest in the potential sale of the property to the second respondent. As the result, in and during July 2012, a meeting took place with Louis van der Watt and Lucille Louw in attendance for the first respondent, and Rai and Ashraf Mohamed in attendance for the second respondent. Kuun and the applicant were also in attendance in their capacities as representatives of the respondents. Subsequently in and during June 2013 and as a result of the introduction of the second respondent to the property by the applicant, the respondents concluded the agreement in respect of the property.

5. The applicant played no role in drafting and finalising the agreement and was accordingly not privy to all terms and conditions of the agreement but maintains that he was certainly the effective cause of the sale and therefore entitled to commission. As nothing to the contrary had been discussed between the applicant and the second respondent, he assumed that his commission would be wholly payable by the second respondent.
6. Clause 24 of the agreement provides as follows:-

"agents commission amounting to an aggregate R3 336 416-00 (three million three hundred and thirty-six thousand four hundred and sixteen rand) in respect of this sale shall be payable by the seller to Enzo Kuun and Jeff Marock on transfer."

7. It is common cause that Kuun on behalf of the first respondent and the applicant on behalf of the second respondent played some part in facilitating the conclusion of the agreement. The applicant received a payment from the second respondent for his participation in facilitating the sale. The applicant seeks a further payment from first respondent .
8. The transfer of the property was registered on or about 12 September
2013. The applicant contends that as a result of the transfer of the property, payment in the amount of R1 668 208-00 became due and owing by the first respondent in accordance with the agreement.
9. The applicant submits that he only became aware in or during late September 2013, that a claim of R1 668 208-00 of his commission was payable by the first respondent, it was when the second respondent in the person of Jeremy de Villiers supplied the applicant with page 22 of the agreement containing clause 24. The applicant then contacted the first respondent's attorneys to arrange for payment of the payment due to him. In so doing, he submits he expressed acceptance of the benefits of the stipulation in his favour in terms of clause 24 of the agreement. Despite the provisions of clause 24 of the agreement, the full amount of R3 336 416-00 was paid to Kuun on the first respondent's, alternatively Kuun's, instructions. The applicant contends that on or about 04 November 2013 he demanded payment of the R1 668 208-00 from the first respondent thereby expressing acceptance of the benefits of the stipulation in clause 24 of the agreement.
10. The applicant contends that the stipulatio alteri is contained in clause 24 of the agreement concluded between the first and second respondent s. The first respondent rejects the applicant's claim and contends that clause 24 stands to be rectified.
11. The first respondent contends that the applicant has failed to prove any right to payment based on clause 24, for the following reasons: first, clause 24, properly construed, is not a stipulation alteri; second, the applicant failed to plead and prove any tacit term to render clause 24 capable of being construed as a stipulatio alteri and conferr ing a right to payment of the claimed amount; third, even if clause 24 is a stipulatio alteri capable of giving rise to a right to payment of the claimed amount, clause 24 was not timeously accepted by the applicant.
12. The respondent states that clause 24 is not a stipulatio alteri. The respondent submits that a stipulatio alteri exhibits a positive intention to empower the third party to adopt and become a party to the contract if he wishes . It must be a positive intention; it is not sufficient that it would be to the third party's advantage to adopt and become a party to the contract.

13. The respondent contends that clause 24 does not stipulate that the aggregate commission (R3 336 416-00) is to be paid to the applicant and Kuun in equal shares. As such, clause 24 does not support the applicant's contention that the adoption of clause 24 entitles him to payment of half of the aggregate commission. The respondent maintains that, absent specificity about the exact debt owed to the applicant in respect of commission, clause 24 does not meet the stipulatio alteri threshold.
14. The respondent contends that in the premises, clause 24 is not a stipulatio alteri. The applicant's purported acceptance thereof did not constitute a contract between the applicant and the first respondent and, accordingly, did not provide the applicant a contractual right to payment from the first respondent. The respondent further submits that the applicant failed to plead and prove any tacit term regarding the distribution of the aggregate commission.
15. The respondent states that, the applicant's alleged right to payment based on clause 24 is entirely dependent on proof of a tacit term regarding the percentage of the aggregate commission to be paid to the applicant. The respondent submits that the applicant's contention that it is entitled to payment of R1 668 208-00 is not premised on any express provision of the agreement, stipulating the specific amount payable to the applicant. The respondent contends that, to rely on a tacit term, the applicant had to plead that the agreement contains a tacit term which provides that the aggregate commission would be equally distributed between the applicant and Kuun.
16. The respondent states that if clause 24 was not accepted by the applicant prior to transfer of the property, no contract between the applicant and the first respondent was concluded prior to transfer, and

no liability for the respondent based on clause 24 existed on transfer.
17. What is important is the intention on the part of the contracting parties to confer a benefit to the third party, upon acceptance by the beneficiary. So nothing turns on the fact that clause 24 failed to stipulate what portion of the commission was the applicant entitled to. It is sufficient that mention is made that the benefit, that is the aggregate commission of R3 336 416-00, was payable to Kuun and the applicant.
18. An agent may base the claim for commission on a provision in the sale agreement if the provision was a stipulatio alteri and the agent accepted the benefit. See *Jurgens Eiendomsagente v Share* [1990] ZASCA 81; 1990 (4) SA 664 (A). The stipulation may be accepted at any time while it remains open. The first respondent contended that the applicant is not entitled to the payment of commission, inter alia, because the benefit was not timeously accepted before transfer. In my view, the condition that the commission is payable on transfer is merely an indication of the event that triggers the entitlement to payment and should not be restrictively interpreted to mean that if the commission is not paid immediately on transfer the right to payment becomes unenforceable.

19. Notwithstanding the stipulatio alteri, the applicant still has to satisfy the court that he is entitled to payment of a specific amount of commission before the court can come to his assistance. On the papers, the applicant has failed to establish the specific amount of commission that is due to him. Clause 24 does not specify the exact commission due to the applicant. The applicant contends that he is entitled to 50% of the commission without laying a sound basis for his claim. I am thus not in a position to find that the applicant is entitled to payment of an indeterminable amount.
20. In the result, the application is dismissed with costs, including the costs of two counsels

S S MPHAHLELE

JUDGE OF THE HIGH COURT,

PRETORIA

FOR THE APPLICANT: Adv A Kantor

INSTRUCTED BY: Ashersons Attorneys

FOR THE 1ST RESPONDENT: Adv KW Luderitz, SC

INSTRUCTED BY: Adams & Adams Attorneys

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Prepared on 12 October 2026 · Esheria