

SOUTH AFRICA / JUDGMENT

Mothoa v S (CA39/2013) [2014] ZANWHC 64 (10 July 2014)

[2014] ZANWHC 64

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

49/2007

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IN THE HIGH COURT OF
SOUTH AFRICA
(NORTH WEST DIVISION,
MAHIKENG)
CASE
NO.: 49/2007
In

the matter between:

ZUHRINA
ABDURAHMAN-BRAND
APPLICANT
and
MULTILAYER
TRADING 134 CC
1ST
RESPONDENT
JAN
DANIEL GENIS
2ND
RESPONDENT
KOTZE
LOW & SWANEPOEL
3RD
RESPONDENT
REGISTRAR OF DEEDS,
PRETORIA
4TH RESPONDENT
DEPARTMENT
OF RURAL DEVELOPMENT
AND LAND

REFORM 5TH
RESPONDENT

JUDGMENT

LANDMAN J:

Introduction

- [1] This is the return day of a rule nisi issued at the instance of Mrs Zuhrina Abdurahman-Brand, calling upon Multilayer Trading 134 CC (Multilayer) and JD Steyn (the sole member of the Multilayer) as second respondent and others to show cause why the interim order that the third respondent, attorneys acting on behalf of Multilayer, should not be ordered to retain the sum of R500 000 in its trust account from the proceeds of the sale of the farm 42HN Jan Kempdorp, North West (the farm) by Multilayer to the Rural Development and Land Reform Department (the fifth respondent). The other respondent is the Registrar of Deeds, Pretoria.

The applicant's case

- [2] Multilayer was the owner of the farm. During 2013 Multilayer, according to the applicant, approached the applicant, who is not a registered estate agent, to assist it in selling the farm to the fifth respondent. It is common cause that it was agreed that should the applicant facilitate the sale of the farm for an amount in excess of R15 000 000 she would be entitled to commission in the amount of R500 000. The applicant sets out the steps which she took which led to the sale of the farm to the fifth respondent for R16 000 000 (actually R16 500 000). She says, correctly, that Multilayer has indicated that it would not abide by the commission agreement.
- [3] The applicant says that she has performed her obligations in terms of the commission agreement and that she facilitated the conclusion of the sale of the farm and that she has a clear right to claim commission.
- [4] The applicant submits that she has no other remedy except to approach this court on an urgent basis as by the time the application is heard, in the ordinary course, the funds due to her as her commission would have already been paid to Multilayer and would be dissipated. She says that this would be pernicious as it would worsen her already precarious financial position and she would suffer irreparable harm.
- [5] The applicant adds that she has no other remedy except to apply for an order that the amount of the commission due to her be held back by the transferring attorney in its trust account pending the outcome of her contemplated action against Multilayer.

The first two respondents' case

- [6] The nub of the opposing affidavit by the second respondent, who is also the sole member of Multilayer, is that the applicant made telephonic contact with him as a result of a discussion which he had with Mr Joseph Uys, his neighbour. The applicant enquired whether he would be willing to sell the farm. The applicant asked him to furnish her with a clear description of the immovable property, as well as a full description of all the farming activities carried on there. He sent the documentation to her. But she then advised him that that he should rather send the documentation to the fifth respondent at Vryburg. He did this. He had no personal contact with the applicant.
- [7] The second respondent says that the applicant would have acted as an estate agent to facilitate the sale of the farm to Multilayer. He assumed that she was an estate agent who was in possession of a valid fidelity fund certificate. He only discovered on 22 May 2014 that the applicant did not have such a certificate. He also says that the applicant did not inform him that she was not a registered estate agent.
- [8] The second respondent denies that the applicant's efforts led to the sale of the farm. The second respondent says that although Multilayer's attorney of record, which is also his attorney of record, indicated in a letter, dated 8 May 2014, that payment of the commission would be paid to the applicant as soon as Multilayer received the purchase price from the fifth respondent, he has been advised that in terms of section 34A of the Estate Agency Affairs Act 112 of 1976 provides that an estate agent will not be entitled to any remuneration arising from the selling of immovable property, if at the time of the performance of the sale, a valid fidelity fund certificate has not been issued.
- [9] The second respondent says, as regards urgency, that the applicant knew of the intended registration and transfer of the farm as from 14 April 2014. He submits that the applicant has created her own urgency in bringing this application on an urgent basis.
- [10] The second respondent also says that the financial situation of the applicant is not relevant to the determination of this application. He points out that the applicant has made no mention of Multilayer's financial situation. He says Multilayer is not a "man of straw" and will be in a position to pay the amount of R500 000 to the

applicant in the event that she is successful and proves that she is entitled to payment of the commission.

The reply

- [11] The applicant submits that she is entitled to institute action against the Multilayer and that "whether or not the action would be successful is an entirely separate matter, which will be adjudicated by the trial court at the hearing of my contemplated action". She also says that she and the second respondent, communicated continuously with the objective of facilitating the sale of the farm. She did not represent to the second respondent that she was a registered estate agent. She avers that the fact that she has no valid fidelity fund certificate

has no bearing on the validity and enforceability of the commission agreement.

The law

[12] An applicant that seeks an interim interdict must show:

- (a) a clear right, alternatively a prima facie right though open to some doubt;
- (b) a well grounded apprehension of irreparable harm;
- (c) that the balance of convenience favours the applicant;
- (d) the absence of an adequate ordinary remedy;

See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[13] In an application for an anti-dissipation order the applicant must show a particular state of mind on the part of the respondent. This is explained in *Knox D'Arcy Limited and Others v Jamieson and Others*

[1996] ZASCA 58; 1996

(4) SA 348 (AD) at 372G-I where Grosskopf JA said:

"The question which arises from this approach is whether an applicant need show a particular state of mind on the part of the respondent, ie that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this type of interdict, the answer must be, I consider, yes, except possibly in exceptional cases. As I have said, the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect of the applicant's claim. However, there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment dealing with special situations which might arise, for instance, by contract or under the law of insolvency."

[14] Eksteen J observed in *B v B* (607/2014) [2014] ZAECPHC 33 (29 May 2014) at para 29 that in the *Knox D'Arcy* appeal case, there was some argument as to whether the fact that assets were likely to be secreted with the intent to thwart the petitioners'

claim had to be proved on a balance of probability or merely prima facie. Grosskopf JA held at 373G-H

"... it seems to me that here also the relative strength or weakness of the petitioners' proof would be a factor to be taken into account and weighed against other features in deciding whether an interim interdict should be granted."

[15] Section 34A of the Estate Agents Affairs Act of 1976 provides that:

“(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.”

[16] I am satisfied that section 34A of the Estate Agents Affairs Act of 1976 does not disentitle the applicant from claiming her commission. In *Warren Jack Property Broker CC t/a Warren Jack Property Group and Another v Venter* (CA 156/2011) [2012] ZAECGHC 59 (27 July 2012) it was said:

‘[19] In *Taljaard v TL Botha Property* [2008] ZASCA 38; 2008

- (6) SA 207, to which the author Nagel refers, the Supreme Court of Appeal considered the purpose of the enactment of section 34A. Nugent JA,

again in a unanimous judgment of that court, stated at 209C-E:

“... [i]t was not enacted for the benefit of clients who have incurred a contractual obligation to pay remuneration to an estate agent who has performed his or her mandate – I have already held that the contract giving rise to the obligation remains valid notwithstanding the breach of section 26 – but rather to penalise estate agents who have breached the section. An estate agent who claims remuneration in conflict with section 34A might expose himself or herself to criminal sanction, and will be prevented from enforcing his or her claim, ...”

[20] Accordingly, the mischief which section 34A seeks to address is not to protect members of the public against unregistered estate agents, on the contrary, such members of the public enjoy no protection as the contract giving rise to their obligation to pay commission is valid and where a member of the public, unaware of the estate agent’s default, has paid out the commission he is bound by his contract. He cannot reclaim his money (see *Taljaard supra*). ...’

[17] The applicant must show that she facilitated the sale. She has set out facts of her involvement regarding the farm. Multilayer has and may not be expected to have knowledge of some of the facts. Multilayer disputes some of the facts of which it does have knowledge but I am satisfied that the applicant has shown that she has some prospect of success in the contemplated action.

[18] However, I am not satisfied that the applicant has satisfied the test in *Knox D'Arcy*. The applicant has provided no facts which relate to the financial position of Multilayer. The second respondent says that Multilayer is not a “man of straw”. The applicant simply says that Multilayer will dissipate the funds. She does not provide any

facts

to justify this allegation. She was obliged to do so should she wishes to secure a temporary interdict. As Eksteen J said in the *B v B* judgment at para 15:

‘The facts which the applicant is required to set out in her founding affidavit must be primary facts and not merely secondary facts. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Secondary facts, in the absence of primary facts on which they are based, are nothing more than the deponents own conclusions. (See *Harms: Civil Procedure in the Supreme Court; Commentary on the Uniform Rules B47*; and *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others 2003*

(1) All SA 164 (C) para [28].)’

[19] The applicant has not set out any facts which show that Multilayer and its member are acting mala fide save that they dispute her claim for commission. But this is not enough. She has not shown that Multilayer and its member are getting rid of the funds, or are likely to do so, with the intention of defeating the claims of creditors and in particular her claim. It follows, in my view, that she has not established that she has no other remedy. Her remedy is that of any other creditor. In the absence of evidence establishing the necessary state of mind of Multilayer and its member there is no justification for making an order which would compel Multilayer to regulate its bona fide expenditure so as to have its attorneys retain funds for the payment of the disputed claim against it.

[20] It follows that the rule must be discharged and the application dismissed.

Costs

[22] Costs should follow the result. I intend making a costs order which shall include the reserved costs.

Order

[23] In the result I make the following order;

1. The rule is discharged and the application is dismissed.
2. The applicant is ordered to pay the costs including the wasted costs.

A A LANDMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

date of hearing

: 12 June 2014

date of judgment

: 19 June 2014

counsel for applicant

: adv swiegelaar

counsel for 1st & 2nd respondents : adv p smit

attorneys for applicant

: nienaber & wissing

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