

SOUTH AFRICA / JUDGMENT

Rusking Real Estate v Gaussian Resources (Pty) Ltd (6327/2008) [2011] ZAWCHC 82 (1 April 2011)

[2011] ZAWCHC 82

COURT

Western Cape High Court, Cape Town

BEFORE

Koen, AJ

CASE / FILE NUMBER

6327/2008

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THE
REPUBLIC OF SOUTH AFRICA
IN
THE HIGH COURT
OF
SOUTH
AFRICA
WESTERN
CAPE HIGH COURT, CAPE TOWN
CASE
NO: 6327/2008
In

the matter between:

RUSKING
REAL ESTATE

.....Plaintiff

and

GAUSSIAN
RESOURCES (PTY) LTD

.....Defendant

JUDGMENT

: 1 APRIL 2011

Koen, AJ

1. The plaintiff in this matter is Rusking Real Estate. This is the name under which Mr Russell Glyn-Cuthbert conducts business as an estate agent. He has instituted action against the defendant, a property developer, for payment of the sum of R 1 475 603.88 in respect of commission he alleges is due to him in terms of an agreement concluded with the defendant during August 2006¹. The commission was in respect of the sale of off-plan sectional title units in a property development known as Gordon Sands.
2. In an affidavit deposed to in opposition to a summary judgment application, and in its plea, the defendant alleges that it did not agree to pay commission to the plaintiff but to either Little Swift Investments 338 (Pty) Ltd ("Little Swift") or to Midnight Storm Investments 256 (Pty) Ltd ("Midnight Storm"). At the commencement of the trial, however, it abandoned reliance upon it having concluded an agreement with Midnight Storm and relied only upon the conclusion of an agreement with Little Swift. 3. The relevance of the defendant's plea is this. Unlike the plaintiff, Little Swift has never been in possession of a fidelity fund certificate issued by the Estate Agency Affairs Board. If it was the entity which had contracted to act as the estate agent it would not be entitled to enforce a claim for commission. Whether Mr Glyn-Cuthbert was acting in his own name, or on behalf of Little Swift, when the agreement upon which he relies was concluded is therefore the question which I am required to decide. 4. Not many of the facts were in dispute. It is common cause that a company called Fifth Season Investments 173 (Pty) Ltd ("Fifth

Season") first decided to proceed with the Gordon Sands development. This company was the vehicle employed by a joint

venture between Zen Q Properties (Pty) Ltd and the Crown Hill Properties CC. One Welsh represented the former, and Dr Vlok represented the latter. Welsh, however, was the person who managed the business of the joint venture. 5. It should be mentioned at this stage that Crown Hill Properties CC converted to the defendant company at a later stage. When I refer in this judgment to the defendant I refer interchangeably to Crown Hill Properties CC or the company to which it later converted. I do so for convenience and because nothing turns on the name by which the defendant was known at various times. 6. As is so often the case, before finance for the development would be made available, the bank required pre-sales of 90 of the sectional title units. Welsh arranged for the plaintiff to attend a meeting in Cape Town on 3 April 2006 to discuss the marketing of the units so that the bank's requirement could be met. At the meeting it was decided that the plaintiff would attend to the marketing of the off-plan sectional title units. Following on the meeting, on 5 April 2006, the plaintiff wrote a letter to Welsh on a Rusking Real Estate letterhead in which he confirmed that the firm would attend to the marketing of the units. The rate of commission proposed was 6% plus VAT calculated on the selling price. Attached to

the letter was what was described as a "...proposed marketing mandate for your acceptance..". The document recorded that the parties to the proposed agreement of mandate were Fifth Season and Little Swift. 7. The draft agreement of mandate was never signed. Instead, sales of the off-plan sectional titles units commenced without there being any formal written record of the terms of the agreement. The sales were made by the plaintiff, and other estate agents in his employ. The costs involved in marketing the units, such as advertising, and printing costs, were borne by the plaintiff. By August 2006 more than 65 units had been sold on this basis. 8. In the meanwhile, for reasons which are not clear (or important) the joint venture floundered, and Fifth Season fell out of the picture. This turn of events came to the attention of the plaintiff. He made enquiries of Dr Vlok and was told that the defendant would be proceeding with the development in its own name and that it would be prepared to take over the development's professional team, including the estate agent, from the joint venture. 9. On 2 August 2006 the plaintiff wrote a letter to the defendant, on a Rusking Real Estate letterhead, in the letter he expressed relief that the Gordon Sands development was going to continue. He also stated, inter alia, the following: *You may have a copy of the mandate, but we are attaching a copy herewith and would be grateful if you would consider appointing us

- seeing as we have already performed". The mandate which was attached to this letter was a copy of the draft agreement sent to Welsh under cover of the plaintiffs letter dated 5 April 2006. 10. The 2 August 2006 letter was responded to by the defendant on 11 August 2006 by email. The email was addressed to "Russel

Glyn-Cuthbert", the plaintiff. The relevant part of the email read as follows: "The sales that Husking brought in for Fifth Seasons Investments are by definition null and void but we will consider retaining the sales on the basis of a 4% plus VAT commission structure calculated on the VAT exclusive sales amount." 11. It will be apparent that the proposed rate of commission was lower than that which had been agreed with Welsh. Negotiations about the rate of commission ensued. After discussions, and on 14 August 2006, the defendant sent a telefax - again addressed to "Russel Glyn-Cuthbert" - in which the following was stated: "Herewith a summary of our conversation earlier - 1. [the defendant] will pay Rusking 4.5% commission plus VAT on the Gordon Sands sales (exclusive of VAT) made by Rusking if Rusking

delivers the following before 16:00 Friday 18 August 2006: 65 deeds of sale with the Mortgage Shop

65 deposits of R1000 each with Lucille Geldenhuys Attorneys. Some people have paid deposits of R1000 or R5000 - we emphasize that every deposit needs to be R10 000. 2. [the defendant] will pay Rusking 4,0% commission plus VAT (exclusive of VAT) made by Rusking if Rusking delivers anything less than stipulated above at 16:00 Friday 18 August 2006." 12. The request was complied with, and the defendant informed accordingly, by way of a letter written on a Rusking Real Estate

letterhead, on 18 August 2006. 13. What followed need not, I think, be recorded in minute detail. At some stage before 31 July 2007 - that is almost a year after the exchange of correspondence I have alluded to above - a pro forma invoice in respect of the commission was sent to the

defendant. It recorded that the commission was due to Little Swift. The transfers of the units were registered in the Deeds Office on 26 November 2007. An invoice, again reflecting the commission to be due to Little Swift, seems to have been issued to the defendant on 3 December 2007. The commission was not paid. During December 2007 attorneys were instructed to demand payment of the commission. They did so in letters stating that their client was Little Swift. On 17 January 2008 a letter on a Rusking Real Estate Marketing letterhead was drafted, but not sent. The letter stated that the 3 December 2007 invoice sent by Little Swift was incorrect and that a correct invoice from Rusking was attached. The letter was not sent because the person who drafted it wished it to be amended to reflect that Rusking's tax invoice was attached. On 30 January 2008 a letter - on a Rusking Real Estate letterhead (not Rusking Real Estate Marketing)

- was sent to the defendant attaching a tax invoice. This letterhead is the first of the Rusking Real Estate letterheads to reflect a VAT number. Finally, during February 2008 the attorneys wrote another letter to the defendant claiming payment of the commission. Again their client was said to be Little Swift. 14. It is also necessary to mention that Midnight Storm had purchased certain of the units in the Golden Sands Development. The transfer duty declarations, prepared by the developer's attorney, which the plaintiff had signed during November 2007, reflected that estate agents commission was due to Little Swift. 15. The defendant argued that the draft agreement of mandate reflecting Little Swift to be the estate agent, the invoices issued in the name of Little Swift, the transfer duty declarations reflecting the estate agent to be Little Swift, and the attorney's letters written on behalf of Little Swift proved that it was Little Swift which had contracted with the defendant. It is therefore necessary to examine how these features of the case were explained by the plaintiff in his evidence. 16. The plaintiff testified that the draft agreement of mandate had reflected Little Swift to be the estate agent because during April 2006 he and one Budge had intended that they would utilise Little Swift as a vehicle for this purpose. However, this plan was not persisted in and Budge fell out of the picture. 17. In regard to the draft agreement of mandate the plaintiff testified that he had intended the agreement prepared during April 2006 reflecting the parties to be Fifth Season and Little Swift to serve as a precedent, or template, when he sent it to the defendant on 2 August 2006. He had not meant it to indicate that Little Swift was the estate agent, and not himself, or that Fifth Season was the developer, and not the defendant. The agreement could never have been intended by the parties to be signed in the form in which it was. It contained material and obvious errors. It reflected the developer to be Fifth Season, and contained a warranty given by Fifth Season to the effect that it was or would become the owner of the land to be developed. It is quite clear that the developer was not intended to be Fifth Season at that time, and Dr Vlok testified that at that stage it was never contemplated that Fifth Season would own the land. It is overwhelmingly probable, in my view, that the plaintiff's evidence that the draft agreement was intended to serve as a precedent is correct. 18. The plaintiff, in his evidence, testified that he ran a number of businesses and employed an administrative staff of 18 persons. He could not explain how the July 2007 pro forma invoice in the name of Little Swift came to be issued. He said that it was an error, which perpetuated itself when his accounts staff instructed the

attorneys to send the letters of demand. He had no hand in it being sent. 19. On the probabilities I am inclined to accept his evidence in this regard. There is no doubt, for instance, that the February 2008 letter addressed to the attorneys was an error. By that stage the plaintiff himself had already addressed a letter to the defendant attaching the tax invoice in the name of Rusking, and stating that the earlier invoices had been issued in error.

2. In an affidavit deposed to in opposition to a summary judgment application, and in its plea, the defendant alleges that it did not agree to pay commission to the plaintiff but to either Little Swift investments 338 (Pty) Ltd ("Little Swift") or to Midnight Storm Investments 256 (Pty) Ltd ("Midnight Storm"). At the commencement of the trial, however, it abandoned reliance upon it having concluded an agreement with Midnight Storm and relied only upon the conclusion of an agreement with Little Swift.
3. The relevance of the defendant's plea is this. Unlike the plaintiff, Little Swift has never been in possession of a fidelity fund certificate issued by the Estate Agency Affairs Board. If it was the entity which had contracted to act as the estate agent it would not be entitled to enforce a claim for commission. Whether Mr Glyn-Cuthbert was acting in his own name, or on behalf of Little Swift, when the agreement upon which he relies was concluded is therefore the question which I am required to decide.
4. Not many of the facts were in dispute. It is common cause that a company called Fifth Season Investments 173 (Pty) Ltd ("Fifth

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venture between Zen Q Properties (Pty) Ltd and the Crown Hill Properties CC One Welsh represented the former, and Dr Vlok represented the latter. Welsh, however, was the person who managed the business of the joint venture.

5. It should be mentioned at this stage that Crown Hill Properties CC converted to the defendant company at a later stage. When I refer in this judgment to the defendant I refer interchangeably to Crown Hill Properties CC or the company to which it later converted. I do so for convenience and because nothing turns on the name by which the defendant was known at various times.
6. As is so often the case, before finance for the development would be made available, the bank required pre-sales of 90 of the sectional title units. Welsh arranged for the plaintiff to attend a meeting in Cape Town on 3 April 2006 to discuss the marketing of the units so that the bank's requirement could be met. At the meeting it was decided that the plaintiff would attend to the marketing of the off-plan sectional title units. Following on the meeting, on 5 April 2006, the plaintiff wrote a letter to Welsh on a Rusking Real Estate letterhead in which he confirmed that the firm would attend to the marketing of the units. The rate of commission proposed was 6% plus VAT calculated on the selling price. Attached to the letter was what was described as a "...proposed marketing mandate for your acceptance..". The

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9. On 2 August 2006 the plaintiff wrote a letter to the defendant, on a Rusking Real Estate letterhead, in the letter he expressed relief that the Gordon Sands development was going to continue. He also stated, inter alia, the following: "You may have a copy of the mandate, but we are attaching a copy herewith and would be grateful if you would consider appointing us - seeing as we have already performed". The mandate which was attached to this letter was a copy of the draft agreement sent to Welsh under cover of the plaintiff's letter dated 5 April 2006.
10. The 2 August 2006 letter was responded to by the defendant on 11 August 2006 by email. The email was addressed to "Russel

Glyn-Cuthbert", the plaintiff. The relevant part of the email read as follows: "The sales that Husking brought in for Fifth Seasons Investments are by definition null and void but we will consider retaining the sales on the basis of a 4% plus VAT commission structure calculated on the VAT exclusive sales amount."

11. It will be apparent that the proposed rate of commission was lower than that which had been agreed with Welsh. Negotiations about the rate of commission ensued. After discussions, and on 14 August 2006, the defendant sent a telefax - again addressed to "Russel Glyn-Cuthbert" - in which the following was stated:

"Herewith a summary of our conversation earlier -

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12. The request was complied with, and the defendant informed accordingly, by way of a letter written on a Rusking Real Estate

letterhead, on 18 August 2006.

13. What followed need not, I think, be recorded in minute detail. At some stage before 31 July 2007 - that is almost a year after the exchange of correspondence I have alluded to above - a pro forma invoice in respect of the commission was sent to the defendant. It recorded that the commission was due to Little Swift. The transfers of the units were registered in the Deeds Office on 26 November 2007. An invoice, again reflecting the commission to be due to Little Swift, seems to have been issued to the defendant on 3 December 2007. The commission was not paid. During December 2007 attorneys were instructed to demand payment of the commission. They did so in letters stating that their client was Little Swift. On 17 January 2008 a letter on a Rusking Real Estate Marketing letterhead was drafted, but not sent. The letter stated that the 3 December 2007 invoice sent by Little Swift was incorrect and that a correct invoice from Rusking was attached. The letter was not sent because the person who drafted it wished it to be amended to reflect that Rusking's tax invoice was attached. On 30 January 2008 a letter - on a Rusking Real Estate letterhead (not Rusking Real Estate Marketing)

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14. It is also necessary to mention that Midnight Storm had purchased certain of the units in the Golden Sands Development. The transfer duty declarations, prepared by the developer's attorney, which the plaintiff had signed during November 2007, reflected that estate agents commission was due to Little Swift.
 15. The defendant argued that the draft agreement of mandate reflecting Little Swift to be the estate agent, the invoices issued in the name of Little Swift, the transfer duty declarations reflecting the estate agent to be Little Swift, and the attorney's letters written on behalf of Little Swift proved that it was Little Swift which had contracted with the defendant. It is therefore necessary to examine how these features of the case were explained by the plaintiff in his evidence.

16. The plaintiff testified that the draft agreement of mandate had reflected Little Swift to be the estate agent because during April 2006 he and one Budge had intended that they would utilise Little Swift as a vehicle for this purpose. However, this plan was not persisted in and Bud\$e fell out of the picture.
17. In regard to the draft agreement of mandate the plaintiff testified that he had intended the agreement prepared during April 2006 reflecting the parties to be Fifth Season and Little Swift to serve as a precedent, or template, when he sent it to the defendant on 2 August 2006. He had not meant it to indicate that Little Swift was the estate agent, and not himself, or that Fifth Season was the developer, and not the defendant. The agreement could never have been intended by the parties to be signed in the form in which it was. It contained material and obvious errors. It reflected the developer to be Fifth Season, and contained a warranty given by Fifth Season to the effect that it was or would become the owner of the land to be developed. It is quite clear that the developer was not intended to be Fifth Season at that time, and Dr Vlok testified that at that stage it was never contemplated that Fifth Season would own the land. It is overwhelmingly probable, in my view, that the plaintiffs evidence that the draft agreement was intended to serve as a precedent is correct.
18. The plaintiff, in his evidence, testified that he ran a number of businesses and employed an administrative staff of 18 persons. He could not explain how the July 2007 pro forma invoice in the name of Little Swift came to be issued. He said that it was an error, which perpetuated itself when his accounts staff instructed the attorneys to send the letters of demand. He had no hand in it being sent.
19. On the probabilities I am inclined to accept his evidence in this regard. There is no doubt, for instance, that the February 2008 letter addressed to the attorneys was an error. By that stage the plaintiff himself had already addressed a letter to the defendant attaching the tax invoice in the name of Rusking, and stating that the earlier invoices had been issued in error.
20. It was suggested by counsel for the defendant that the 27 November 2007 invoice in the name of Rusking had been issued during January 2008, and backdated. On the probabilities I am inclined to agree. But it seems to me that this happened precisely because the plaintiff had uncovered the error which had been made when the Little Swift invoices were sent to the defendant. I do not think that anything turns on tn\s fact. 21. In regard to the transfer duty declarations the plaintiff testified that he had been sent the documents by the defendant's conveyancers. Each document had been drafted by them. Pencil crosses were appended to the documents reflecting where his signature was required. He had not examined the documents carefully, but merely signed where the crosses appeared and returned them to the conveyancers. 22. The plaintiff was cross examined very capably and at some length about the transfer duty declarations. His evidence was not

discredited in any significant respect during this process. I formed the impression that he was honest and forthright and I accept his explanations in regard to these issues outlined above. 23. During his evidence Dr Vlok conceded that it was not a matter of much import to him when he negotiated the rate of commission payable in regard to the sale of the units with the plaintiff early in August 2006 to whom the commission was payable. This is perfectly plausible because a very substantial number of the units had, of course, already been sold. What was important to him was the rate of commission which had to be paid, and not the entity to whom it had to be paid. It is also evident that at least until the time the plea was filed that the Dr Vlok did not know to which entity the commission was payable. Had he thought, on account of the draft mandate, the invoices in the name of Little Swift, and the attorneys letters - all of which were in his possession before he deposed to the affidavit opposing summary judgment and before the plea was filed - that it was Little Swift then it is far more likely that the plea would have said so. 24. In any event what is really important is what Dr Vlok knew during August 2006, when the agreement was allegedly concluded. AH Dr Vlok had at that stage to lead him to believe that it was Little Swift with whom the defendant was contracting was the draft agreement of mandate. And as I have already found it is extremely unlikely that he thought on the basis of that document that it was intended as anything other than a precedent. 25. In the circumstances I have come to the view that the plaintiff has proved that it was himself who contracted with the defendant. 26. I need add only that the fact that the commission was due and payable by the defendant on date of registration of transfer of the sectional title units was not in dispute. This was 26 November 2007. In argument counsel for the plaintiff submitted that interest should thus run from the following day, 27 November 2007. 27. I therefore grant judgment in favour of the plaintiff against the defendant for: (a) payment of the sum of R 1 475 603.88; (b) interest on the amount referred to in paragraph (a) above at the legal rate from 27 November 2007 to date of payment; (c) costs of suit. S J KOEN, AJ

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25. In the circumstances I have come to the view that the plaintiff has proved that it was himself who contracted with the defendant.
- 26.1 need add only that the fact that the commission was due and payable by the defendant on date of registration of transfer of the sectional title units was not in dispute. This was 26 November 2007. In argument counsel for the plaintiff submitted that interest should thus run from the following day, 27 November 2007.
27. I therefore grant judgment in favour of the plaintiff against the defendant for:
- (a) payment of the sum of R 1 475 603.88;
 - (b) interest on the amount referred to in paragraph (a) above at the legal rate from 27 November 2007 to date of payment;
 - (c) costs of suit.

S J KOEN, AJ

¹This amount differs from that claimed in the summons. The parties have agreed this amount as being the amount due to the plaintiff if it should succeed in this action.

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