

SOUTH AFRICA / JUDGMENT

Tekenpraktyk CC v Erf 2720 Tzaneen (Pty) Ltd (20648/2012) [2013] ZAGPPHC 228 (2 August 2013) [2013] ZAGPPHC 228

COURT

North Gauteng High Court, Pretoria

BEFORE

N Kollapen

CASE / FILE NUMBER

20648/2012

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IN THE NORTH GAUTENG HIGH COURT.

PRETORIA (REPUBLIC OF SOUTH AFRICA)

CASE NO: 20648/2012

DATE: 02 August 2013

IN THE MATTER BETWEEN

TEKENPRAKTYK CC.....PLAINTIFF

AND

ERF 2720 TZANEEN (PTY) LTD.....DEFENDANT

JUDGMENT

KOLLAPEN J

- 1) The plaintiff has issued summons against the defendant in which it seeks payment of the sum of R 500 000-00 being commission it alleges it is entitled to arising out of an oral mandate given to it by the defendant.
- 2) The plaintiff contends that it was the effective cause of the sale of Erf 2270 Tzaneen (the erf) by the defendant to Rapicorp 155 (Pty) Ltd (Rapicorp) and that it is entitled to payment of R 500 000-00 following the sale of the property for R 50 000-00.

- 3) The stance of the defendant was to deny that the plaintiff was the effective cause of the sale and while it admitted the sale, its position was that the defendant and Rapicorp concluded the sale without the plaintiff being the effective cause thereof.
- 4) The plaintiff called Mr Petrus Johannes Human to testify in its case while the defendant called Mr Wiebe Hendrik van der Laan, Mr Tienie Kalan and Mr Liversage.
- 5) Mr Human's testimony was that he was the sole member of the plaintiff, which conducted the business of an estate agency and that during the period 2009 / 2010 the defendant represented by van der Laan, gave him an oral mandate to sell an industrial property of the defendant known as Erf 2270 Tzaneen. The defendant's terms was that it wished to receive a net amount of R 5 million in respect of the property and would only be willing to sell on that condition.
- 6) He testified that during February 2011, Mr Kalan with whom he had done business before, called him about purchasing a property close to where his current business was situated. Human thought that the property of van der Laan was something that could be of interest to Kalan. Human then called van der Laan and arranged a meeting between Kalan and van der Laan at the property in question at which meeting Human was present.
- 7) At the meeting, van der Laan confirmed that he was looking for a net amount of R 5 million and Human then advised Kalan that the asking price was R 5,5 million as he anticipated his commission would be R 500 000-00. There was some uncertainty in his testimony as to whether there was an express agreement with van der Laan in respect of commission.
- 8) What appears to have occurred according to Human was that given that van der Laan wanted a net return of R 5 million, Human would attempt to sell the property ideally for R 5,5 million in order to earn a commission of R 500 000-00 but if the sale was concluded for less than R5,5 million the commission would in effect be the difference between R 5 million and the selling price. If the sale was in excess of R 5,5 million then Human would negotiate an appropriate commission with van der Laan.
- 9) Following the meeting on the property Kalan intimated that the asking price was too high and asked whether the price was negotiable to which Human replied in the affirmative. Kalan then indicated that he w'ould discuss it with 'his bosses' and took van der Laan's telephone number with the permission of Human.
- 10) According to Human he then cautioned van der Laan that if the latter did a deal with Kalan without Human's involvement, he would sue van der Laan for commission. 'The reason for this was that he had dealt with Kalan previously and on such occasion Kalan had gone directly to the seller to conclude a sale creating difficulties with regard to his entitlement to commission and which resulted in him having to ultimately accept commission lower than that which he was entitled to.

- 11) He heard no further from Kalan and made no follow-up himself. He later received news that the property had been sold by the defendant to a company that Kalan represented and when he confronted van der Laan about this the latter's response was that he was instructed by his attorneys to act in the manner in which he did (i.e. to contract directly with the defendant). He was of the view that his introduction of Kalan to van der Laan and the meeting held on the erf was the effective cause of the sale.
- 12) He conceded that at no stage did he inform van der Laan that he was acting on behalf of the plaintiff.
- 13) The version of the defendant was that van der Laan had met Kalan late in 2009 to discuss the problem of a fence wall on the former's property which adjoined the property of Kalan. They went to the site in order to inspect the fence and Kalan then expressed interest in purchasing the erf in question to which van der Laan responded that he would consider an offer of R 5 million.
- 14) Nothing further happened until February 2011 when Human came to Kalan's place of business and Kalan then asked whether Human had the telephone details of van der Laan as he (Kalan) was interested in discussing a property with him. Human replied he would see what he could do. Human then contacted van der Laan and arranged a meeting at the erf at which meeting van der Laan and Kalan then realized that they knew each other from the contact they had in late 2009. There was some discussion on the possible sale of the erf on the day and Kalan said he will speak to his 'bosses'. Nothing further transpired.
- 15) Later that year Kalan and Mr Liversage, a mealie meal agent who worked closely with Mr Kalan, spoke about the need to find larger premises for the business they were involved in and Kalan mentioned van der Laan's name as a possible party to approach. Liversage was able to secure van der Laan's contact details from a third party, made contact with van der Laan and was shown three different properties.
- 16) Liversage was however interested in Erf 2270 but was unable to do the deal himself as it was beyond his financial means. He then advised van der Laan about the introduction of a possible partner and a meeting was then arranged between Liversage, Kalan and van der Laan which then led to Kalan and van der Laan concluding the agreement for the sale of the erf. According to the evidence of van der Laan, he denied giving Human any mandate and while he knew him, the first time they spoke about the property in question was on the 12th of February 2011. Kalan in his evidence denied that he asked Human about acquiring the erf. His only request was for Human to provide him with van der Laan's telephone number and while he told Human it was in connection with a property, he did not give Human any details about the proposed property.

Analysis

17) The two issues in dispute and for determination are:

- a) The locus standi of the plaintiff;

- b) Was Human the effective cause of the sale?; and
- c) If Human was the effective cause of the sale, then what was the agreement regarding the payment of commission, and if there was no express agreement, was the plaintiff entitled to any commission and if so, how was it to be determined?

Locus standi

- 18) Leaving aside the question of whether or not the defendant was the effective cause of the sale, the evidence led and which was not in dispute is that while Human is the sole and principal member of the defendant close corporation, he never disclosed to van der Laan that he was acting in that capacity.

- 19) On this aspect and while it is not in dispute that Human arranged the meeting

in between van der Laan and Kalan on the 15 February 2011, it appears that Human and van der Laan, even though both in these proceedings represent corporate entities, engaged one another on the basis of their personal knowledge of each other and while the corporate capacity of these parties was not disclosed, there appears to have been an acceptance that the form of that entity would hardly be an issue, van der Laan when he was contacted by Human regarding the meeting, did not tell Human the owner of the property was the defendant and that his presence at the meeting was in that capacity. Human it would appear acted likewise and in the small town style of how business was done - informally and on a handshake, I am not inclined to uphold the challenge of the defendant on this basis alone. In any event, Human appears to be the driving force and only member of the plaintiff and his identity is interwoven into that of the plaintiff.

In any event, the non-disclosure by Human that he was acting at the time on behalf of the plaintiff is not fatal in my view. Human's

evidence was that at the time he received the mandate from van der Laan, he was acting on behalf of the plaintiff. His failure to disclose this to van der Laan does not objectively alter the situation that at the time he was representing the plaintiff. That evidence does not have the effect of varying the contract the plaintiff relies on. What it does is that it simply informs the Court that some other person (the plaintiff in this instance) is entitled to the rights flowing from the contract. (See *COOKE v ALDRED* 1909 vol 1 150 at page 151).

Was the plaintiff the effective cause of the sale?

- 21) While it is not in dispute that Human arranged the meeting between van der Laan and Kalan on the 15th of February 2011, what is in dispute is whether in doing so he simply brought together parties who were known to each other and had previously been negotiating around the same erf, under circumstances where he was not specifically requested to do more than to provide Kalan with a telephone number. In addition the events after the 15th of February 2011 and the role of Liversage are also relevant in this regard.

- 22) On this aspect there are two conflicting versions that emerge from the evidence led in the trial.
- 23) When a court is faced with two diametrically opposed versions then the approach it has to follow was succinctly described in *STELLENBOSCH FARMERS' WINERY GROUP LTD and ANOTHER v MARTELL ET CIE and OTHERS* 2003 (1) SA 11 (SCA). What is required is for the Court to make findings on: (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.
- 24) With regard to the credibility and reliability of the various witnesses both counsel were in agreement that not much by way of criticism could be leveled against the witnesses on these aspects. They came across as honest, testified to the issues openly, frankly and without bias. I concur with the views of counsel in this regard. That being said once must then examine the probabilities.
- 25) On the defendant's version, van der Laan's case is that he gave no oral mandate to Human nor did he ever discuss the possible sale of the erf with Human, until Human called him on the 12th of February 2011 to arrange the meeting for the 15th of February 2011. At the same time Kalan's evidence was that all he requested of Human was a telephone number for van der Laan and while he told Human it was in connection with a property, he provided no further details to Human.
- 26) Given that it is common cause that Human then proceeded to arrange a meeting between van der Laan and Kalan concerning the erf in question and indeed on the erf, when none of them told him about the particular erf or sought his assistance, must raise the question as to how Human would have known of Kalan's interest in acquiring the particular erf and van der Laan's willingness to sell it.
- 27) In my view it is highly improbable that Human purely on the limited information that Kalan was interested in some property that van der Laan owned, would be able to bring the parties together for a meeting at the very erf Kalan had in mind and van der Laan was willing to sell.
- 28) In my view the meeting would have only been possible if Human was aware that both Kalan and van der Laan had the interest in buying and selling erf 2270 respectively. For that to happen Human would have to receive that information from someone and the only parties who could have provided that information were Kaian and van der Laan.
- 29) In my view the probabilities militate against the version of the defendant in this regard and overwhelmingly favour the plaintiffs version in how he was able to bring the parties together and the role he played in effecting the sale.

- 30) That being the case I am satisfied that whatever discussions van der Laan and Kalan had in late 2009 regarding the erf were hardly significant or substantive. There was no inspection of the erf, no telephone numbers were exchanged and the discussion at best was the expression of an interest which went no further.
- 31) Thus some 16 months later when the events of February 2011 unfolded, it was certainly not a continuation of the November 2009 discussion and in my view it constituted a fresh introduction of the parties on the site of the erf with a view to concluding a sale.
- 32) The finalization of the sale in November 2011 was directly linked to the February 2011 meeting and discussion and I conclude this for the following reasons:
- a) Liversage's initial approach to Van der Laan was with a view to securing the property for himself;
 - b) As the price was too high for him he introduced the idea of a partner (but which for all practical purposes was another party), namely Kalan;
 - c) Kalan then met van der Laan and the deal was concluded. Kalan did not see the property again after the February meeting. His knowledge of the property was derived solely from the February 2011 meeting which Human was instrumental in arranging.
- 33) I am accordingly satisfied that Human was the eventual cause of the sale and that neither the November 2009 discussion between van der Laan and Kalan nor the

intervention of Liversage, his initial interest in the erf and his facilitating the meeting between van der Laan and Kalan in November 2011, constituted the eventual cause of the sale.

The commission payable

- 34) The arrangements for the payment of commission on the 15th February 2011 were quite loose. Human's view was that if he sold the property for R 5,5 million, he would be entitled to R 500 000 as commission but if the property was sold for any other amount, then the commission payable would be discussed with van der Laan. Given that van der Laan insisted on securing a net return of R 5 million, it would appear that if the property was sold for an amount above R 5 million but less than R 5.5 million, the commission would represent the difference between the selling price and R 5 million. The evidence of Human was not clear in this regard and the dominant impression that was created was that the mandate was that van der Laan wanted R 5 million, while the amount of the commission that Human would earn was not discussed at all or sufficiently so.
- 35) It is common cause that the erf was sold for R5 million. It is not clear whether if Human continued to remain actively involved until the conclusion of the sale, and

if allowance had to be made for his commission, whether Kalan would have paid more than R 5 million or if van der Laan would have been willing to accept less than R 5 million.

36) On the other hand he was excluded and given that he was the eventual cause of the sale, he would ordinarily have been entitled to commission.

37)The difficulty is that the plaintiff has not pleaded any basis for the payment of commission other than that it was to be R 500 000-00 which could only be so if the sale was for R 5.5 million. Mr Visser suggested that in these circumstances the customary, prescribed or prevailing rate of commission could be used as a benchmark to determine the amount of the commission payable to the plaintiff but when confronted by the absence of any evidence led in this regard suggested that the Court could, if it was so inclined and after making a finding in favour of the plaintiffs right to commission, allow the plaintiff the opportunity to lead evidence with regard to the customary, prescribed or prevailing rate.

38) The difficulty with the suggestion, apart from the impracticality arising out of dealing with the matter on a piecemeal basis, is that the pleadings as they stand do not provide for a basis for the reception of such evidence. It has never been the case for the plaintiff that it was entitled to the customary, prescribed or prevailing rate of commission and any attempt to lead evidence on such a rate would have been destined to fail.

39)In the circumstances there is no basis on which the plaintiff can succeed. Notwithstanding my conclusion that it was the eventual cause of the sale of the erf, the basis of its entitlement to commission and the manner in which such commission was to be calculated is ominously lacking in the manner in which the plaintiff has prosecuted its claim.

40)The plaintiff has accordingly failed to discharge the evidentiary burden it has and in the circumstances its claim must fail.

Order

I accordingly make the following order:

The plaintiffs claim is dismissed with costs.

N KOLLAPEN

JUDGE OF THE NORTH GAUTENG HIGH COURT

20648-2012

HEARD ON: 07 JUNE 2013

FOR THE PLAINTIFF: ADV S A VISSER

INSTRUCTED BY: STEWART MARITZ BASSON 1NG

FOR THE DEFENDANT: ADV A ELS

INSTRUCTED BY: THOMAS & SWANEPOEL INC

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