

SOUTH AFRICA / JUDGMENT

**Van Den Heever v EFC Properties CC T/A
Pam Golding (Margate) (1578/2008)
[2014] ZAKZDHC 37 (15 September 2014)
[2014] ZAKZDHC 37**

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Lopes

CASE / FILE NUMBER
1578/2008

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In the High Court of South Africa

KwaZulu-Natal Local Division, Durban

Case No : 1578/2008

DATE: 15 SEPTEMBER 2014

In the matter between :

Willem van den Heever.....Plaintiff

And

EFC Properties CC t/a Pam Golding (Margate).....Defendant

Judgment

Lopes J

- [1] The plaintiff in this matter sues upon a written agency agreement concluded between himself and the defendant (PGM) at Margate on the 28th October 2004. In terms of that agreement the plaintiff was to be appointed an agent in the estate agency business operated by PGM.
- [2] The plaintiff initially claimed a full accounting of the commissions which he had earned in respect of the sales made in seven property developments on the KwaZulu-Natal South Coast, a debatement of that account and costs of the action.

PGM admitted the conclusion of the written agency agreement, the terms as pleaded by the plaintiff, PGM's liability to pay commission to the plaintiff in return for the provision of his services, and the developments in respect of which the plaintiff ultimately claims compensation.

- [3] When the matter came before me on the first day of trial, Mr White, who appeared for the plaintiff, indicated that the plaintiff accepted that there had been a proper accounting, and that he wished to proceed with the matter of the debatement of that account.
- [4] Mr Harrison, who appeared for PGM, recorded that PGM had prepared to deal with the issue of the accounting because that was, as far as PGM was aware, still a live issue between the parties. This was the first time that PGM was being notified that the plaintiff accepted PGM's accounting. Mr Harrison also drew attention to the fact that the plaintiff had delivered a replication, in respect of which PGM wished to argue an exception.
- [5] After a short debate Mr White withdrew the replication. The matter was then stood down for the parties to discuss and identify the issues in dispute which they wanted clarified. Both Mr White and Mr Harrison appreciated the difficulty that the matter could not finish in the allocated five days if all the accounting records were dealt with in evidence.
- [6] Accordingly the parties agreed that I would decide upon the issues listed below, whereupon they would engage the services of an accountant in order to determine the quantum, if any, of the plaintiff's claim.
- [7] The issues which I was called upon to decide were :

(a) Outside introductions :

This is where a party, not employed by PGM, introduced a property which was then sold by the plaintiff. What is in issue is whether commission earned by PGM, and upon which the plaintiff was entitled to base his 50 per cent commission, was to include or exclude the commission of the outside agent who introduced the property.

(b) Cancelled sales :

It was the plaintiff's contention that once the suspensive conditions in a sale had been fulfilled, he was entitled to commission if he had been the effective cause of the sale. This arose in situations where sales were cancelled after the fulfilment of the suspensive conditions, and the property was resold by another agent.

(c) The sale of units in the development 'Colonial Sands' :

'Colonial Sands' was a development in which the plaintiff sold a number of sectional title units. Commission on some of those units had been paid to him at the rate of five percent. He claimed that he was entitled to be paid at the rate of six percent.

(d) The 'Colonial Sands' sale to Visser :

On the basis that the plaintiff was entitled to be paid a commission on cancelled sales, he claimed an extra commission on the sale of a property in the development referred to as 'Colonial Sands' which had been made to one Visser. This was denied by PGM.

(e) The relocation expenses :

This dispute related to an advance to the plaintiff of an amount of R30 000 in respect of relocation expenses when he moved from Pretoria to Margate in order to be employed by PGM. The plaintiff claimed that the sum of R30 000 was an advance by Mrs Porteous, the sole member of PMG (EFC Properties CC t/a Pam Golding (Margate)) made in her personal capacity. Accordingly it could not be recovered by PGM. The submission by the plaintiff was that that amount had been advanced to him by Mrs Porteous and that despite his having initially offered to repay the amount, it had been given to him by her on the basis that he need not repay it.

(f) Advances on commission or salary :

The plaintiff's case is that from October of 2004 to February 2006 a salary had been paid to him by PGM. It was only after that time that amounts paid to him constituted advances against commission which he was to earn in the future. PGM's contention is that all the amounts, save for a small amount paid in October of 2004, were advances against commission, which advances were repayable by the plaintiff when commission became payable to him by PGM.

(g) Preston College payment :

A payment had been made by PGM directly to Preston College, the school at which the plaintiff's two minor children were attending. The plaintiff, who was at that time in the throes of a divorce from his ex-wife, averred that that amount was payable by her and was not for his account.

(h) Interest :

It is common cause that in the defendant's accounting it has charged the plaintiff interest on the amounts advanced to him. The plaintiff denied that any interest was payable, and PGM claimed that it was payable from the amounts paid out to the plaintiff from October of 2004.

[8] The plaintiff testified that in 1995 he had been employed as an estate agent by Ewaldina Porteous the sole member of PGM. He had terminated that employment and the family moved to Pretoria where he ran a security business. In August of 2004 the family were visited by Mrs Porteous. She was in the process of dealing with a series of new off-plan developments in Margate as well as expanding her letting department, and enquired whether the plaintiff and his wife would be interested in working for her. The plaintiff's view was that his wife was to attend to certain administrative functions in PGM and he was to help with the start-up of the new off plan development.

[9] The plaintiff indicated to Mrs Porteous that he was unable to sustain himself because his security business was in trouble, and he needed to make certain monthly payments in order that he and his family could survive. He said that it was anticipated that the off-plan development sales would only go through and commission would only be paid once the

sectional title register had been opened in respect of a particular development, and the properties were transferred. He thus anticipated that there would be a period of time during which he would be unable to have cash on hand although he would be earning a future income by way of commissions due to him.

- [10] Pursuant to the discussion with Mrs Porteous, they agreed that he would be paid R18 000 per month. The plaintiff also indicated to Mrs Porteous that he needed expenses to relocate from Pretoria to Margate and the amount of R30 000 was agreed in this regard. The plaintiff also indicated to Mrs Porteous that he needed rental for a few months and that those amounts together with the R30 000 could be repaid out of his commission. In addition to the amounts to be paid to him, the plaintiff understood that his wife would be paid an amount of R4 000 per month including electricity and water for the family.
- [11] The plaintiff maintained that he was employed as an agent from October of 2004 until March or April of 2006. Initially he had been involved in the off-plan developments. However, when his finances became strained, it was necessary for him to conduct smaller sales in the residential market in order to earn sales commission.
- [12] The plaintiff testified that when he had been the effective cause of a sale, and the suspensive conditions, if any, were fulfilled, his commission would become due to him. He stated that the commission would only be payable when registration of transfer took place. As far as he was concerned his function ended when a document referred to by the parties in evidence as a sales advice memo ("SAM") was compiled after the fulfilment of the suspensive conditions. The plaintiff testified that during the latter part of 2005 he was able to conclude a number of small residential sales for which he was paid commission, but that those commissions form no part of this case.
- [13] The plaintiff maintained that he was paid a salary up until the end of February 2006, and in this regard referred an email sent by him to Mrs Porteous on the 28th March 2006. He recorded his need for a salary, which was to have been set off against the future commissions which he would earn. His concern at that stage was that Mrs Porteous had indicated to him that she would not continue to advance monies to him, and he would have to wait for his commission payments in order to obtain finances. He makes the point in the email that Mrs Porteous will get all her money back and that it is not as if she was paying him a salary which she would never have returned to her.
- [14] Mrs Porteous replied to that email on the 28th March 2006 indicating that she was in no position to continue paying him a salary. She also indicated that she felt that it was only fair to treat the plaintiff the same way as she treated the other members of the development team.

- [15] The plaintiff's evidence was that it was only at the end of March 2006 that the salary became an issue and advances were dealt with on the basis of a loan account. He said that the loan account had not been an issue which was mentioned before then. It was never part of his original agreement with Mrs Porteous.
- [16] As evidence of the arrangement between the parties, the plaintiff referred to an email dated the 13th April 2006 sent to him by PGM's accountant one Ian Crawford, recording that his understanding was that he had to recover the advances owing to PGM by the plaintiff, at the rate of 50 per cent of commissions received by the plaintiff.
- [17] The plaintiff recorded that in his view the only amount which he had to repay was the original R30 000 which had been advanced for relocation expenses and for which he had offered to pay back to Mrs Porteous, despite the fact that she originally said he did not have to do so. He claimed that he had not received any advances before his salary was stopped in March 2006. Thereafter he received advances which would be recovered at the rate of 50 per cent of the commissions which became due to be paid to him.
- [18] A number of documents were referred to in the evidence, and in particular three pages compiled in the handwriting of Ian Crawford which described the payments to the plaintiff between April of 2005 and March of 2006 as being 'salary'. The purpose of compiling that document had been to calculate the amount which had to be deducted from the plaintiff for taxation purposes. It was eventually agreed between the parties that those amounts had been deducted from the payments made to him during that period.
- [19] The plaintiff testified that the initial salary paid to him was actually R14 000, because Mrs Porteous adopted the view once they had moved to Margate, that the R18 000 was a combined monthly amount payable to the plaintiff and his wife. As from November of 2005 the monthly amount paid to him increased from R14 000 to R18 025,64.
- [20] The plaintiff recorded that he at no stage received a pay slip during his employment. In this regard he was never asked whether he had requested one but he did not say that he had. The plaintiff also referred to an IT3(a) form which was sent by PGM to the Receiver of Revenue recording commissions paid to him for the period between the 1st September 2004 and the 1st March 2005 of R127
261. The first time the plaintiff saw this document was when the defendant discovered it. He had no idea how the amount was calculated. He denied that at that stage he had received any commission whatsoever. He stated that it could have been salary, but that the numbers did not 'add up'.
- [21] The plaintiff recorded his view that any payments which were made to Preston College were made pursuant to an arrangement between his ex-wife and Mrs Porteous. They had decided that his children would attend school there and it was not a decision to which he had been party. None of those payments should then have been recorded against his loan account.

- [22] The plaintiff stated that he was not aware of any outside introductions at the time he had made sales of the off-plan development units. He claimed that he had never given permission to the defendant to deduct any amounts for outside introductions from the commission which was due to him. The plaintiff admitted that he had signed the estate agency agreement which was Annexure 'A' to his particulars of claim. He referred to various clauses in the agreement which he claimed indicated that he was entitled to 50 per cent of whatever the defendant was paid by way of commission, prior to the deduction of any amounts for outside introductory commissions. He said that if he appointed any assistants to help in the sale he was responsible to pay their salary and no commissions fell to be deducted from the amount upon which his commission was calculated. He claimed that as evidence of this he had a partnership agreement with another agent named Renee whose commission was correctly recorded on the documents supplied by PGM to him. In respect of the outside introductions with regard to the Kingfisher, St Tropez and Mustique off-plan developments, he had not given permission for these outside introductory commissions to be paid.
- [23] With regard to cancelled sales the plaintiff stated that once a SAM document had been compiled, the property was ready for transfer and he had earned his commission which he was entitled to be paid. In accordance with the estate agency agreement that commission was 50 per cent of the amount which was due to be paid to PGM.
- [24] With regard to the 'Colonial Sands' commission the plaintiff recorded that the commission percentage was six per cent, and not five per cent. He had been told this by the developer whom he had known. He was unable to explain why some of those commissions were recorded at five per cent and some at six per cent.
- [25] The plaintiff recorded that a particular sale in 'Colonial Sands' had been cancelled. That was the sale to Mr Visser for R2,5m of section no. 406 in 'Colonial Sands'. He had done all the work in the matter, the SAM document had been issued and the sale had been cancelled. He did not know why, and regarded himself as entitled to the commission which was payable by PGM.
- [26] The plaintiff recorded that he had never agreed to the payment of interest on the advances to him. This was notwithstanding the fact that interest was claimed and recorded by PGM. The plaintiff also stated that as far as he was concerned he had never been given a correct accounting, and that the figures ultimately presented by PGM were not an accurate accounting.
- [27] During the evidence of the plaintiff, Mr Harrison recorded that PGM would concede that all the sales agreements concluded in respect of the 'Colonial Sands' off-plan development reflected commission due at six per cent. There was a separate sole mandate agreement reflecting five per cent and the entitlement of PGM to obtain six per cent from the developer is presently the subject of an action before the Magistrates' Court in Margate. The defendant had received five per cent, and if the remaining one per cent was collected pursuant to the

litigation, it would be paid over to the plaintiff.

[28] The plaintiff was cross-examined at length. I shall refer only to the important parts of the cross-examination as they emerged in the evidence :

- (a) the plaintiff refused to accept that in terms of the estate agency agreement he was only entitled to paid commission once it had been actually paid to the defendant. He denied that if no commission was actually paid, he would not be entitled to commission;
- (b) with regard to cancelled sales the plaintiff maintained his view that once he had provided a service to PGM he was entitled to commission and it did not matter whether PGM received the commission or not. This was despite his having earlier said that he was only entitled to commission upon registration of transfer;
- (c) the plaintiff maintained that as there was no reference in the estate agency agreement to advances, that was done separately and outside the ambit of the written agreement between the parties. He said that he had asked for advances on the commissions which he had not yet earned because he needed them. He denied the suggestion that he had only been paid a salary for part of October 2004, and that he had then asked to be transferred from the administration section of PGM, and to be allowed to work as an estate agent;
- (d) the plaintiff denied any suggestion that his family were in dire straits when they were visited by Mrs Porteous in August of

2004. He denied that the original offer made to him was to work in the administration section of the defendant for a salary of R18 000 per month – he had been hired from the outset as an estate agent on a salary. He denied this was a cumulative amount for himself and his wife and said that this was only made clear to him by Mrs Porteous two months after he had started working for her;

- (e) with regard to outside introductions, the plaintiff was referred to a portion of a sale agreement of a unit in the ‘Kingfisher’ development which was a sale to one A J Swanepoel for R965 000. That document recorded that the selling agent was ‘Little Swift Investment 338 (Pty) Ltd trading as Rusking Real Estate’. That sale agreement was initialled by the plaintiff as a witness. He admitted that he had sold the unit but said that the sale document was compiled by the attorney and that the reference to Rusking Real Estate was probably a reference to a mandate which the PGM had with Rusking Real Estate. It was put to him that that was an outside introduction, and he replied that he imagined so;
- (f) notwithstanding having initialled the document, the plaintiff maintained that he was not aware of any commission going to Rusking Real Estate and he had not agreed that that should happen. He was unable to comment upon the suggestion that the commission in that case would have been paid to Rusking Real Estate by the conveyancers, and Rusking Real Estate would have paid PGM the portion due to it. The plaintiff was also referred to a copy of the file of a sale to a Mr van der Westhuizen of Unit 103 at ‘St Tropez’ which recorded an external commission payable to an entity described as ‘Falcodor’ of ten per cent. The

plaintiff claimed no knowledge of that entity;

- (g) with regard to the payment of interest on advances made to him the plaintiff could not dispute that on the 12th January 2006 Ian Crawford had emailed Mrs Porteous stating that he had raised with the plaintiff the issue of interest on amounts advanced to the plaintiff, and that the plaintiff had agreed to pay interest. It was put to him that email had been written because Mrs Porteous had discussed the matter separately with him and it had been a difficult discussion. The plaintiff maintained that he could not remember the discussion;
 - (h) the plaintiff refuted the repeated suggestions that he was continually asking Mrs Porteous for advances because he was having difficulty meeting his expenses. He denied that when commissions were paid to him, whether they were from domestic sales or ultimately from the sales of off-plan developments, he requested that she not deduct the full 50 per cent earmarked for the repayment of his advances. When it was put to him that it was as a result of these continual demands that Mrs Porteous decided to charge him interest on the advances made to him, his response was that he had never agreed to interest;
 - (i) the plaintiff was initially unable to recall the conversation alleged by Ian Crawford and simply contented himself with saying that he had never agreed to pay interest. This, despite admitting having had a discussion with Ian Crawford about interest. The plaintiff admitted that on the 11th September 2006 he had had a discussion with Ian Crawford about the payment of interest and Ian Crawford recorded in a later email, on the 11th September 2006 sent to the plaintiff, that the plaintiff had agreed in January of 2006 that he would pay interest on advances. At stages in his evidence the plaintiff said that he had had a number of discussion around interest but had never agreed to it after the emails to him by Ian Crawford. He then said that he had never confirmed that he would pay interest in writing and then stated that he did not think that he did so;
 - (j) the plaintiff was questioned at length about whether he had received an accounting on an ongoing basis. He conceded that he had received documents from time to time from PGM, but maintained his view that they had not constituted a proper accounting. He maintained his view that it was because of insufficient accounting that the action was instituted;
 - (k) the plaintiff conceded that on the 14th September 2007 he had had a meeting with Dolores Markham, apparently the conveyancing liaison secretary employed by PGM, and one Barbara Bekker, the regional representative from the head office of Pam Golding Properties in Pietermaritzburg. They had discussed the files and the plaintiff conceded that although he had not looked at all the documents, he had not been denied access to them. He had asked for a commission breakdown in an email sent to Ms Markham on the 5th October
2007. He said he was unable to recall being invited by Ms Markham to come into the office and make photostat copies of the files he wished to query. He admitted that he had made copies of certain documents;

- (l) the plaintiff was asked whether he had read through the agreement in respect of the sale to AJ Swanepoel in the 'Kingfisher' development. When asked what he had thought when he had looked at the selling agent being recorded as Rusking Real Estate, he said that was not his concern. He thought it would have no influence on his commission. This was despite the fact that Rusking Real Estate was referred to as 'the selling agent', and the plaintiff maintained that he had been the effective cause of the sale of that unit.
- [30] That was the case for the plaintiff.
- [31] The first witness for PGM was Ms Markham. She told the court that her function was to prepare files once a sale agreement had been received. She would then follow up on the fulfilment of terms and conditions until all the suspensive conditions were fulfilled and the matter could thereafter be passed onto the attorneys for registration of transfer to take place.
- [32] Ms Markham said that she recalled the meeting with Barbara Bekker and the plaintiff on the 14th October 2007, which meeting had been requested by the plaintiff. She said that all the commissions on sales were checked by the Pietermaritzburg office. The purpose of the meeting had been because the plaintiff wanted to check the commissions due to him and clarify any disputes. She said that he had had no real disputes at the time and was quite happy with the explanations given.
- [33] With regard to the plaintiff making copies of the sales files, Ms Markham testified that the plaintiff came into her office and required some files from her. He copied them and returned them to her. She had informed Mrs Porteous of this event. At that stage the plaintiff was still employed by the defendant. He had not been prevented from access to any files or from copying them.
- [34] In cross-examination Ms Markham conceded that during the meeting with Barbara Bekker each file had been looked at, and once the items raised by the plaintiff had been discussed, they moved onto the next file. She had been responsible for compiling a spreadsheet which was given to the plaintiff setting out all the matters in which he had been involved. This included introductory commissions where the plaintiff would have been paid part of the commission due on someone else's deals because he introduced the property to another agent.
- [35] The second witness for the defendant was Mrs Porteous. She described herself as the franchisee and sole member of EFC Territory CC which traded as Pam Golding (Margate). She had operated this business for 21 years. She confirmed that the plaintiff had worked for her in 1995 as an estate agent working on two developments.
- [36] She explained that the concept of outside introductions was when an introduction came from a source outside of PGM, and could be another agent for either the buyer or the seller. This was catered for by a referral process on a strict commission basis. Introductory commission was given for the introduction of the buyer or the seller.

- [37] With regard to the 'Kingfisher' development, the initial launch had been done by Rusking Real Estate who had requested PGM for assistance to sell the balance of the units which it had not sold. Two-thirds of the commission accrued to PGM and one third to Rusking Real Estate. With regard to the suggestion that the plaintiff had not given permission for outside introductions, Mrs Porteous recorded that those commissions were discussed with the sales team because they had to be part of the decision-making process. An initial commission percentage of five per cent had been agreed upon between the developer and Rusking Real Estate. Mrs Porteous also confirmed what had become common cause between the parties, that VAT and royalties were deducted from the commission of PGM prior to the calculation of the commission due to the plaintiff.
- [38] With regard to the cancellation of sales, Mrs Porteous maintained that in the event that a sale was cancelled, the defendant would earn no commission and there would accordingly be no commission payable to the plaintiff. This was because PGM would earn no commission, and the payment of commission to the plaintiff depended upon the payment of a commission to PGM.
- [39] Mrs Porteous confirmed that PGM was presently suing for the balance of commission (one per cent) in the Margate Magistrates' Court against the developer of 'Colonial Sands'. She also confirmed that any amounts recovered would result in a portion accruing to the plaintiff.
- [40] With regard to the conclusion of the contract with the plaintiff, Mrs Porteous stated :
- (a) she had visited her sister who is the plaintiff's ex-wife, and her children in Pretoria, and was appalled by what she had found. They were living in circumstances in which she and her sisters had not been raised and she regarded them as being in dire straits;
 - (b) the plaintiff told her that his security business was not going well and as a gesture of goodwill, Mrs Porteous suggested that they relocate back to Margate and work for her in her firm. She pointed out that two of her other sisters are also employed by her;
 - (c) it was anticipated that both the plaintiff and his wife would be accommodated in the defendant's business. It was envisaged
- that they would move (temporarily) into a new house in a development which was being marketed by the defendant. It was also initially
- anticipated that the plaintiff would assist with administrative work in the office;
- (d) soon after starting work in October 2004 the plaintiff asked her whether he could work as an estate agent instead of in the administration. Mrs Porteous was concerned about this because she knew that he would not receive a salary and commission would take time to come, so she agreed on the following :
- (i) the plaintiff would sign the estate agency agreement;

- (ii) the plaintiff would join the sales team;
- (iii) PGM would advance the equivalent of a 'salary' to the plaintiff to help him keep life and limb together;
- (iv) the amounts paid by way of the 'salary' would be recovered from the plaintiff in due course.

Mrs Porteous pointed out in this regard that there were no salaried agents in the defendant's business. She employed 28 agents and making an exception would prove to be difficult;

- (e) with regard to the advancement of R30 000 for relocation expenses Mrs Porteous testified that that amount came out of her business account as a loan or advance and was recorded as such in the Pastel accounting system. She regarded it as a loan and it was intended that the plaintiff would repay it.

[42] Mrs Porteous maintained that the payments made to the plaintiff between October 2004 and February of 2006 were not salary in the normal sense, but advances. She recorded that if they were salaries she would have deducted PAYE, UIF and skills development levies. She had referred to the amounts as 'salary' and 'salaris' in various emails because it was an amount which she had agreed to pay him towards the end of every month and the amount was the same each month. With regard to the repayment of the advances, she stated that she had realised that she could not take all the commission which was paid out to the plaintiff, and had agreed to take only 50 per cent. She had agreed to advance him monies until the commissions were paid to him.

[43] She said that the handwritten notes of Ian Crawford which referred to the advances to the plaintiff as 'salary' were simply calculations of the advances and the tax payable on them. The IT3(a) document was compiled because PAYE had not been deducted from the amounts paid over to the plaintiff.

[44] Mrs Porteous was referred to an email addressed by the plaintiff to her in August of 2007 in which he recorded that Mrs Porteous had offered to pay him a monthly salary as an advance on commissions. Mrs Porteous stated that this paragraph was only half true, as she had agreed to pay him some costs on a monthly basis as an advance on the commissions which he was to earn. She said it was also untrue that the plaintiff was only selling new off-plan developments. In response to the suggestion that the off-plan development agents were not allowed to sell other properties, Mrs Porteous had agreed to them doing so as long as they referred to each other. This was because where a residential agent sold a property as a result of an introduction from one of the off-plan development agents, the commission was shared. In this regard commission was shared in both directions.

[45] Mrs Porteous stated that matters had come to something of a head in January 2006 because of the continuous demands from the plaintiff for further advances, and requests from him that Mrs Porteous not deduct the agreed 50 per cent of any commissions which he would get to repay the advances.

[46] It was because of these continual requests and demands that she raised the issue of the plaintiff paying interest, in the belief that it would curtail the requests. She told the plaintiff that she would have to raise interest on advances at the prime rate which the banks charged. She reiterated that Ian Crawford had the same understanding as a result of his discussions with the plaintiff. With regard to an email dated the 11th September 2006 in which the plaintiff had stated to Ian Crawford that he had discussed the matter of interest with Mrs Porteous who said that interest would not be charged, she said that she had been misquoted. Ian Crawford had approached her after receiving the email and had requested clarity and direction. Thereafter he had continued to charge interest.

[47] Reference was made to the email sent to Ian Crawford by the plaintiff on the 11th September 2006 recording the following :

‘I can’t remember agreeing to the interest. I do remember discussing it with her and she agreed that there was no interest payable but then let’s wait and see what she can remember as I don’t want to argue about it.’

As a result of receiving that email Mrs Porteous convened a meeting with the plaintiff, herself and Ian Crawford. The meeting was to debate the further advances on his commission. Although the intention had been to deal with the question of interest, that had not been raised but they had dealt only with the advances to the plaintiff.

[48] Mrs Porteous admitted that on the 16th November 2006 the plaintiff had sent an email to Ian Crawford requesting that he provide an updated statement ‘after the interest and recent payments were taken off’. Mrs Porteous maintained that the plaintiff was being selective in this email because she had never agreed to waive interest. Mrs Porteous reiterated that if Ian Crawford had understood that no interest was payable he would have told her and would have adjusted the accounts accordingly.

[49] With regard to the access of the staff of PGM to the sales records, Mrs Porteous stated that it was never necessary for any member of staff to ask her for information or indeed for permission to examine the sale files on the matters in which they were involved. In addition, a spreadsheet of sales was kept to which each member of the sales staff had access. This was because the sales were never processed until registration of transfer and a separate system was kept so that PGM and its employees could keep track of the financial position of the agents from time to time.

[50] The important aspects of the cross-examination of Mrs Porteous were as follows :

(a) she reiterated that she had been trying to evolve a function for the plaintiff when he arrived at PGM in October 2004. He had done general administration work for a week or two when he approached her to be appointed as an estate agent;

- (b) with regard to the estate agency agreement which was signed on the 28th October 2004, that agreement was a standard estate agency agreement used in all the Pam Golding franchises and it would have been prepared by the human resources section who would have discussed the contract with the plaintiff;
- (c) the advances which were made to the plaintiff from time to time were not part of the estate agency agreement because she viewed this as something which would not be a long term arrangement;
- (d) Mrs Porteous confirmed that interest had first been discussed in January of 2006. When asked why it had been charged on all the advances to him from October of 2004 she stated that she had done that as a method to stop him requesting loans. She said that the plaintiff had agreed to this because he needed the advances which she gave him;
- (e) with regard to the concept of outside introductions, Mrs Porteous reiterated that in the Kingfisher development, another agent had concluded the contract with the developers and had referred to PGM for assistance. For that reason the outside agency Rusking Real Estate appeared as the selling agent in all the sale agreements. In those instances the conveyancers would pay the outside agent who would pay over to PGM the share of commission to which it was entitled. In contracts where PGM was cited as the selling agent it would pay over any commission due to outside agents for introductions;
- (f) with regard to the units sold in St Tropez, Falconer Estates had brought the business to PGM and had been paid a commission. In the case of the Mustique development the conveyancers had paid PGM directly and they had paid STD Consultants, an agent who was part of the arrangement;
- (g) in response to the suggestion that the plaintiff was the effective cause of the sale with regard to the sale of the Mustique units, Mr Porteous pointed out that he was only part of the effective cause of the sale. She pointed out that whatever figure PGM was ultimately paid, the plaintiff would be entitled to half of that figure after the usual deductions;
- (h) Mrs Porteous confirmed that the plaintiff had never suggested at any stage that the way the outside introductions worked was unfair. Nor had any other agent in all the years she had done business. She denied the suggestion that any commission or other fees payable to other agents would come off the share of PGM and not off the plaintiff's share;
- (i) Mrs Porteous confirmed that the Kingfisher sales were all to have been paid at six per cent and that was the reason why she was in litigation with the developer. Mrs Porteous confirmed that the plaintiff had been present when she had negotiated the outside introductory commission;

- (j) with regard to the approach of PGM to cancellations by purchasers and sellers, Mrs Porteous said PGM would look at the whole agreement and try to approach the development on the basis of weighing up the pros and cons of accepting the cancellation. She said that there were various reasons why cancellations took place and each one had to be looked at individually;
- (k) with regard to the payment of a salary to the plaintiff, Mrs Porteous confirmed that PGM had issued an IRP5 certificate for a very small amount for the period in October of 2004 when the plaintiff had initially worked as a salaried employee in the administration section;
- (l) it had later been necessary to issue the IT3(a) certificate reflecting the commission paid to the plaintiff. Although it actually represented monies loaned to the plaintiff, it had been presented in that way because the loans were an advance against commission to be earned. Mrs Porteous agreed that the plaintiff had been paid the same amount of approximately R14 000 per month at first and later R18 000 a month because those were the amounts which he said he needed as advances against the commission he would earn. The fact that the word 'salary' had been used on the documents compiled by Ian Crawford, and in some of her emails, was simply because that was the agreed amount that was being paid monthly to the plaintiff;
- (m) Mrs Porteous confirmed that she had written the email of the 28th March 2006 notifying the plaintiff that she would not continue paying him the monthly amount because the advances had become too drawn out and he had been too demanding. The leeway she had given him was treating him differently from the other members of the sales team;
- (n) with regard to the advances, Mrs Porteous conceded that there was an emotional element in the decision she had made to advance him a monthly amount. She recorded that other agents were from time to time given advances but those were paid back immediately when commissions were due to the agent concerned. She had always believed that the payment of the advances to the plaintiff would be a short-term matter;
- (o) during her cross-examination Mrs Porteous fell into the error of confusing what had been referred to by the parties as 'outside introductions' with the concept of 'other agents' 'Other agents' was a reference to agents employed by PGM or employed by an agent to assist him in discharging his or her functions for PGM. She was prepared to accept that in the email sent by the plaintiff to Ian Crawford on the 13th April 2006 his reference to 'outside intros' could well have been a reference to other agents. But this is because the email suggested that the plaintiff accepted that his commission would be paid after the outside introductions had been paid out by PGM;
- (p) with regard to the interest rate that was charged, Mrs Porteous maintained that it was her understanding that the prime rate charged by the bankers of PGM would be used in charging interest on the plaintiff's advances. She accepted that there had been no clear indication between the parties of the rate to be charged;

(q) in response to the suggestion that interest had been discussed, questioned and disputed on numerous occasions by the plaintiff, Mrs Porteous said that she was aware that the plaintiff was trying to evade the payment of interest and if she had agreed to that, or at any stage thought that no interest should be chargeable, Ian Crawford would have stopped charging it. There was some debate regarding the date from which interest was payable. Mrs Porteous maintained that that date was October of 2004 and that she had reached that decision in January of 2006 when she had decided to limit further advances to the plaintiff;

[51] That was the case for the defendant.

[52] Prior to reaching a decision on each of the items set out at the beginning of this judgment it is necessary for me to comment upon the credibility of the witnesses who appeared before me. In my view the plaintiff was not a very good witness. He was unable to give satisfactory explanations for various of his actions and when faced with certain aspects of the evidence would content himself with saying that he could not remember.

[53] Ms Markham was a good witness although she only testified to a limited number of aspects of the issues involved. I have no hesitation in accepting her evidence where it differed from that of the plaintiff.

[54] Mrs Porteous gave her evidence in what I believe to have been an honest and straightforward manner. She answered questions without hesitation and did not seek to avoid them even where they were uncomfortable. She found it particularly difficult to deal with the evidence of the circumstances in which she had initially offered the plaintiff and his ex-wife a job. This is because the plaintiff's ex-wife was her sister and when she had visited them in Pretoria she had found their circumstances very distressing. Mrs Porteous also dealt well with the aspect of the payment of a 'salary' to the plaintiff. In this regard the documentary evidence as it appeared in the calculations of Ian Crawford and the various emails between the parties do not, on the face of it, support her version of events. However, when the larger picture is looked at i.e. tax returns, and her explanations for why she had called the advances 'salary', on balance there was no reason to doubt her credibility on these

issues.

[55] I should mention that the evidence of the witness Ian Crawford was unable to testify because he is medically unfit to do so. Although no medical evidence was produced in this regard the suggestion was never challenged and I have no hesitation in accepting it.

[56] In assessing the credibility of the witnesses and the evidence which they gave, I am mindful of the fact that the events giving rise to the action occurred between eight and ten years ago. I regard it as inevitable in those circumstances that parties will have a general recollection of what occurred, but much of the detail may have been lost to them. Insofar as they do not have documents which directly verify what they understood to have been the position, they could easily be mistaken. This is something which was applicable to all the witnesses,

[57] With regard to the question of onus, Mr White submitted that because the defendant has withheld monies from the plaintiff, it bears the onus of proving the debatement. However, the plaintiff sought an accounting and debatement. The accounting has been conceded by the defendant. The plaintiff accordingly bears the onus of proving the basis upon which, and the amount ultimately claimed by him from the defendant.

See : Doyle and Another v Fleet Motors P.E. (Pty) Ltd 1971 (3) SA 760 (A). Keith Kirsten's (Pty) Ltd v Weltevrede Nursery (Pty) Ltd and Another 2002 (4) SA 756 (CPD) at 766 H.

[58] With regard to the issues which I am required to decide :

1. Interest :

Mr White submitted that the fundamental flaw in the evidence of Mrs Porteous regarding interest was the fact that it was to be backdated to October of 2004. He submitted that it was perfectly understandable that Mrs Porteous may have wished to limit the advances and to charge interest in order to do so. However, to have backdated the amount to October of 2004 (some 15 months) was not only improbable, but something to which the plaintiff was unlikely to have agreed. He submitted that PGM bears the onus of demonstrating that interest was payable, at what rate and from what date. Mr White submitted that Mrs Porteous was a very efficient businesswoman and drew attention to the fact that in her evidence-in-chief she had referred to interest 'going forward'

and in her cross-examination she had referred to interest going back to October of 2004. Mr Harrison had pointed out during the

cross-examination that he had been at fault for that mis-statement in Mrs Porteous's evidence-in-chief because he had put to her a leading question which was not in accordance with his instructions.

[59] There is no doubt from the emails which were exchanged between the parties and Ian Crawford, that interest had been discussed between them. It is also clear that Mrs Porteous had wanted to charge interest, at least from January of 2006. I have no reason to doubt the emails of Ian Crawford when he records in them that the plaintiff had agreed to pay interest from January of 2006. The denials of the plaintiff in this regard appear to me to have been disingenuous attempts to ensure that Ian Crawford did not levy interest against the advances. If it was a genuine refusal to accept interest, I cannot understand why he did not sit down with Mrs Porteous and confront her with that issue and arrive at an agreement. That that was not done was probably a function of the pressure he was under and the fact that he needed the advances which Mrs Porteous may otherwise have withdrawn from making

to him.

- [60] On the other hand, it seems unlikely that Mrs Porteous would have imposed interest as a method of limiting requests for advances in January of 2006, but required that the interest be backdated to October of 2004. What is more probable is the suggestion made by Mr Harrison that the interest was to have been from January of 2006 but calculated on the outstanding balance from then until the payment was made in full. Interest was also to be charged on any future advances after January of 2006.
- [61] With regard to the interest rate payable, I am faced with the contradictory evidence that Mrs Porteous understood that it would be the prime rate being paid by PGM to its bankers, and the evidence of the plaintiff who avers that no interest at all was discussed. I understand that Ian Crawford had charged interest at the prime rate from time to time. In my view it is likely that that was the understanding of the parties.
- [62] In conclusion then I find that interest was payable on the amount outstanding by the plaintiff to PGM as at the end of January 2006 calculated at the prime rate charged by PGM's bankers from time to time. I find this to be the case irrespective of which party bore the onus. Although it is difficult to pinpoint an exact date from which the interest is to be payable, Ian Crawford wrote to Mrs Porteous on the 12th January 2006 recording that he had raised the issue of interest with the plaintiff and he had agreed to pay it. I accordingly find that the interest was payable from that date.

2. Salary or commission?

- [63] Mr White submitted that PGM bore the onus of establishing that advances on commission were made to the plaintiff for the period from October 2004 until February of 2006. He submitted that the numerous references in the emails to 'salary' and 'salaris' together with the workings of Ian Crawford which refer to 'salary' throughout indicate that the plaintiff had been paid a salary by PGM. He submitted that the only evidence to counter this was the IT3(a) document which was probably compiled somewhere near the middle of 2005, and designed only to inform the South African Revenue Services of commission amounts which were paid to the plaintiff. The problem which I have on placing any reliance of the IT3(a) documents is that it is not dated (as to when it was compiled) and neither party led any evidence to demonstrate how the amount referred to in that document was calculated or arrived at. In the loan account document which formed part of the papers before me a General Journal entry on the 28th February 2005 recorded a credit of R124 261,45 which together with a further credit passed on the same day of R3 000 gives the total reflected on the IT3(a) document.
- [64] Mr Harrison contended that one could do no better than to look at what the plaintiff said in his correspondence to Barbara Bekker on the 24th August 2007. In his letter he stated :
- 'As part of the negotiations Dina offered to pay my relocation costs and offered to pay me a monthly salary as an advance on my commissions ... and it can take up to eighteen months before I would receive my first commission.'

- [65] On the evidence then of the plaintiff, although he referred to a 'monthly salary', the payments were clearly repayable advances. Mr Harrison also pointed to the fact that the plaintiff had been charged interest on all the advances which had been made to him. This was inconsistent with the payment of a salary. Had the parties genuinely intended the amounts advanced to be a salary in the normal sense there would have been documentation available such as PAYE, UIF and skills development levies which would have all been in the records of PGM because that is how all the other salaried employees were treated. In addition no pay slip had ever been given to the plaintiff, something which he did not deny. He also never averred that he had asked for a pay slip, which one would have expected him to do, had he been paid a salary as a normal salaried employee.
- [66] Mr White submitted that given the ongoing success of the plaintiff as an estate agent, it was no longer financially necessary to have him as a salaried employee after February of 2006. The commissions which he was earning were due to be paid and they were substantial, and the amounts of salary paid to him were insignificant in comparison. These were among the reasons why Mrs Porteous would have changed her mind and terminated the salary arrangement.
- [67] Mr White also submitted that in the event that the court were to hold that the monthly payments were not salary, then the payment dated the 27th October 2004 of R14 000 which was made to the plaintiff by PGM was a salary amount and not an advance.
- [68] In my view the correct position was as testified to by Mrs Porteous that the plaintiff was initially employed for a period of a couple of weeks as a salaried employee and thereafter the monthly amounts paid to him until February of 2006 were in the nature of advances and not salary. As I was not shown the IRP5 which was issued in respect of the plaintiff for the portion of October 2004, I am unable to say whether it constituted the R14 000 paid to him on the 27th October 2004 or not. I simply do not have any information in that regard. The parties were even unable to pinpoint exactly when the plaintiff started working for PGM. I accordingly find for PGM on this issue.

3 Outside introductions

- [69] Mr White submitted that it is clear from an interpretation of the estate agency agreement that outside introductions were to form no part of the calculation of the plaintiff's commission, and that the plaintiff's commission would be 50 per cent of whatever was due to the selling agent in the sale agreement. If the selling agent was recorded as a separate company as in the position of Rusking Real Estate, then the conveyancer would pay the estate agent's commission on the sale to that outside company who would then pay over to PGM the amount due to it. The plaintiff's commission would then simply be 50 per cent of that amount. Where PGM was cited as the selling agent in the sale agreement, any commission paid to a third party for introducing the property would not be deducted from the original amount in the sale agreement. That was the amount that would be paid by the conveyancer to PGM and the plaintiff would be entitled to 50 per cent of that amount. I

should mention that the

parties agreed that the 50 per cent commission payable to the plaintiff was only calculated after the deduction of royalties and

VAT. There appears, however, to be no logical reason for distinguishing between the above two examples. None was submitted to

me.

[70] Mr Harrison pointed out that there was a logical contradiction in the interpretation of the agreement by the plaintiff. This is demonstrated if the third party introducing the property agrees with PGM that the commission will be split on a 50/50 basis. On Mr White's first proposition, the third party would have received all the commission from the conveyance and paid 50 per cent of it to PGM. PGM would then be obliged, after the deduction of royalties and VAT to pay to the plaintiff 50 per cent of the nett amount paid to PGM. On the second example, PGM would receive no commission whatsoever on the deal. The commission of the plaintiff would be different in the two examples, despite the outside introductory commission being the same. That seems illogical. That the introductory commissions were likely to be in large proportions and not merely nominal percentages, is evidenced by the Kingfisher deal in which Rusking were to obtain one-third of the commission.

[71] The evidence of Mrs Porteous was that the estate agency agreement was a standard one applicable to all Pam Golding franchises throughout the country. She had never come across an example where an agent had claimed or had been paid half of the original commission reflected in a sale agreement in the case of an outside introduction.

[72] In interpreting the estate agency agreement, I have followed the approach of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593 (SCA). I am also mindful of the various cases which require that any interpretation of a business agreement must give business efficacy to that agreement. To interpret the estate agency agreement in this case as the plaintiff would have me do would result

in an absurdity. In my view the wording of the agreement is clear and the plaintiff is only entitled to be paid 50 per cent of the nett commission received by PGM – i.e. after the deduction of outside introductions, royalties and VAT.

4. Colonial Sands :

[73] This is no longer an issue between the parties. PGM agrees that the commission payable on all the 'Kingfisher' units would be calculated at six per cent. It has also undertaken that in the event that it is successful in recovering that commission in the Margate Magistrates' Court, it will pay over the remaining portion of the one percent due to the plaintiff.

5. The cancelled sale to Visser :

[74] Mr White submitted that the cancellation of the sale by Mr Visser did not prevent the plaintiff from being paid his commission. A SAM document had been completed indicating that the suspensive conditions had been fulfilled. In my view, if and only when PGM is paid commission in respect of this sale, is the plaintiff will be entitled to be paid his share. As the sale has been cancelled it is within the discretion of PGM to decide what it wishes to do about that cancellation. If it elects to sue for the commission on the cancelled sale, and is successful, the plaintiff will be entitled to his payment. If it does not then he does not get paid. The fact that he had no legal nexus with the buyer and seller to enable him to sue for payment does not assist him in this action. In this action he is bound by the estate agency agreement which he signed and he is only entitled to be paid if and when PGM is paid.

6. The R30 000 relocation fee :

[75] It is unfortunate in this regard that I did not have as part of the evidence the loan accounts of both parties to indicate what had happened to the R30 000. This amount does appear in the loan account document relating to the plaintiff which is part of the court documents, but only as a General Journal entry. I do not believe that I am entitled to take judicial notice of what such a journal entry may have constituted, save that it is an adjustment at the end of the tax year.

[76] In my view, and given the emotional circumstances of the parties prior to October of 2004, and leading up to the generous offer made by Mrs Porteous to the plaintiff and his ex-wife, the probabilities are that that amount of R30 000 loaned to him by her was a loan from PGM. It is not an unusual occurrence for businesses to provide employees with relocation allowances. The evidence of Mrs Porteous was that entries had been put through both her loan account and that of the plaintiff reflecting the R30 000. That much appears to be evidenced by the loan account document which was adduced in evidence which records the R30 000 being debited to the plaintiff's loan account, albeit on the 28th February as a General Journal entry. Given her business acumen, it accords also with the probabilities that Mrs Porteous would have made the relocation expenses part of a business loan. The amount of R30 000 is accordingly payable by the plaintiff to PGM.

7. Preston College :

[77] Mr White faintly argued that the plaintiff should not be liable for this amount. As it was an advance made in the books of PGM to pay for the school fees of his own children, the probabilities are that this would have been advanced to him. His suggestion was that it was not for his account because the decision to send the children to Preston College was one made by his wife and Mrs Porteous together, and from which he was excluded. I have no reason to doubt the evidence of Mrs Porteous in this regards that it was an amount which he requested and which was paid on his behalf.

Costs :

- [78] The question of costs is intricately tied in with the plaintiff's claim for an accounting. Mr White submitted that the plaintiff had been obliged to sue for an accounting and had received it only after issue of the summons. He submitted that in those circumstances the plaintiff had already been partially successful and should succeed in obtaining the costs of the action.
- [79] Mr Harrison submitted that the accounting process was what he referred to as a 'moving target' in the sense that it was continually changing as the various commissions were paid in respect of the various developments. In this regard he submitted that the plaintiff had been given figures even prior to the issue of summons and thereafter regularly obtained updates dating as far back as the 8th June 2012. As the accounting was always changing it was difficult to reach finality.
- [80] Mr Harrison pointed out when Mr White had told the court at the outset of the trial that the accounting was accepted, that was the first time that PGM had known about that. As at the holding of the last Rule 37 conference prior to the trial, royalties and VAT were still issues which had been resolved only on the first day of the trial. A further issue between the parties had been the commissions which were payable on the various sales which the plaintiff had maintained was seven and a half per cent. This stance had been maintained by the plaintiff up until the last minute. Mr Harrison submitted that in any event the plaintiff had been given every access to documents in the possession of PGM. Nothing had been denied to him. This was even done after he had terminated his relationship with PGM.
- [81] I was invited by Mr Harrison to examine the spreadsheets used in evidence at the trial to show that ultimately the plaintiff was indebted to the defendant and there was nothing upon which an accounting was justified. Mr White urged that the court should not look at the arithmetic in a rands and cents way but accept that no real accounting had been received until after summons had been issued. Nor was it just a case of adding up the number of issues on which the plaintiff was successful in order to determine whether the costs should be awarded to him.
- [82] In assessing the question of costs I have a discretion to exercise upon a consideration of the issues in the matter and the success which the plaintiff has achieved in bringing this matter to court. PGM has been successful, albeit partially on the matter of interest, and was wholly successful on the matters of salary versus commission, outside introduction, cancelled sales, the cancelled sale to Visser, the R30 000 for relocation expenses and the Preston College advance. The only matters upon which the plaintiff has been successful is the 'Colonial Sands' percentage and the fact that it had to sue for an accounting.
- [83] With regard to the fact that the plaintiff had to sue for an accounting, there is no doubt that PGM would not have paid any amount whatsoever to the plaintiff unless the plaintiff had instituted summons.

[84] In my view it would be in accordance with the dictates of justice and fairness were PGM to be ordered to pay the costs of the action prior to the beginning of the trial. The costs from the beginning of the trial to the end are to be paid by the plaintiff.

[85] I accordingly make the following order :

- (1) I find for the defendant on the issues of the outside introductions, cancelled sales, the cancelled sale to Visser in 'Colonial Sands', the relocation expenses, the advances on commission versus salary paid, the Preston College payment and the payment of interest (at the defendant's banker's prime interest rate from the 12th January 2006 to the date of payment);
- (2) I find for the plaintiff on the issue of the commission of six per cent due on the sales in 'Colonial Sands';
- (3) The matter is referred to an accountant agreed upon between the parties, failing which, one appointed by the Chairperson of the South African Institute of Chartered Accountants, for the application of my findings to the accounts of the defendant in order to determine what amount, if any, is payable by the defendant to the plaintiff;
- (4) The defendant is to pay the plaintiff's costs of the action up to, but not including, the 1st September 2014;
- (5) The plaintiff is to pay the defendant's costs of the action from the 1st September 2014 to the 5th September 2014, both days inclusive.

Date of hearing : 1st – 5th September 2014

Date of judgment : 15th September 2014

For the Plaintiff : J M White of Jon White Attorneys

Counsel for the Defendant : G M Harrison (instructed by V Chetty and Company)

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