

SOUTH AFRICA / JUDGMENT

Wakefields Real Estate (Pty) Ltd v Attree and Others (666/10) [2011] ZASCA 161; 2011 (6) SA 557 (SCA) (28 September 2011)

[2011] ZASCA 161

COURT

Supreme Court of Appeal

BEFORE

Navsa, Lewis, Ponnann, Mhlantla, Wallis

CASE / FILE NUMBER

666/10

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 666/10

In the matter between:

WAKEFIELDS REAL ESTATE (PTY) LTDAppellant

and

GAVIN WAYNE ATTREEFirst Respondent

TRACEY ATTREESecond Respondent

FIONA ISOBEL HOWARDThird Respondent

Neutral citation: Wakefields Real Estate v Attree (666/10) [2011] ZASCA 160 (28 September 2011)

Coram: Navsa, Lewis, Ponnann, Mhlantla and Wallis JJA

Heard: 12 September 2011

Delivered 28 September 2011

Summary: Whether estate agent who introduces a purchaser to a property, where sale is concluded through another agent, is effective cause of the sale and entitled to commission.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban Nicholson J sitting as court of first instance):

The appeal is upheld with costs and the cross appeal is dismissed with costs.

Paragraphs (a) and (b) of the order of the high court are set aside and replaced with:

‘The defendants are ordered to pay the plaintiff the sum of R232 560 plus interest at the rate of 15.5 per cent per annum from 11 October 2005 to date of payment, and costs of suit.’

LEWIS JA (NAVSA, PONNAN, MHLANTLA and WALLIS JJA concurring)

- [1] The appellant in this matter, Wakefields Real Estate (Pty) Ltd (Wakefields), is an estate agency. The first two respondents, Mr and Mrs Attree, sold their house at 37 Monteith Place (I shall refer to the house as Monteith Place), Durban North, KwaZulu-Natal, to the third party, Mrs F Howard, who was joined at the instance of the Attrees. The dispute between them is whether Wakefields was the effective cause of the sale and thus entitled to commission. The Attrees in fact paid commission to another estate agency, Pam Golding Properties, which in turn shared it with a third agency, Remax Estate Agents. Remax had the sole mandate to sell the house at the time the sale was concluded.
- [2] The high court (Nicholson J) held that Wakefields had not been given a mandate by the Attrees and also that they had not been the effective cause of the sale. It dismissed Wakefields’ claim. The high court did not, in the circumstances, need to deal with Howard’s position, but it nonetheless ordered that the Attrees pay her costs incurred prior to a rule 37 conference held on 6 November 2009, and that she pay her costs after that date. She cross appeals against the latter costs order. Leave to appeal was granted by this court.
- [3] It will be immediately apparent that at least three estate agents attempted to find a willing purchaser for the house. In fact there were more. I shall turn to a brief summary of the facts before dealing with the legal principles applicable and the evidence of the parties and the estate agents.
- [4] In 2001 the Attrees bought Monteith Place through Wakefields, represented by Mr M Craig. Some two years later they acquired a vacant piece of land in Mount Edgcombe, and started building another house there in 2004. A number of estate agents, including Craig, heard that the Attrees were building at Mount Edgcombe and offered to find a purchaser for Monteith Place. At that stage, the Attrees were not sure that they would move to the new house, but did tell agents that they could bring potential purchasers to view Monteith Place. Craig ‘listed’ the house on Wakefields’ books and advertised it at a price of R3 775 000, although Mr Attree had said that he wanted R3 995 000.
- [5] Craig, when giving evidence, maintained that Wakefields had sent a standard letter to the Attrees confirming that it had a mandate to sell the house. Mr Attree denied ever receiving such a letter and Craig could not produce a copy since Wakefields’ computer systems had ‘crashed’. He did, however, produce a standard letter to this effect, and insisted that he would

have sent one to the Attrees. Nothing actually turns on this, for Wakefields pleaded that there was an oral mandate, the express (or implied) terms of which included one that the Attrees pay estate agent's commission equivalent to the tariff amount plus VAT. The amount payable if that term were proved was agreed by all concerned to be six per cent of the purchase price (less in fact than the tariff amount would have been).

- [6] From time to time in 2005 Mrs Phoulla Walker, an estate agent employed by Wakefields, took prospective purchasers to view Monteith

Place. She did not encounter either of the Attrees on these visits but was let in by a domestic worker and always left a card to show that she had been there.

- [7] Howard and her husband lived in Morningside, Durban. In January 2005 she attended a show day in a complex, where she encountered

Walker, the estate agent showing the property. Howard told Walker that she was not really interested in the type of property on show, but wished to buy something older. Walker made a note of houses to show Howard, and took her to view a number of houses in different areas. Although Howard was keen to remain in Morningside she nonetheless went to see Monteith Place in Durban North in March 2005. In her own words she 'loved' the house. However, she told Walker that the price was beyond her reach. Despite that she visited again with her husband and they spent some time there.

- [8] When Walker phoned Howard after the second visit, on 6 March 2005, Howard told her that she and her husband had decided not to buy a new house. They were under financial pressure and needed to invest money in their garage business. Walker accordingly stopped phoning Howard and showing her houses on the property market.

- [9] Shortly afterwards, Howard went to the Gateway shopping centre with a friend. Fortuitously they encountered the friend's aunt, Mrs D de Marigny, an agent employed by Pam Golding Properties. When Howard learned that De Marigny was an estate agent working in the Durban North area, Howard told her that she had seen Monteith Place and had really liked it – the look and the layout – but that it was far too expensive, and she had stopped looking for a while. She asked whether De Marigny knew of any other properties that were similar. De Marigny said that, offhand, she did not. In any event Howard said that she still wished to live in Morningside and De Marigny said that she would put Howard in contact with the Pam Golding agents who worked there.

- [10] Early in April 2005 the Attrees were advised by Mrs D Hamilton of Remax that they should lower their asking price to R3 495 000.

(This was termed ‘price counselling’.) They agreed to do so and gave Remax the sole mandate to find a purchaser, arranging for Monteith Place to be put on show on Sunday 10 April. The sole mandate was effective from 7 April, but the Attrees mistakenly thought that it would commence only the following Monday. Remax advertised the house for sale on Friday 8 April at the lower price.

- [11] Despite having given a sole mandate to Remax, Attree phoned two other agents, one of whom was De Marigny, on 8 April, and told them that he had agreed to lower the price. De Marigny recalled that Howard had said she really liked Monteith Place and on Saturday 9 April phoned her to tell her that the price had been reduced. Howard agreed to go back to the house with her husband and made arrangements to do so that day. De Marigny prepared an offer to purchase for R3 400 000 and agreed to a reduced commission. She took it to the Attrees who accepted the offer that evening. As indicated, the commission of R150 000 was shared by Remax, which had the sole mandate, and Pam Golding which claimed that it was the effective cause of the sale.
- [12] The high court found that there was no oral mandate given to Wakefields to find a purchaser for a commission of six per cent. On appeal the Attrees did not persist in the argument that Wakefields had no mandate, accepting that Monteith Place had been listed for sale by them and that they had had dealings with the Attrees and brought potential purchasers to view it. They accepted also that in the absence of agreement as to the quantum of commission the rate would have been six per cent.
- [13] But the high court found also that De Marigny was the effective cause of the sale – hence the dismissal of Wakefields’

claim. It reached this finding on several bases: that at the time when Walker took the Howards to Monteith Place they could not afford the asking price; that De Marigny did more than Walker to secure the sale; that the Attrees had been persuaded to reduce the price; and that the Howards were no longer under financial pressure in respect of their business. The cumulative effect of these factors, said the judge, outweighed the effect of the initial introduction by Walker.

- [14] It is notoriously difficult, when there are competing estate agents, to determine who is the effective cause of the sale that

eventuates. It may be that more than one agent is entitled to commission. This was put trenchantly by Van den Heever JA in *Webranchek v L K Jacobs & Co Ltd* 1948 (4) SA 671 (A) at 678 where he said:

‘Situations are conceivable in which it is impossible to distinguish between the efforts of one agent and another in terms of causality or degrees of causation. In such a situation it may well be (it is not necessary to decide the point) that the principal may owe commission to both agents and that he has only himself to blame for his predicament; for he should protect himself against that risk.’

Van den Heever JA continued (at 679):

‘[A] judge who has to try the issue must needs decide the matter by applying the common sense standards and not according to the notions in regard to the operation of causation which “might satisfy the metaphysician” The distinction between the concepts *causa sine qua non* and *causa causans* is not as crisp and clear as the frequent use of these phrases would suggest; they are relative concepts. . . . It stands to reason,

therefore, that the cumulative importance of a number of causes attributable to one agent may be such that, although each in itself

might have been described as a *causa sine qua non*, the sum of efforts of that agent may be said to have been the effective cause of the sale.’

[15] Was Walker’s introduction of Howard to Monteith Place in itself the effective cause when the sale was concluded? The high court held not, for the reasons already described. And it found that Walker, De Marigny, Howard, Mr Howard and Mr Attree, all of whom testified, were telling the truth to the best of their ability. In my view, nothing actually turns on the respective witnesses’ credibility. For the facts that are not in dispute are sufficient to determine whether Wakefields were entitled to commission. I should note, however, that the evidence of De Marigny was far from satisfactory and that the Howards, who allegedly indemnified the Attrees against paying commission to any agent other than Pam Golding (an issue that does not arise in this appeal), were not disinterested witnesses.

[16] The high court concluded that the Howards dealt with De Marigny ‘because she was the most instrumental in securing the sale’ and the judge ‘was not convinced a sale would have eventuated without the efforts of Mrs de Marigny’. However, the court recognised that she ‘was fortunate in meeting the Howards (sic) by accident’. She came ‘on the scene when the obstacles were capable of removal’. This, and the fact that she took them to see Monteith Place again, tended ‘to offset the notion that the original introduction and visiting of the house was conclusive and dominating’. The judge considered that while Walker’s introduction of Howard to the house was a *sine qua non*, it was not the *causa causans* of the sale.

[17] The high court relied on *Basil Elk Estates (Pty) Ltd v Curzon* 1990 (2) SA 1 (T) in concluding that the first introduction by the estate agent had been outweighed by intervening factors. Various personal factors had stopped the prospective purchaser in that case from concluding a sale. But nine months later circumstances had changed and the purchaser bought the property through another estate agent. The court held that the intervening factors were such as to

make the initial introduction relatively unimportant.

[18] In my view *Aida Real Estate Ltd v Lipschitz* 1971 (3) SA 871 (W) is more instructive. Although Nicholson J quoted from it extensively, he did not apply the principles cited. In that case an

estate agent had introduced a purchaser who ultimately negotiated directly with the seller in concluding a sale. The agent was

nonetheless held to be the effective cause of the sale and entitled to commission. Marais J said (at 875E-H) that protracted negotiations

about finances are often attendant on transactions brought about by an estate agent. In that case it was the purchaser who had concluded the deal, but it was the estate agent's 'wisdom and business acumen' that brought together the eager seller and the purchaser who was able to overcome financial obstacles. Marais J said that '[i]n such a case the agent would be entitled to remuneration, no matter whether he selected the potential purchaser by chance or by foresight. A commission agent is paid by results and not by good intentions or even hard work.'

[19] This matter is little different from *Aida*. But for Walker's introduction of the house to Howard, the latter would not have been aware of the existence of the property. It was Walker's 'wisdom and business acumen' that made her take Howard to Monteith Place in Durban North. Howard was not looking in that area at the time, and preferred to buy a house in the area where she and her family then lived. She claimed to have been frustrated that Walker took her to see houses in Durban North that were out of their price range, but she nevertheless did view them. And when Walker took Howard to Monteith Place Howard 'loved' the house, and returned with her husband the following day, accompanied by Walker. Howard conceded that she and her husband were very interested in the house but said that, given financial constraints (that later fell away), they could not afford it. Walker gave up trying to negotiate a sale with Howard only when told that she had stopped looking for a house to buy and that she and her husband were going to renovate their existing home.

[20] If Howard had herself approached the Attrees, and persuaded them to sell Monteith Place to her at a lower price (that is, assuming there was no intervention at all by De Marigny) Wakefields would undoubtedly have been entitled to commission, as was the agent in *Aida*. So too, had the Attrees approached Howard directly and offered to sell to her at a lower price, Wakefields would likewise have been entitled to commission: Walker was the effective cause of the sale.

[21] De Marigny, on the other hand, learned that Howard was interested in Monteith Place quite fortuitously. She did nothing about it until phoned by Mr Attree who advised that he was asking for less. At that stage it was only five weeks since Howard had seen the house with Walker. The effort that De Marigny put in amounted to no more than making a phone call to Howard, arranging for the Howards to see the house again, drawing up the offer to purchase, persuading the Attrees to lower their price even further and accepting a reduced commission. That may be regarded by some as a hard day's work: and she was undoubtedly instrumental in concluding the sale. Indeed she was reluctant to admit that Walker's introduction, and the work of the Remax agent who had persuaded the Attrees to reduce the asking price, had any effect on the sale of Monteith Place.

- [22] Had Walker not shown the Howards the house first – the initial introduction – Monteith Place would not have been sold to Howard through the agency of Pam Golding. Howard had ‘absolutely loved the house’ and had persuaded her husband to view it with her. He too liked it but was concerned about finances. But for that introduction De Marigny would not have known that the Howards were interested in the property (and that, as I have said, she discovered quite fortuitously). She would not have found a willing and able purchaser before Remax’s show day. She reaped where she had not sown. Despite De Marigny’s later intervention, in my view Walker’s introduction was the effective cause of the sale.
- [23] Accordingly, Wakefields were entitled to commission at the rate agreed by them to be applicable – six per cent. That the Attrees find themselves liable to pay more than one agent is of their own making. This is the kind of situation described by Van den Heever JA in *Webranchek* where he said that a seller has ‘only himself to blame for his predicament; for he should protect himself against that risk’ (quoted above).
- [24] As far as the cross appeal against the costs order is concerned, Howard’s lack of success on the merits means that it must fail. There was no appeal against the order that the Attrees pay her costs before the pre-trial conference on 6 November 2009. And in this regard there was some logic in the reasoning of the high court, which in any event was exercising a discretion. The cross appeal must thus be dismissed and paras (c) and (d) of the high court’s order (that the Attrees pay Howard’s costs incurred prior to 6 November, and that she pay her own costs incurred after that date) must stand.
- [25] The appeal is upheld with costs and the cross appeal is dismissed with costs. Paragraphs (a) and (b) of the order of the high

court are set aside and replaced with:

C H Lewis

Judge of Appeal

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