

SOUTH AFRICA / JUDGMENT

Wakefields Real Estate (Pty) Ltd v Baboolal and Another (9167/07) [2013] ZAKZDHC 71 (22 February 2013) [2013] ZAKZDHC 71

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mbatha

CASE / FILE NUMBER

9167/07

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IN

THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC

OF SOUTH AFRICA

CASE

NO: 9167/07

In

the matter between:

WAKEFIELDS

REAL ESTATE

(PTY)LTD.....Plaintiff

Versus

TIMAL

BABOOLAL.....First

Defendant

BHANUMATHI

BABOOLAL.....Second

Defendant

JUDGMENT

Delivered: 22 January 2013

MBATHA J

- [1] The Plaintiff is Wakefields Real Estate (PTY) Limited, a company duly registered and incorporated in accordance with The Laws of the Republic of South Africa, carrying on business as Wakefields Estate Agents and has its principal place of business at 105 Essenwood Road Durban, KwaZulu-Natal.
- [2] The Defendants are Timal Baboolal and Bhanumathi Baboolal, who both reside at No.[...] C[...] C[...], U[...] R[...]. They are cited herein as the First and Second Defendants respectively, jointly and severally the one paying the other to be absolved.
- [3] The Plaintiff is claiming a sum of R384 750.00 together with interest thereon a tempore morae from the date of transfer, being, the 15th of January 2007 to date of payment and costs of suit.

The Plaintiff's claim arises from a claim for commission arising from the sale of the property for R4,5 million belonging to the Defendants.

- [4] The Plaintiff claims that one of its agents, Ms Helena Real, was the effective cause of the sale and therefore entitled to commission.

The Defendants' dispute that the Plaintiff is entitled to commission on the basis that it failed to bring the sale into fruition and was therefore not entitled to any commission. It is their evidence that it was Tuscan Real Estates that concluded the

sale with Mr and Mrs Rangappa and Tuscan was therefore entitled to commission.

- [5] The following issues are common cause:

5.1 That the Plaintiff has complied with the provisions of the Estate Agency Affairs Act 112 of 1976. That it has a valid Fidelity Fund Certificate in terms of section 26 (1) of Act 112 of 1976, as amended.

5.2 It is also common cause that the Plaintiff was given a sole and exclusive mandate by the Defendants starting from the 3rd of May 2006 to the 22nd of May 2006.

5.3 That during the period of the sole mandate the Rangappas were introduced to the Defendants. Their offer to purchase was accepted on the 3rd of May 2006 by the Defendants subject to a suspensive condition which lapsed after the expiry of a ninety (90) day period.

5.4 It is also common cause that the offer lapsed when the suspensive condition was not fulfilled.

5.5 It is also common cause that Tuscany made an offer to the Defendants on the 21st of August 2006 on behalf of the Rangappas for the purchase price of R4,5 million, which they accepted. The property was subsequently

transferred and registered to the Rangappas on the 15th of January 2007.

[6] It is important at this stage that I summarise the facts of this case, so as to be able to highlight where the dispute lies.

As of the 3rd of May 2006 the Plaintiff was given a sole and exclusive mandate by the Defendants. This mandate was to end on the 22nd of May 2006. The agent for the Plaintiff, one Ms Helena Real, introduced the Rangappas to this property situated at No.13 Canterbury Crescent, Umhlanga Ridge, KwaZulu-Natal. The property was for sale for R5,2 million. An offer of R4,7 million was accepted by the Defendants, but it was subject to a suspensive condition, which had to be fulfilled within a ninety day period. The sale failed as the suspensive condition remained unfulfilled.

After the lapse of the mandate, the property remained on the market and it was still being marketed by the Plaintiff. The Defendants were also approached by one Ms Wilson, an agent for Tuscany, to market their property. Tuscany advertised the property and was approached by Mrs Rangappa to make an offer to the Defendants for the sum of R4,5 million. This offer was accepted by the Defendants and the property was subsequently transferred to the Rangappas. Tuscany was paid commission for the sale of the property.

[7] The main issue, amongst others, to be decided by this Court is whether the Plaintiff was the effective cause of the sale. This is a factual issue, which can be determined by the evaluation of the evidence presented to this Court.

8.1 The terms of the sole and exclusive mandate given to the Plaintiff to sell the property as of the 3rd of May 2006 are relevant to the determination of the issues before this Court. The Plaintiff was given a mandate starting from the 3rd of May 2006 and ending on the 22nd of May 2006 to sell the property for R5,2 million or such a lesser amount as the seller may be prepared to accept (my underlining).

8.2 The Defendants undertook to pay the Plaintiff a commission of 7.5% plus VAT thereon calculated on the purchase price accepted by the seller during the currency of the agreement.

8.3 Such commission was also payable by the seller in the event that the sale of the property would occur within a period of thirty

(30) days after the termination of the agreement (whether by effluxion of time or otherwise) to a person who was introduced during the mandate period to the seller or the property as a potential purchaser thereof by Wakefields or any third party or after the expiry of a period of thirty (30) days after such termination and Wakefields was the effective cause of the sale (my underlining). The terms of the sole and exclusive mandate appear in Exhibit "A".

[9] It is common cause that on the very same day of obtaining the mandate, Ms Real submitted an offer by the Rangappas for the purchase

price of R4,7 million. It was accepted by the Defendants subject to a suspensive condition that the Rangappas will sell their immovable

property at No.5 Taunton Place, Summerset Park, within a period of ninety (90) days from the date of the acceptance of the offer being the 3rd of May 2006. It was the intention of the Rangappas that from the proceeds of the sale of their immovable property a sum of R3,4

million would be paid towards the purchase price of the immovable property sold by the Defendants. ABSA bank had also pre-approved a mortgage loan in their favour totalling a sum of R1 333 856,12.

[10] The Rangappas kept in touch with Ms Real in a quest to get the property that they were very keen on. It was the evidence of Mrs Rangappa that they came up with various proposals to Ms Real, who remained adamant that the Defendants would not accept a reduced

offer. This led them to approaching Tuscany who had also advertised this property at a later stage.

[11] It is submitted on behalf of the Defendants that the Plaintiff had failed to introduce a buyer that was able financially and legally to purchase the immovable property from the Defendants. It is further submitted that the Rangappas were unable for financial reasons to purchase the property during the sole and exclusive mandate.

[12] It was submitted on behalf of the Defendants that the Plaintiff did not fulfil the mandate as it did not bring a purchaser for the sum of 5,2 million rand as required by the Defendants. The mandate stated categorically that “or such a lesser amount as the seller may be prepared to accept”. The mandate was signed by the Defendants and is self explanatory as it appears where I have underlined above in this judgment.

EVALUATION OF EVIDENCE AND APPLICATION OF THE LAW

[13] It is important to note that the property was finally bought by the very same Rangappas who had made an offer during the subsistence of the exclusive and sole mandate held by the Plaintiff. The Rangappas had means to purchase the property including the pre-approved

mortgage loan and a property of value to realise. Their failure to sell within the ninety (90) day period cannot be interpreted to mean that they were not financially in a position to purchase the property.

- [14] If the premises are sold to a willing and able purchaser and the agent was the effective cause of the sale, he/she is entitled to commission. The actual sale can take place at a later stage, for instance, in a case where the agent introduces a tenant who later on exercises his right pre-emption incorporated in the lease agreement to purchase the very same property such an agent would be entitled to commission as long as the Court accepts that he/she was the effective cause of the sale.
- [15] This cannot be seen in isolation. The agent is entitled to commission if he/she introduced a purchaser who is able legally and financially to purchase the property and such an introduction leads to the conclusion of an effective sale as held in *Selman Properties 112 (PTY)LTD*[1].
- [16] The mere fact that their offer was accepted subject to the sale of their property is indicative of financial means and that the Defendants accepted that they had a valuable asset capable of realisation. It would have been a completely different scenario had they only qualified for R1,3 million loan only.
- [17] In *Aida Real Estate Ltd v Lipsichtz*[2] the Court held that the agent who brought the seller and the purchaser together was the effective cause of the sale, though the purchaser had to overcome certain financial obstacles.
- [18] Further, the mandate given to the Plaintiff was to introduce a purchaser for the sum of R5,2 million or such a lesser amount as the seller may be prepared to accept. I accept that our case law has established the following principle:

“That if the agent introduces a person who negotiates with the principal and, because of the introduction and negotiations the seller agrees to accept a lower price, the agent is nevertheless entitled to commission notwithstanding the failure to carry out the original

mandate.”

The aforementioned principles appear in *Doyle v Gibbon*[3] and *Burt v Ryan*[4]. Also in *Le Grange v Metter*[5] at 80 De Velliers JP held as follows:

“...a broker or other selling agent (in the absence of any argument to the contrary) been held repeatedly to be entitled to his commission, when once it is established that he was the “efficient cause” of the sale, notwithstanding that such sale may only go through after his active efforts have ceased and notwithstanding that such sale may go through on different terms and conditions from those on which the broker or agent was employed to sell...”

- [19] The ability to purchase does not depend whether the purchaser has money in hand nor does it depend on whether the purchaser has a binding agreement in terms of which a third person is obliged to provide him or her with resources to carry out the contract, as stated in *James v Smith*[6] and *Gluckman v Landau and Co.*[7].

- [20] A purchasers' ability to pay must be assessed at the time of signing the agreement as held in *Beckwith v Foundation Investment Co.*[8]. I therefore find that the submission made on behalf of the Defendants that the Rangappas when introduced to the Defendants were not legally and financially able to purchase the property to be without merit.
- [21] I must also determine if the Plaintiff was the effective cause of the sale. The Defendant's evidence and submission is that the sale took place after the expiry of the sole and exclusive mandate, therefore the Plaintiff was not the effective cause of the sale. This is a question of fact and the onus is on the Plaintiff to prove that they were the effective cause of the sale.
- [22] Ms Real dealt with the Defendant's property whilst at Acutts. Upon joining the Plaintiff's agency she found the same property on the Plaintiff's marketing list and continued to market it. As from September 2005 she actively marketed the property by holding four (4) or five (5) show houses and took prospective buyers to the property at various intervals to the property. I consider her actions to be aggressive marketing and indicate her intention to market the property as speedily as possible.
- [23] It was both the evidence of Ms Real and Mrs Rangappa that she fell in love with the property for the first time that she saw it. She also took her again to see the property with her husband and family. This is supported by evidence before this Court indicating that the Rangappas attended one of her show houses. Ms Real took her for a detailed tour of the property. This is clear from the offer of purchase, that indeed she had been taken through the property, she pointed out the repairs that she wanted to be effected on the property. Such issues can be raised when a person has a keen interest on the property and has had ample of opportunity to tour the property to see such defects.
- [24] The introduction to the property was formalised by the offer in writing. It was also Mrs Rangappa's evidence that she tried to persuade the Defendants through Ms Real to reduce the purchase price as she would also have done likewise in respect of her own property that she was selling. It was Mrs Rangappa's evidence that she remained keen on the property even after the lapse of the ninety (90) days period and kept in touch with Ms Real.
- [25] The Rangappas approached Tuscany after it advertised the property. There is no evidence before this Court which indicates any form of aggressive marketing by Tuscany or more than the once off advertising. Tuscany is approached by the purchaser who has been dealing with another agent for quite some time and who was introduced to the very same property by another agent.

25.1 It is also Mrs Rangappa's evidence that she saw the property again only after signing the offer to purchase with Tuscany. The offer to purchase was signed on the 26th of August 2006 and the suspensive condition lapsed in respect of the previous offer on the 3rd of August 2006. This was within the same month, that the Rangappas made an offer through Tuscany to the Defendants.

25.2 I must therefore consider if the intervention of Tuscany at that stage was weighty enough not to make the Plaintiff the effective

cause of the sale. It is quite clear from what I have highlighted above that the intervention of Tuscany was not weighty enough to make it the effective cause of the sale. It is the agent who is the effective cause of the sale that is entitled to commission and not necessarily the agent who introduces the purchaser, as held in *Eschini v Jones*[9].

25.2 In the same case it was further held that the sine qua non of the sum of the causes may be said to be the effective cause of the sale. A long break after the first introduction may indicate a new mandate if resumed by another agent. This was not the case here, as the suspensive conditions lapsed on the 3rd of August 2006 and the offer was made on the 26th of August 2006. It is also the evidence of Mrs Rangappa that when she saw the advert by Tuscany she immediately contacted Ms Real and tried to persuade her to make an offer of R4,5 million to the Defendants. This is an indication that the Plaintiff was still in the picture and was considered in all respects to be the agent for the property. She indicated that the Defendants were still keen on a higher purchase price, which was not unusual in the light that the Defendants had previously taken the property off the market, revamped it and returned it back to the market with the intention of getting a better return.

[26] The evidence presented before me proves on a balance of probabilities that the Plaintiff was the effective cause of the sale as the Rangappas were willing and able to buy on the seller's conditions and that the sale was bound to have gone through

independently of any negotiations conducted by another agent, as was held in the *Eschini* case mentioned above.

[27] There is a difference between full and substantial performance. If an agent introduces a person who negotiates a lower rate the principal accepts it, the agent is still entitled to commission. In this case, the terms of the mandate to Wakefields include the acceptance of a lesser amount.

[28] Where there are competing agents, it is the agent who is the effective cause of the sale that is entitled to commission and not necessarily the agent who introduces the purchaser as held in the *Eschini v Jones* judgment[10]. Our Courts hold the view that the first introduction is the decisive factor, particularly when nothing intervenes between the time of the introduction to the time of the sale. A long break after the first mandate may indicate a new mandate if returned by another agent. I find that there was no break at all in this case. This sale could have gone through without the intervention of Tuscany. There were in fact no negotiations by Tuscany save to submit the offer to the Defendants.

[29] Here we have the classical scenario of the principal preventing the agent from earning the commission. It is trite law that when an estate agent has done his or her mandate, but the principal through his own fault fails to take the benefits of the agents service or refuses to allow the agent is nevertheless entitled to commission as held in Consolidated Estates and Trusts Ltd v Turnbull[11].

29.1 The principal first independently marketed the property, took it off the market as it did not give them the desired financial result. He revamped the property and put it back on the market. The only agent who is mentioned and who marketed the property extensively was Ms Real. She was astute to realise that she has a financially and legally competent purchaser in the Rangappas and sought a sole and exclusive mandate from the principal. Ms Reals' evidence is that the principal would not accept an offer to R4,5 million as he had rejected such an offer from another prospective buyer. She had been told not to waste their time, which is dismissive. It was only upon a presentation of a lower offer by a different agent that he realised that Ms Real had not been wasting his time, this is the one and only offer that he has on the table. I accept that he had indeed rejected the reduced offers, as he had to consult his family before eventually accepting the reduced offer. Had the Defendants not have pushed aside the offers proposed by the Plaintiff, it is clear that the property would have been sold by the Plaintiff.

[30] The Plaintiff has discharged the onus that she was the effective cause of the sale irrespective of the dismissive attitude of the principal and that this was so irrespective of the intervention by Tuscany. I accept that the Plaintiff has successfully proved that the effects of her introduction continued right up to the time of purchase, irrespective that it was affected after the termination of her sole and exclusive mandate. The degree of her efforts should be taken into account as well.

[31] The submissions made by the Defendants as to the unreliability of her evidence are rejected and contradictions made by Ms Real are very minor, and have no effect on her entire testimony. She gave her evidence clearly and in a sincere manner. I find her to be a credible witness.

[32] Her counterpart, Ms Wilson, was selective in her evidence. It is not probable that she has completely forgotten whose board was on the property of the Defendants. I find that she was fully aware of the consequences of her actions, hence her covering up that she sought legal advice. Her actions were opportunistic in nature.

Irrespective of Mrs Rangappa's evidence emphasising that Ms Real refused to take her offer of R4,5 million to the Defendants, I still find that the evidence presented before me by the Plaintiff was the effective cause of the sale.

[33] The Supreme Court of Appeal in Wakefields Real Estate v Attre[12] dealt with the issues whether an estate agent who introduces a purchaser to a property where a sale is concluded through another

agent is the effective cause of the sale and entitled to commission. This supports the Plaintiff's case as that case deals with the same issues raised in this matter.

[32] Similarly, in *Aida Real Estate Ltd v Lipsichtz*[13] the Court held that the agent who brought the seller and the purchaser together was the effective cause of the sale; this was a

purchaser who had to overcome certain financial obstacles. In this case there were no financial hurdles, as the Rangappas were on a good legal and financial standing.

[34] Even though an agent is paid by good intentions or even hard work, it is still a factual issue. In this case, the results were prevented by the dismissive attitude of the Defendants and the Tuscan agent who had realised that she was not the effective cause of the sale, but still went ahead to finalise the deal.

[35] I therefore find in favour of the Plaintiff.

I make the following order:

(a) The First and Second Defendants are ordered to pay the Plaintiff the sum of R384 750.00, together with interest at the rate of 15,5% p.a from the date of transfer, being the 15th of January 2007 to date of payment, jointly and severally, the one paying the other to be absolved;

(b) Cost of suit on a party and party scale.

Date of hearing: 05 October 2011

Date of judgment: 22 January 2013

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[1] 2006

(1) All SA 545 (C).

[2] 1971

(3) SA 871 (W)

[3] 1919 TPD 220

[4] 1926 TPD 682.

[5] 1925 OPD 76

[6] 1931 KB 317

[7] 1944 TPD 261

[8] 1961

(4) SA 510 (A) 513.

[9] 1929 CPD 18 29.

[10] 1929 CPD 18 29

[11] 1924 TPD 1 6

[12] (666/10)

[2011] ZASCA 160

[13] 1971

(3) SA 871 (W)

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