

SIGNING THE SALE AS EXECUTOR: WATCH OUT

Bluegrass Trading 1112 CC t/a Rawson Properties v Ramsern and Another (39592/2019) [2021] ZAGPJHC 753 (30 November 2021)

Married persons often appoint their spouses as executors in their deceased estates. When acting in that capacity, the executor must be careful to note this capacity when signing agreements relating to the spouse's assets. Here, one of the reasons for the failure of the agent's claim for commission related to the fact that the sellers (the surviving spouse and her husband's deceased estate) were not properly identified in the agreement. The surviving spouse had appended her name and signature in duplicate in some places, but did not indicate that this meant that she was acting both as executor and in her personal capacity. The agreement was rendered void and the agent's redress against the purchasers who had cancelled the sale, as provided for in the purported agreement, fell away. This is an important reminder to clearly note the capacity in which a person signs an agreement.

The Judgment can be viewed [here](#).

FACTS

Mr and Mrs Ramsern entered into an agreement of sale with Ms L Robinson. At the time, the deeds office records showed the owners as Mr and Mrs Robinson. However, Mr Robinson had passed away in 2013 and Mrs Robinson was the executrix in the estate. She had given a mandate to Bluegrass Trading 1112 CC t/a Rawson Properties ('the estate agency') to sell the property.

This matter dealt with a claim for payment of commission by the agent against the purchasers after the sale was cancelled. Regarding the commission, there was a clause in the agreement stating that the seller agrees to pay to the estate agency its commission, upon transfer. The agreement stated that the commission was deemed to be earned upon transfer of the property to the purchaser or upon cancellation of the sale by either party. Clause 22 provided that if the purchaser failed to fulfill its obligations, within 7 days of delivery of written notice from the seller, any of his obligations herein, the seller and his agent shall have the right to, amongst other things, hold the purchaser to the agreement or to claim fees from the purchaser.

Signature of the agreement was problematic:

- On page 1 of the document, the names of each the purchasers were inserted in manuscript. Under the notation "Seller No. 1" the name Loreen Robinson is written and beneath that, after the notation "Spouse", the words in manuscript: "Estate late John Joseph Benjamin Robinson" followed by a reference to an ANC with date 3/7/1990. Further on in the agreement, provision is made for the signatures and marital status of the purchaser/s and seller/s respectively to be inserted. The signature of the purchasers appeared, followed by that of Mrs Robinson in her capacity as spouse. Mrs Robinson signed twice against the notation "Seller No. 1" and below that in the space provided for spousal details wrote "N/A".
- The final page of the sale agreement entitled "ADDITIONAL INFORMATION" is in printed format with provision for manuscript details to be inserted concerning the purchasers and the seller. Seller 1 is reflected as "Robinson", below which two identity numbers appear, one of which is that of the late John Joseph Benjamin Robinson and the other that of Mrs Robinson.
- Further on in the document, after the manuscript insertion of "Bluegrass Trading 1112 CC" and a reference to the franchisor, there appears in printed script "... and we hereby accept the benefits of the foregoing contract". Nowhere in the document was there any signature on behalf of the estate agent or agency.

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The purchasers disputed liability for the commission. They argued, amongst other things, that the agreement was void as the sellers were not identifiable; and that they were entitled to cancel the agreement due to Mrs Robinson's misrepresentation, as she never informed them that the home builder was not registered with the NHBRC and that the home was never enrolled with the council, as is required by the Housing Consumers' Protection Measures Act, 95 of 1998 ("the Housing Act"). After an email to this effect to the agent, seller and conveyancers, they were presented with a wasted costs bill and no further correspondence, and assumed that the agreement was validly cancelled.

HELD

Validity of the sale agreement

- The Deeds Office records reflected that the property was at all material times owned by both Mrs Robinson and Mr Robinson. There was no clear indication on the sale agreement itself that it was signed by both parties, specifically that Mrs Robinson signed in her capacity as executrix as well as in her personal capacity. No proof of appointment as executrix was annexed to the agreement.
- In *Brink v Humphries & Jewell (Pty) Ltd*, the SCA accepted the general proposition that where a document (in that case not specifically an agreement under the Alienation Act) makes provision for signature in two capacities (in that case accepting a credit application and signing as personal surety) it is not necessary that the signatory is required to sign the form twice, once in each capacity. In this sense, the signature can be a "double signature".
- However, an executor's functions must be understood particularly: "It has long been recognised in our case law that a deceased estate has no legal personality and consists of an aggregate of assets and obligations. The estate vests in the executor...and he alone has the power to deal with the totality of the estate's rights and obligations ... As the executor alone has the power to deal with the assets of the estate, it follows that the executor must be a party to the sale of any immovable property belonging to the estate." Thus, in order to comply with section 2(1) of the Alienation of Land Act, the identity of the parties/principals must appear on the face of the written document. If evidence outside the agreement is necessary to establish the identity of the seller, the agreement is invalid.
- Applying these principles to the present matter: Mrs Robinson, as executrix, was entitled to sign the agreement on behalf of her late husband's estate; whether she did so, was an outstanding question, as there was no proof before the Court that this was indeed her intention (the matter being brought before the Court by the agent claiming commission and not the seller claiming that there was a valid agreement).
- Thus, section 2(1) of the Alienation of Land Act that requires the identity of the parties to appear in the agreement of sale was not complied with. Although there were clear references in the sale agreement to the existence of an estate in the name of the late John Robinson (referred to next to the notation "Spouse" on the first page of the agreement, as is there a reference to an antenuptial contract with the date "3/7/1990" on the same page), there was no indication on the printed page for signatures by the purchasers and sellers respectively that the estate late John Robinson is implicated. Other questions arise: if Mrs Robinson did not apply her mind to this question and she simply filled in the information regarding her late husband for completeness (the reference to his estate, his identity number and – apparently – his income tax number) would this constitute the necessary intention to contract on behalf of the estate? This question cannot be considered without an evidential backing, which was lacking.
- The applicant in this matter was the estate agent. She did not demonstrate that she had knowledge or insight into Mrs Robinson's state of mind preceding the conclusion of the sale agreement, particularly regarding Mrs Robinson's double signature at various places on the sale agreement.

- The sale agreement was therefore void, as argued by the purchasers.

Invalid sale agreement: What happens to the agent's claim for commission?

- The relief sought by the estate agent flows directly from the sale agreement. The legal basis of the agent's claim against the purchasers was based on a *stipulatio alteri* contained in the sale agreement. A *stipulatio alteri* is not simply a contract designed to benefit a third person, but " ... a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two". The question in each case is whether there is an intention that the third party can, by adoption of the promise, become a party to the contract in which this promise is embodied.
- Despite the apparent lack of a signature by the estate agent, the sale agreement adequately reflected that the agent accepted the benefits of the agreement. It is axiomatic that such benefits as may be recorded in such agreement can only accrue to the applicant if the sale agreement itself is valid.

CONCLUSION

For these reasons the claim had to be rejected, as it was not shown that there was a valid sale agreement.

(The Court then went further regarding the other defences raised by the purchasers, in the event of the finding that the agreement was void being challenged.

The misrepresentation relied on by the purchasers

- The misrepresentation relied on by the purchasers concerns the failure of the builder not to register the house as required by the Housing Act. This Act provisions imposes a number of important obligations on a home builder. No person is entitled to carry on the business of a home builder or to receive consideration in respect of the sale or construction of a home unless that person is a registered builder.
- Mrs Robinson, together with her late husband would (at the material time) have fallen within the definition of persons who are housing consumers. It appears from a reading of the Act that the purchasers would also have fallen within the definition of housing consumers, once they became owners.
- The purchasers stated that the certificate and the registration of the builder with the NHBRC was of importance to them because they had witnessed certain defects to the house and they would have been comfortable with the structural integrity of the house if there had been a certificate. However, there was no evidence that the purchasers enquired about this certificate before they submitted the offer to purchase, despite noticing the structural problems when they first inspected the home. They had also not shown that Mrs Robinson knew this or that she had a legal duty to advise them. In order to hold someone legally accountable for a misrepresentation (by silence), there must be proof that the person had the relevant knowledge.
- The purchasers did not established the elements of an actionable non-disclosure or silence by representation and this argument could not succeed.

Cancellation of the agreement

- The email sent by the purchasers notified the seller, agent and conveyancer that the purchasers cancelled the sale because there was no certificate of registration for the house.
- The purchasers did not show that they were entitled to cancel the sale based on a material misrepresentation/non-disclosure on the part of Mrs Robinson sufficient to render the sale agreement void, or to permit them to cancel that agreement. However, the facts showed that after initially refusing to accept the cancellation, the conveyancers subsequently sent an account for wasted costs to the purchasers. This appeared to confirm an acknowledgement by Mrs

Robinson that the sale agreement had come to an end, through the express or implied joint intention of Mrs Robinson and the purchasers.

The legal basis of the agent's claim for commission

- A claim for commission at common law, lies in the relationship between the seller and the agent. The agent here could therefore not claim for commission as against the purchasers.
- The other basis would be for the claim to lie in contract. This could not succeed either because the contract was found to be void. But also, because clause 22 of the purported agreement gave Mrs Robinson the right: (i) to hold the purchasers to the agreement, or (ii) to cancel the agreement and to retain the amounts paid on account of the purchase price as liquidated damages on account of the purchasers' breach, or (iii) to claim fees from the purchaser. Plainly, (i) and (ii) are options that can accrue only to Mrs Robinson. Option (iii) can accrue to Mrs Robinson or to the agent. If Mrs Robinson were to pay commission to the agent on cancellation, then she would probably be entitled to seek to recover this from the purchasers. If she had not taken this step it would be a contractual option for the agent. But any right of action, either by Mrs Robinson or by the agent, is conditional upon proof of the introductory portion to clause 22 being the failure by the purchasers to fulfil any of their obligations within seven days of delivery of a written notice from Mrs Robinson. This is the contractual and consequently the jurisdictional condition for any claim by the agent against the purchasers.
- No such notice was issued by or on behalf of Mrs Robinson. What the estate agent was seeking to achieve, was to recover commission from the aborted sale with the purchasers. It could not do so as the agreement was not valid.)