LEARN FROM THE PITFALLS ARISING FROM ORAL MANDATES

Gilfillan v Renico Construction (Pty) Ltd (36734/2021) [2024] ZAGPPHC 241 (11 March 2024)

Nowadays, with so much business activity conducted digitally, it comes almost as a surprise to find that persons in business transactions do not record the details of their oral engagements via, at least, an email or Whatsapp. This matter illustrates the pitfalls that can arise from entering into oral mandates. The estate agent, mandated by the purchaser, was successful in bringing a seller and purchaser together and was mentioned in the sale agreement as the effective cause of the sale. However, when the purchaser elected to cancel the sale, it argued that it was not liable for commission. The agent, on the other hand, contended that their oral agreement did not make the payment of commission dependent on transfer. Absent a recordal of the terms of their engagement, it was necessary to approach a court for a finding, many months and extensive legal fees later.

The Judgment can be viewed here

FACTS

Gilfillan, a sole practitioner estate agent, was (so she alleged) mandated by Renico Construction (Pty) Ltd ('RC'), a developer, to source property suitable for commercial development. RC was known to her as they had previously worked together. (In court, RC denied that Gilfillan had a mandate.)

In performing the mandate, Gilfillan sourced various properties for RC. Initially nothing came from these efforts, but after introducing RC to the so-called 'Van Tonder property', matters took a turn for the better. Although that property was not purchased by RC, the 'Van Tonder property' introduction was the forerunner to putting RC and Brawild (Pty) Ltd ('Brawild') into contact with each other. Shortly after, but before any agreement was concluded between RC and Brawild, Gilfillan handed her file with information over to RC.

This was followed by various email exchanges between RC and Brawild. Eventually, without further input from Gilfillan, RC instructed its attorneys to prepare a sale agreement. In this agreement, RC inserted a clause recording that Gilfillan was the effective cause of the sale and that commission in an amount of R450 000-00 was payable to her by RC.

Brawild and RC (as purchaser) signed the agreement. Gilfillan was not present at the time of the conclusion of the sale agreement, but received a copy of the written agreement from RC.

Gilfillan knew RC's business from previous deals she had with them and knew that arrangements regarding commission did not always follow the norm, being payment on registration of transfer. In particular, in a previous instance, the agreement provided for payment of the commission to occur in instalments.

RC eventually cancelled the agreement with Brawild. Gilfillan sought payment of her commission. RC denied that she was entitled thereto because (i) there was no mandate; and (ii), in any event, despite the absence of a term in the agreement that commission was payable on transfer only, such a term was a *tacit* or *implied* term of the agreement. If transfer did not occur, no commission would be payable.

HELD

Was there a mandate?

- On the facts, it was clear that Gilfillan was mandated by RC. She had introduced an able and willing seller to RC and a written agreement ensued.

- The evidence before the Court also included an email from RC to Gilfillan where she enquired after the progress in the transaction, to which RC responded that "Jou werk is klaar…". The only logical inference to be made from these facts was that, as far as Gilfillan was concerned, she was mandated and had executed her mandate.
- Having fulfilled her obligation in terms of the mandate, she was entitled to claim her commission by virtue of the agreement.

Was payment of commission dependent on transfer taking place?

- It appeared that RC was of the view that its election to cancel the agreement would free it from its contractual obligation towards Gilfillan. This despite the fact that RC was, at the time of concluding the agreement, both willing and able to buy the property.
- The agreement of sale however contained no provision that the commission will only become due and payable after transfer. There was also no other clause in the agreement that would justify such an interpretation.
- To infer a tacit term into the written agreement of sale, as claimed by RC, that payment would only be made after registration of transfer, cannot be upheld. (A tacit term is an unexpressed provision in an agreement which derives from the common intention of the parties and which is inferred from the express terms of the contract and the surrounding circumstances. The common law test for determining whether a tacit term exists, is referred to as the 'officious bystander' test. The test poses the question whether an officious bystander, at the time the contract was entered into, would deduct (if asked) that the term was part of the agreement. If both contracting parties agree that the answer would have been in the affirmative, the tacit term is deemed to apply to the agreement between the parties.)
- Our Courts seldom import tacit terms into a contract and will only do so if there is adequate evidence of such a tacit term. In the present matter, there was no such evidence and no ground to infer such tacit term:
    - The written agreement was silent on when commission becomes due and payable;
    - RC admitted that Gilfillan had to do no more to earn her commission;
    - It was established that the prior arrangements between the parties regarding commission, did not follow the norm; and
    - There were no facts before the Court to support a finding that the usual arrangement regarding payment of commission applied in this instance.
- Similarly, regarding an alleged implied term (terms that do not appear in the contract or which are not expressly agreed to but, form part of the contract as a result of the clear intention of both parties) to this effect, there was no proof that both parties agreed that commission would only be payable on transfer. Hence such a term could not be implied to apply to the agreement.

CONCLUSION

The Court found in favour of Gilfillan and ordered the commission to be paid.

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