COLLECTING YOUR COMMISSION FROM THE ONE WHO UNDERTOOK TO PAY IT

Property Knight (Pty) Ltd v van Niekerk and Others (A220/2023) [2024] ZAWCHC 30 (7 February 2024)

This judgment is another warning against the dangers of intern agents not acting under the supervision of their principals, and the pitfalls that arise in the absence of records regarding the details of a mandate. The claim for commission in this matter failed because the agency, claiming that their intern was the effective cause of the sale, did not take account of the recordal regarding payment of the commission in the seller and buyer's sale agreement. In addition, the intern was reported to the PPRA for apparent failure to adhere to the requirements regarding his status as intern and his Fidelity Fund Certificate.

View the judgment here.

FACTS

On 6 September 2021, Ms Tshabalala and the VW Trust ('the Trust') signed a sale agreement for the purchase of a property belonging to the Trust. The agreement provided, amongst other things, that commission would be paid to the VR Group; that the agreement would not be varied or cancelled unless such variation or cancellation was reduced to writing and signed by all the parties or their duty authorised representatives; that the sale agreement constituted the whole agreement between the parties and that no other agreements, representations or warranties or whatever nature have been made by the parties or VR Group, save as may be included in the sale agreement; that commission would be payable on registration of transfer; that the Trust irrevocably authorised and instructed the conveyancers to make payment of the commission to VR Group from the deposit held by the conveyancers when due; and that the purchaser warranted that she was introduced to the property by VR Group and that VR Group was the effective cause of the sale.

At the time of the conclusion of the sale agreement, Mr Bernard, an intern estate agent, was employed by Property Knight. The sale agreement indicated that Bernard, acting as agent on behalf of the Trust, had offered the property for sale to Ms Tshabalala.

Property Knight (Pty) Ltd ('Property Knight') and VR Group are both estate agencies.

In October 2021, Property Knight instituted urgent proceedings in the Magistrates' Court in which it sought to interdict the conveyancers attending to the transfer, from paying the commission to Bernard and VR Group, and an order directing them to pay the commission to it (i.e., Property Knight) on registration of transfer. The urgent application was dismissed.

The conveyancers then informed Property Knight that they would proceed to pay the commission over to VR Group. Property Knight however retorted that the Magistrates' Court's dismissal of the urgent application did not mean that they (the conveyancers) were allowed to pay the commission to VR Group, and that the seller insisted on seeing a Fidelity Fund Certificate issued to Bernard under the auspices of the VR Group, failing which commission should be returned to it (i.e., the Trust). VR Group disagreed.

In light of the conflicting claims, the conveyancers issued an interpleader summons to which both estate agencies delivered interpleader particulars of claim. VR Group contended that on a proper interpretation of the terms of the sale agreement, it is entitled to payment of the commission because the sale agreement identifies VR Group as the party to which the commission is payable. Property Knight, on the other hand, contended that it is entitled to payment of the commission because Bernard (a) was the effective cause of the sale; (b) was employed by Property Knight at the time that the sale was concluded; and (c) held a fidelity fund certificate that identified him as an intern estate agent operating under the supervision of Property Knight. In these interpleader proceedings, the magistrate agreed with VR Group's contention and ordered the conveyancers to pay the commission to VR Group.

Property Knight then appealed to the High Court.

HELD

- The appeal turns on the proper interpretation of the sale agreement.
- It is well settled in our law that whether an agent is entitled to the payment of commission, depends upon what was agreed between the agent and the seller. Where such a claim is made, one has to look at the particular contract and see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened on the occurrence of which the commission is expressed to be payable.
- Consequently, in order to determine whether Property Knight is entitled to payment of the commission, regard must be had to the terms of the agreement, properly interpreted.
- It is trite that the interpretation of written agreements is a unitary exercise where the words of the document are considered in the light of all relevant and admissible context. While one is at liberty to depart from the words used, if having regard to admissible background and surrounding factors it is evident that the words used would lead to a result contrary to the purpose and intention of the parties, a court cannot make a contract for the parties.
- Bearing these principles in mind, it is clear from the terms of the sale agreement that the commission was to be paid to VR Group on registration of transfer. There is no single provision in the contract that can reasonably be interpreted as entitling any party other than VR Group to payment of the commission. Critically, there is no reference at all to Property Knight in the sale agreement. Further, none of the evidence established that it was the common intention of the parties to the sale agreement, that Property Knight be entitled to payment of the commission. This was, in any event, not Property Knight's case. Further, it was common cause that all of the contractual provisions for the payment of the commission had been fulfilled.
- Consequently the sale agreement, properly interpreted, entitled VR Group to payment of the commission and there was no basis in law for the commission to be paid by VGV to Property Knight. For these reasons the findings of the Magistrate could not be faulted.
- It may be that Property Knight has a claim for commission against the Trust, in terms of any separate agreement that it might have had in respect of the marketing and sale of the property. If there was such an agreement, Property Knight's remedy lies in enforcing its rights under that agreement.

CONCLUSION

The appeal failed. The Court directed that the judgment be sent to the Property Practitioners Regulatory Authority for investigation of the actions of the estate agent, Bernard.