IF THERE IS NO PRIOR AGREEMENT ON THE COMMISSION AMOUNT, IS IT THEN NOT PAYABLE?

Golden Rewards 120 CC t/a Remax Marine v M3 Holdings (Pty) Ltd **(D42/2019) [2024] ZAKZDHC 22 (10 May 2024)**

This judgment speaks volumes about commonplace challenges that estate agents face daily. In this case, in exercising a verbal (and later written) mandate to find a tenant for a five-year period for a commercial property, the agent had introduced a tenant to the landlord, facilitated various amendments to the terms of the lease, and caused the tenant to submit a draft lease for signature by the landlord. The landlord accepted the terms and proceeded to arrange signature of a lease agreement, excluding the agent. The agent's subsequent enquiry about payment of commission was dismissed, with the landlord retorting that no commission was payable as both the oral and written mandate were concluded on the basis that commission was still to be agreed upon, which agreement never occurred.

The judgment and summary below highlight the reasoning of the court.

FACTS

Golden Rewards 120 CC t/a Remax Marine ('Remax Marine') is an estate agency. It instituted this matter against M3 Holdings (Pty) Ltd ('M3') in respect of commission it believed was due to it.

What had transpired was that M3 had contacted Remax Marine and gave their Mrs Fourie a verbal mandate to find a tenant for a property it owned. The lease would be for a 5-year period at a rental of R170 000 per month.

Later, the agency and M3 met to finalise a written mandate. Although agreeing that Remax Marine would act on behalf of M3 to find a suitable tenant, the amount of the commission upon successful completion of the mandate, was not finalised and marked as "to be negotiated."

In performing her duties under the mandate, Mrs Fourie introduced Mr Gray of Bearing Man to M3 as a potential tenant for the property. Subsequently she arranged for them all to meet at the property; facilitated discussions between M3 and Mr Gray on their respective requirements; assisted in negotiations (including a drop in rental to R127 500 per month), all of which resulted in Mr Gray providing Mrs Fourie with a draft lease agreement for consideration by M3. Mrs Fourie forwarded the draft agreement to M3.

Shortly thereafter, Mrs Fourie learnt that a written lease agreement had been concluded between M3 and Mr Gray of Bearing Man – to her exclusion. This prompted an exchange of emails between herself, Mr Gray and M3. Mr Gray was adamant that he was at all times under the impression that Mrs Fourie had acted on the instructions of and on behalf of M3.

During subsequent interactions with M3, Mrs Fourie was made to believe (although this was not the case) that the lease agreement had been revised to a period of three years and later, to one year. The explanation proffered by M3 for these changes was that there were plans to sell the property and the variation of the lease was in anticipation of change of ownership.

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Not surprisingly, tensions developed between Mrs Fourie and M3. M3 refused to pay commission to Mrs Fourie, stating that there was no agreement regarding the amount of commission and hence no obligation to pay commission. Remax Marine approached the Durban High Court for assistance.

HELD

- Both the agency and Mrs Fourie held the required certification (Fidelity Fund Certificates). In this regard, the estate agency cannot be denied a claim for commission.

Implied contract term

- With regards to implied contracts, our courts have stated as follows: 'If there is no express agreement between the principal and agent, an implied contract may be inferred under certain circumstances. If a person conducts himself in such a way that from his conduct and from the surrounding circumstances it may be inferred that he is in fact authorising an agent to act on his behalf, then the implied contract of agency comes into being, but one has to be careful to guard against assuming that mere instrumentality in introducing a person who eventually purchases the principal's property constitutes an implied contract.
- In addition, an implied mandate can only be held to exist if the court is able to find that there was consensus between the principal and the agent that the latter should act on behalf of the former.

On the facts

- On the facts, it was shown that a mandate was given to Remax Marine and that there was consensus that they would act on behalf of M3. In addition, there was substantial performance by Mrs Fourie, in terms of the mandate. In the words of Mr Gray in an email to Mrs Fourie, "At no stage where we under illusion other than that you were acting on the mandate of M3 Holdings."

Was entitlement to remuneration agreed upon?

- The facts supported a conclusion that the parties definitely intended and agreed that remuneration would be payable. For example, M3 had approached Remax Marine because it knew that it carried on business as an estate agent; it had authorised Remax Marine to find a tenant; and there was an agreement that commission would be negotiated. In addition, in the emails and the discussions that unfolded between M3 and Mrs Fourie it was clear that some remuneration was intended for the services rendered by Remax Marine.

Amount of commission payable

- The court relied on an expert witness' indication of the commission that is usual in the area, and awarded commission in favour of Remax Marine.

CONCLUSION

Commission was awarded in favour of Remax Marine based on the average rate of commission in the area.

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