

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

DAMAGES CLAIM FOR AGENT PREVENTED FROM PERFORMING MANDATE

Lushaka Investments (Pty) Ltd v JHI Properties (Pty) Ltd (A5085/2014) [2016] ZAGPJHC 45 (31 March 2016)

Granting an exclusive mandate to an agent generally means that, for a determined period of time, the agent has the sole right to market the property and solicit offers in respect thereof. Where the seller breaches the provision, he may be liable to pay damages equal to commission to the agent who has been frustrated in performing his/her duties, as the interesting facts of this matter illustrate.

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

FACTS

In February 2013, Lushaka granted a mandate to JHI Properties (Pty) Ltd (JHI) to procure a purchaser for a property it owned. The mandate was to be in force for a period of six months. The relevant portions of the mandate provided that:

- Lushaka authorised JHI to offer the property for purchase only to certain parties nominated in an annexure to the mandate;
- JHI was exclusively appointed to negotiate with the parties mentioned in the annexure;
- if a sale was concluded during the term of the mandate or at any time thereafter 'with any party introduced to the property by JHI', Lushaka would be liable to JHI for commission; and
- no variation or amendment of the mandate would be enforceable unless reduced to writing and signed by both parties.

Amongst the nominated prospective purchasers, as listed in the annexure, was SA Corporate Real Estate Fund (SA Corporate).

Pursuant to signature of the mandate, JHI marketed the property and, on 28 February 2013, procured an offer from one of the entities on the list, Vividend Income Fund (Vividend). The offer was presented to Lushaka, who in turn, referred it to its attorneys. Various amendments were proposed by Lushaka. JHI vigorously pursued the offer and remained in discussions with Vividend in regard thereto.

However, and unknown to JHI, Lushaka had prior to the conclusion of the mandate with JHI appointed another agency, Penny Brothers Brokers and Valuers (Pty) Ltd (Penny Brothers) in October 2012, to solicit offers for the purchase of the property. During

October 2012 Penny Brothers had introduced the property to SA Corporate (i.e. an entity identified as a prospective purchaser in the annexure).

The upshot was that Penny Brothers were, from October 2012, marketing the property and had already engaged in discussions with SA Corporate whilst, from February 2013, JHI enjoyed an exclusive mandate to market the property to certain nominated prospective purchasers, one of which included SA Corporate.

In March 2013, Penny Brothers presented a first offer from SA Corporate to Lushaka. After some amendments to the offer, Lushaka accepted it on 28 March 2013. On 3 April 2013, Lushaka informed JHI and Vividend that the Vividend offer was declined and confirmed that an offer from SA Corporate had been accepted.

JHI instituted action against Lushaka claiming (i) damages, based on the argument that Lushaka breached the mandate in a number of respects and that, by reason of such breach, JHI was prevented from performance which would have included soliciting an offer from SA Corporate. As a result JHI claimed to have suffered damages in an amount equal to the commission; (ii) that there was a tacit or implied term in the mandate that JHI was entitled to commission in the event of a sale with any party included in Annexure A and, the sale of the property having been concluded between Lushaka and SA Corporate, it was entitled to the commission as agreed.

The trial court dismissed the first claim (for damages), holding that it was not proved that JHI would have procured an offer from SA Corporate and/or that JHI would have accepted it. It found in favour of Lushaka on the second claim (for commission), holding that SA Corporate was identified in the annexure as a potential buyer in respect of which JHI held an exclusive mandate for six months. The parties intended further, in their written agreement of mandate, that commission would be payable when JHI sold the property to SA Corporate at any time during or after the term of the mandate to any buyer listed in Annexure A.

JHI appealed the dismissal of the damages claim, arguing that were it not for the breach by Lushaka, JHI would have presented an offer for the purchase of the property from a willing and able purchaser (including an offer from SA Corporate) for the price eventually secured. Having been prevented from doing so, it suffered damages.

Lushaka cross-appealed the finding in respect of the commission claim, arguing that JHI could not have become entitled to commission because it had neither introduced SA Corporate to the property nor was it the effective cause of the sale.

HELD:

Lushaka's appeal on the claim for commission (second claim)

- The authorities are clear that in order to become entitled to commission, a party must be the effective, efficient or dominant cause of the sale.
- It was common cause in the present matter that JHI did not introduce SA Corporate to Lushaka and therefore could not be considered as the introducing party in any sense of the phrase.
- The ratio of the court *a quo*'s decision regarding the commission claim was faulted. The wording of the mandate was clear: it limited payment of commission by Lushaka to JHI to a sale 'with any party introduced to the Property by ourselves'. It followed from the wording that it was not any sale concluded during the period of the mandate which would entitle JHI to payment of commission but only a sale in which JHI had effected the introduction of the purchaser.
- To read an implied or tacit term into the agreement to this effect would be contrary to the other provisions of the mandate and could not succeed.

Lushaka's appeal against the finding in respect of the commission claim therefore succeeded.

JHI's cross-appeal on the damages claim

- JHI argued that Lushaka breached the agreement and, had it not done so, JHI would have secured an offer from a willing and able purchaser, including SA Corporate, for the price eventually secured. As a result, so JHI argued, it had suffered damages in an amount equivalent to the commission which would have been earned.
- It was not disputed that Lushaka breached the mandate in the following ways:
 - i. Lushaka allowed another agent to market this property without restriction as to prospective purchasers even though it had granted an exclusive mandate to JHI in respect of identified prospective purchasers. Lushaka did not inform Penny Brothers of the existence of the exclusive mandate with JHI in respect of those entities listed on the annexure;
 - ii. Lushaka allowed SA Corporate to remain on the list of nominated prospective purchasers to which JHI was limited to make an approach to, when it knew that Penny Brothers was in contact with SA Corporate. Lushaka denied having been aware of the approach to SA Corporate by Penny Brothers until it was presented with the first SA Corporate offer in March 2013. Nonetheless, it did not at that stage inform JHI of the interest expressed by SA Corporate through the agency of Penny Brothers or take any steps of disclosure to JHI or procure amendment of the mandate.

- iii. Lushaka allowed Penny Brothers to continue working with SA Corporate contrary to the exclusive mandate given to JHI.
 - iv. JHI had presented an offer from Vividend on 28 February, the very day the mandate was signed. Lushaka's response was to instruct JHI to attempt to negotiate a better offer from Vividend. The Vividend offer was still in play when Lushaka accepted the offer from SA Corporate. Lushaka only informed JHI that the Vividend offer was rejected on 3 April. During all that time, Lushaka was negotiating with Penny Brothers and SA Corporate contrary to the terms of the mandate.
 - v. Lushaka conceded that he kept the work of Penny Brothers, the offer from SA Corporate, the negotiations with SA Corporate, and the further offer from SA Corporate 'secret' from JHI because it was concerned that it may jeopardise the transaction.
 - vi. Lushaka accepted the revised offer from SA Corporate through the agency of Penny Brothers notwithstanding the exclusivity that JHI still enjoyed in terms of the mandate.
- There was thus ample support for the conclusion that Lushaka prevented JHI from negotiating with, and obtaining an offer from, SA Corporate by entertaining and ultimately accepting an offer from SA Corporate through Penny Brothers.

Prevention of performance

- By accepting the offer presented through Penny Brothers, Lushaka rendered it impossible for JHI to continue with its mandate.
- Lushaka accordingly, through its breaches, rendered performance by JHI impossible.

Damages

- JHI, as the aggrieved party in respect of Lushaka's breach of contract, was accordingly entitled to damages, being the loss which it suffered through not being able to fulfil the mandate by reason of Lushaka's breach - a claim for damages and not for commission. The two actions are different. If the principal, by some wrongful act or default, prevents the agent from earning his commission, the agent is entitled to recover (as damages) the actual loss sustained. The agent sues for damages, not for commission for services rendered.
- The quantum might be equal to the commission which he had hoped to earn, but the cause of action is different.
- JHI discharged the onus of proving that it would have secured the deal. It had a

relationship with SA Corporate over many years which was still ongoing. JHI knew that SA Corporate had cash earmarked for property acquisitions; in fact 'they needed to spend this cash quite urgently'. There was no reason why SA Corporate would not deal through JHI in this particular (or any other) transaction.

The cross-appeal thus succeeded and JHI was entitled to damages equal to commission.

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