

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

11 March 2024

DATE

SIGNATURE

CASE NO: 36734/2021

In the matter between:

MARIKEN JOSEPHINE GILFILLAN

Plaintiff

and

RENICO CONSTRUCTION (PTY) LTD

Defendant

JUDGMENT

(This matter was heard in open court and judgment was reserved. Judgment will be handed down by uploading the judgment onto the electronic file of the matter on CaseLines and forwarding the judgment to the representatives of the parties by Email thereof. The date of the judgment is deemed to be the date of uploading thereof onto CaseLines).

BEFORE: HOLLAND-MUTER J:

[1] The Plaintiff instituted action against the Defendant for payment of agent's commission in the fixed amount of R 450 000-00, together with interest *a tempore mora* and costs of suit upon an alleged oral mandate between the parties. The Plaintiff acted in person, while the Defendant was represented by Pieter Viljoen, the Defendant's Acquisitions Manager. The plaintiff is a single practising estate agent while the defendant is a property developer trading as a private company [(Pty) Ltd].

[2] In order to be successful with her claim, the Plaintiff must prove the conclusion of the oral mandate and the terms thereof and that the commission became due and payable to the Plaintiff by the Defendant.

[3] The defendant's defence can be summarised as follows:

(3.1) The defendant denies any **oral** mandate relied upon by the plaintiff **but** admits that a written agreement of sale was concluded between itself and Brawild (Pty) Ltd for the acquisition of a portion of land, and important *that the plaintiff was the effective cause of the agreement*; and

(3.2) The defendant admits that in clause 17 of the said written agreement it is recorded that *the defendant is responsible for payment of the commission of R 450 000-00 (Vat included) to Mariken Gilfilan Propreties*. The managing director and proclaimed Chief Executive Officer (CEO) of the defendant, Nicolaas S Louw, testified that he endorsed the written agreement in par 17 to approve the amount of R 450 000-00 as the commission payable to the plaintiff.

(3.3) The defendant however denies having mandated the plaintiff to source the development property to which the written agreement pertains and in respect of which it recorded its obligation to pay the plaintiff's commission.

(3.4) The defendant, despite denying the existence of the oral mandate relied upon by the plaintiff, avers that, with reference to clause 17 thereof, the parties expressly agreed that the commission was only payable upon registration of the said property into the name of the defendant, alternatively to an expressly agreed term, that it was an implied term of the agreement that the commission was only payable after transfer of the property, and in the second alternative that it was a tacit term of the written agreement between Brawild and the defendant that the commission was only payable after transfer had been registered.

PLEADINGS:

[4] I deem it not necessary to repeat the pleadings verbatim, suffice to state that after reading the pleadings, the issues for adjudication are the following:

The Plaintiff's case being:

(4.1) that there was there an oral mandate and if so, what were the terms thereof?

(4.2) Was the agent's commission of R 450 000-00, liability accepted by the defendant in clause 17 of the written agreement, due and payable when action was instituted?

The Defendant's case being:

(4.3) that the agreed commission of R 450 000-00 would only become owing upon fulfilment of the two conditions precedent ("CP") contained in clause 4 of the agreement; and

(4.4) that the agreed commission of R 450 000-00 would only become due and payable upon successful transfer of the property into the name of the defendant?

The Plaintiff's replication:

(4.5) The conditions precedent ("CP") were fulfilled:

(4.6) If held that the CP have not been fulfilled, the CP were to be deemed to fulfilled by virtue of the wilful conduct of the defendant causing the CP not being actually fulfilled; and

(4.7) If held that the commission was only due and payable after transfer of the property into the name of the defendant, it should be held that the defendant through its wilful conduct, frustrated transfer to take place and that the term of the agreement that commission will only become due and payable after transfer, be deemed fulfilled, and the R 450 000-00 payable.

FORMAL ADMISSIONS:

[5] The following formal admissions were recorded at the third pre-trial conference held on 12 October 2023:

(5.1) That the condition precedent in clause 4.1 of the written agreement was fulfilled; and

(5.2) That the condition precedent in clause 4.2 of the agreement of sale was fulfilled.

The minute of the third pre-trial is found on CaseLines under pleadings p 12-16 and in particular par 8.1 & 8.3 thereof. All conditions precedent was fulfilled.

JOINT PRACTICE NOTE:

[6] The defendant recorded the following issues not being in dispute in the Joint Practice Note (CaseLines 018-1 to 5) namely:

(6.1) That the plaintiff during or about June 2019 introduced the "*Hartbeesfontein property*" to the defendant;

(6.2) That on or about 30 October 2019 Brawild and the defendant entered into the written agreement of sale (supra) in terms of which the defendant purchased the Hartbeesfontein property for R 13 800 000-00 (Vat inclusive) from Brawild, and

(6.3) That the plaintiff was the *effective cause of the agreement* of sale. The agreement of sale is the agreement referred to supra.

[7] A further admission orally in Court during the opening address of the plaintiff that the property concerned in this action was transferred by Brawild to Bastion Development Group (Pty) Ltd on 22 June 2022.

REMAINING ISSUES FOR ADJUDICATION:

[8] Taking into account all the above listed admissions made preceding the hearing of the case, it is safe to state that the only remaining issues for adjudication by the court are:

(8.1) The oral mandate referred to by the plaintiff and its terms; and

(8.2) Whether the commission of R 450 000-00 claimed by the plaintiff is owing and was due and payable when the action was instituted.

THE ONUS OF PROOF AND EVIDENTIAL NORMS:

[9] The plaintiff bears the onus to prove her case on a balance of probabilities. The court has to adjudicate on the versions placed before the court via evidence. It often happens that the court is called upon to decide on conflicting versions. The court will view the versions and follow guidelines in previous case law to decide which version to be accepted. The court will evaluate the totality of the evidence, starting with who bears the onus to prove; the probabilities inherent in the respective conflicting versions and other factors coming into consideration. **Dreyer v AXZS Industries 2006(5) SA 548 (SCA) at 558G; Stellenbosch Farmers' Winery Group Ltd v Martell et Cie and Others 2003(1) SA 11 SCA at paras [5]-[7] at 14-15.** A similar approach is found in **National Employers' General Insurance Co Ltd v Jagers 1984(4) SA 437 (E) at 440 D-H.**

[10] Where a point is left unchallenged in cross-examination a party may accept that the unchallenged evidence be accepted as correct. **President of RSA v SARFU and Another 2000 (1) SA 1 (CC) at 36B.** In **ABADER v State 2008(1) SACR 347 W at 335 A** the court held that a failure to cross-examine is not always fatal, but a consideration to be weighed up with all the there factors in the case. I will attend hereto below.

EVIDENCE:

[11] There is no need to summarise the evidence in detail but to concentrate on the relevant portions to the issue before court. The evidence of the three witnesses were very similar but for different nuances on certain aspects. I will deal with those below.

[12] Me Gilfillan was the only witness who testified on behalf of the plaintiff's case. She knew the defendant business from previous deals she had with

them, in particular the one property developed and known as the Waterkloof property. This was one deal where the commission for the agent was not the so-called normal, i.e. that commission is paid by the purchaser after successful transfer of the property occurred. The agreement here was payment of the commission in instalments after some issues between the parties. The significance of this deal is to illustrate that the parties were not bound to the general custom that commission is due payable after transfer of the subject property.

[13] Gilfillan's version is that she was approached by Pieter Viljoen, the marketing director of the defendant to source the defendant property suitable for commercial development, a property suitable to develop in the region of 150 units. This prompted her to search a suitable property, the search ended with the property known as the M[...] [...] property. At first there was the Van Staden property, but due to a waiting time of almost three years, the property was not selected.

[14] Gilfillan's version that she first introduced the defendant to the Van Tonder property was never contested in cross-examination. The sourcing of this property was also the forerunner of the later agreement of sale between the defendant and Brawild. Her mandate in this regard was never challenged.

[15] The written "*Heads of Agreement*" prepared by the defendant also did not deal with who was to pay any commission or the rate of any commission. It was also not mentioned in these *Heads* that commission would only be payable after registration. In view of the admissions made and the later evidence by Louw there can be no doubt as to the value of the plaintiff's evidence.

[16] She eventually found the M[...] property (from the Sinovich group) and introduced the defendant thereto and handed a file containing information thereof to Viljoen. Various emails were exchanged between them which eventually led to Louw having a written deed of sale prepared by his attorneys without any further input from the plaintiff. The significance of this written agreement is that Louw inserted the amount of R 450 000-00 as estate agent commission payable to the plaintiff by the defendant.

[17] Although Gilfillan testified that she mentioned her commission at 3,5 % to Viljoen, Louw unilaterally inserted the amount of R 450 000-00 as commission in clause 17 of the agreement. Gilfillan was not further involved in the matter and received a copy of the written agreement from Viljoen. Advocate Kriek on behalf of the defendant tried her utmost to make something of the 3,5 % not calculating to R 450 000-00 during cross examination of Gilfillan, but in my view this did not detract from the evidence of Gilfillan. The amount of R 450 000-00 was more than 3,5% of the purchase price but that is the amount that Louw on behalf of the defendant decided was what the agent commission should be and the plaintiff accepted it.

[18] The importance of this evidence on the written agreement is that the defendant undertook to pay the commission to Gilfillan without any precedent that payment will only be made after successful transfer of the property.

[19] The defendant's attempt to escape liability for payment of the commission in my view dismally failed for the following:

(19.1) The amount of the commission cannot be in dispute after Louw during evidence stated that he filled the amount into clause 17 of the agreement.

(19.2) It was admitted in the joint practice note that the plaintiff introduced the Hartbeesfontein property (property subject of the action) to the defendant.

(19.3) The plaintiff was the effective cause of the Agreement of Sale to the particulars of claim.

(19.4) Louw conceded during evidence on a question by the court that there was nothing more the plaintiff should have done to be entitled on commission. This can only be interpreted that the plaintiff has fulfilled her obligation in terms of the mandate and agreement of sale and is entitled to claim her commission *ex contractu*. Me Kriel's argument on behalf of the defendant that the plaintiff's claim is a damages claim (*ex delicto*) is in my view not correct.

(19.5) The agreement of sale contains no provision that the commission will only become due and payable *after* transfer is an interpretation by the defendant without any clause in the agreement justifying such interpretation.

(19.6) To infer a tacit term into the written agreement of sale that payment would only be made after registration of transfer is stillborn. The current law is clear that tacit terms are seldom imported into a contract and tacit terms to be inferred by the court will only be done on the evidence in this regard and the express terms of the agreement. **Alfred McAlpine & Son (Pty) Ltd v Transvall Provincial Administration 1974 (3) SA 506 (A) AT 531 D-533 B; KPMG v Securefin Ltd 2009 (4) SA 399 (SCA) at 411C.** In this matter there is no ground to infer such tacit term, taken into account the admissions made and the clear concession made by Louw during evidence.

(19.7) A party who wants to rely on a tacit term which differs from the clear *prima facie* construction of a written agreement has to plead the circumstances relied upon for this construction. **Societe Commerciale de**

Molteurs v Ackermann 1981 (3) SA 422 (A). In this matter where the written agreement is silent on when commission becomes due and payable **together** with the admissions made and the evidence by Louw in this regard there can be no room to incorporate a tacit term into the agreement.

(19.8) There is further nothing ambiguous or uncertain in the agreement and the evidence that contends a meaning contrary the *prima facie* meaning of clause 17 read with the admissions and evidence tendered. I am satisfied that there is no uncertainty or ambiguity as to the proper construction of the contract. **Dorman Long Swan Hunter (Pty) Ltd v Karibib Visserye Ltd 1984 (2) SA 462 (C)**

(19.9) A party intending to rely on an implied term by law must plead such alleged term since the relief sought will depend on it. The implied term the defendant wants to rely upon is that the commission will only be due and payable after successful transfer is contrary the normal terms regarding commission. There is nothing favouring this contention.

(19.10) In **Brayshaw v Schoeman and Others 1960 (1) SA 625 (A)** at 630 D it was held that “*Dit moet as ‘n algemene stelling aanvaar word dat in die geval van ‘m opdrag om ‘n koper te vind, die voltooiing van ‘n geldige koop die gebeurtenis is waarop die agentekommissie betaalbaar is, tensy bykomstige oorwegings tot die teendeel dui*”. To try and rely on this does not aid the defendant in view of clause 17 **and** the express admissions in the joint minute and evidence by Louw that there was nothing more for the plaintiff to do to earn commission. She introduced an able and willing seller to the defendant and a written agreement was concluded between the defendant and the seller. The agreement also differ from the normal that where the seller is liable for commission but that the defendant unambiguously accepted liability for payment towards the plaintiff.

[20] The defendant elected not to proceed with the transaction as indicated in the letter by Louw on 2 May 2020. Louw was of the view that this election would free the defendant from its contractual obligation towards the plaintiff although he conceded during evidence that the defendant at the time of the agreement was concluded, not only willing and able to buy, but also eager to buy.

[21] Viljoen conceded in his E-mail dated 1 November 2020 to the plaintiff “*Jou werk is klaar...*”. The only logical inference to be made is that as far as the plaintiff is concerned regarding the Brawild-property, she has executed her mandate. This is unambiguous and according to Louw’s evidence, entitles her to commission.

[22] After considering all the evidence and the documents and pleadings on CaseLines, I am of the view that the version of the plaintiff is preferred and that the defendants’ witnesses tried to enfold their evidence to the circumstances. The attempt to rely on a tacit and/or implied term was unsuccessful. After weighing both versions I am of the view that the defendant’ version cannot fly. This version should be rejected and I find in favour of the plaintiff.

COSTS:

[23] The awarding of costs is within the discretion of the presiding officer. **Fripp v Gibbon & Co 1913 AD 354**. It is also the rule that costs follow success unless specific circumstances prevail to deviate from the normal rule that costs follows success. The purpose of an award of costs to a successful litigant is to indemnify the party for the expense to which he has been put by the other party to litigate or defend an action. **Texas Co (SA) Ltd V Cape Town**

Municipality 1926 AD 467 at 488. See Herbstein & Van Winsen, Civil Practice of the Supreme Court of South Africa 4th ed p 703.

[24] When considering a request for costs on a punitive scale (other than the normal part-and-party-scale), the court will consider various aspects in the conduct of the party against whom such order is sought.

[25] There is no reason to depart from the normal rule to award costs to the successful party, ie the plaintiff, in this matter but for the scale thereof.

[26] I have considered the following aspects to decide on the scale of the awarded costs; whether the conduct of the defendant was reasonable or not; can the conduct of the defendant be classified as vexatious or not; the circumstances of the matter from the outset coupled with the conduct of the defendant; is there any moral considerations to consider ie the relationship between the parties, whether the defence taken was reasonable or mere to delay and frustrate the plaintiff. It is also to show the court's displeasure with the manner in which the defendant litigated.

[27]The letter addressed to the plaintiff on 13 October 2020 is a clear indication of the mindset of the defendant, in particular that of Louw. The defendant denies that the plaintiff was entitled on any commission despite what she did, the intention of Louw that the defendant will not pay any commission towards her and most important the threat to keep the plaintiff engaged in costly outdrawn litigation for extended period if she elects to litigate in contradistinction to accept the defendant's proposal for her to forgo her claim in exchange for future mandates from the defendant. This borders on extortion and cannot be allowed. This is an indication that Louw in particular is obsessed with power and will not hesitate to achieve what he wants. The court cannot sanction this conduct.

[28] In view of the above, an order on an attorney and client scale is appropriate under the circumstances.

ORDER:

1. The defendant is ordered to pay the plaintiff the amount of R 450 000-00;
2. The defendant is to pay interest of the amount of R 450 000-00 at the statutory prescribed rate for 13 October 2020 to date of final payment.
3. The defendant is to pay the costs of suit, such costs to include the employment of senior counsel and to be taxed on an attorney and client scale.

(Signed: J HOLLAND-MUTER)

HOLLAND-MUTER J

Judge of the Pretoria High Court

Matter was heard on: 25, 26, & 27 October 2023.

Written heads was filed by Plaintiff on 10 November 2023

Written heads was filed by Defendant on 20 November 2023

Oral arguments were heard on 27 November 2023

Judgment reserved on 27 November 2023

Judgment handed down on 11 March 2024 electronically via CaseLines.

Appearances:**Plaintiff:**

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