

REPUBLIC OF SOUTH AFRICA



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

Case No: A80/2023

- (1) REPORTABLE: YES / **NO**
(2) OF INTEREST TO OTHER JUDGES:
YES/**NO**
(3) REVISED.

.....
SIGNATURE

.....
DATE

In the matter between:

TOBIAS JOHN VAN REENEN

First Appellant

CAROLINE MALAUZAT

Second Appellant

and

HEIDI HOMES (PTY) LTD

Respondent

ORDER

On appeal from the Pretoria Magistrate's court:

1 The appeal is upheld with costs.

2. The order of the court a quo is set aside and replaced with the following order:

2.1 The application for summary judgment is refused and the first and second defendants are granted leave to defend the action.

2.2 Costs in the cause.

JUDGMENT

WINDELL J:

[1] This is an appeal against the order and judgment of the Magistrate's court Pretoria (the court a quo), that granted summary judgment against the first and second appellants for payment of R150 000 for estate's commission. The central issue for determination on appeal is whether the learned magistrate erred in concluding that the appellants have not disclosed a bona fide defence to the action and failed to raise any issue for trial.

[2] The background facts to this appeal are common cause. On 31 July 2022 the appellants mandated the respondent, Heidi Homes (Pty) Ltd, duly represented by Mr Piet Kruger ("the estate agent"), to procure a willing and able purchaser for the appellants' immovable property which will result in a net amount to the appellants of R2 700 000.00. It is common cause on the pleadings that the parties agreed that the respondent would be entitled to commission in respect of the mandate being achieved, in an amount of R150 000.00. Hence, the respondent was mandated to market the appellants' immovable property for an amount of R2 850 000.00, to achieve the aforementioned (net) amount and commission.

[3] The estate agent presented the offer to purchase to the appellants on 12 September 2021. The offer was for an amount of R 2 850 000.00. Clause 13 of the offer, however, included the following 'inclusion' in respect of 'FIXTURES AND FITTINGS':

"Specific Inclusions: COMPLETION OF RENOVATIONS TO THE MAIN AND SECOND BATHROOMS (SHOWER, TOILET, SINK/S AND BATHS ETC)"

[4] The appellants declined to accept the offer. No contract of sale was thus entered into between the appellants and the interested buyer, and the appellants subsequently mandated another estate agent to market the property for the same amount of R2 850 000.00

[5] Aggrieved with the appellants refusal to accept the offer, the respondent instituted action against the appellants in which it sought specific performance of the mandate. In its particular of claim (POC) the respondent relied on a partly written and partly oral (alternatively tacit) mandate. In para 5.4 of the POC it is alleged that it 'was an express, alternatively implied term of the mandate that the Plaintiff shall be entitled to payment of its commission upon procuring a willing and able purchaser for the full purchase price of R2 850 000.00.' It is therefore contended that the mandate contained no other special terms or condition and as such, upon procuring a willing and able buyer for the amount of R2 850 000.00, the respondent fulfilled its mandate and is entitled to its commission.

[6] The appellants denied these allegations and pleaded that the respondent would only be entitled to estate agents commission if (a) an offer to purchase acceptable to them was signed by them and the purchaser, and (b) all suspensive conditions contained in the offer to purchase were fulfilled. According to the appellants, they were entitled to reject the offer made as it included a suspensive condition, which was not part of the mandate, namely that the second bathroom be renovated. They explain it as follows in paragraph 10.2 of their plea:

'10 The Defendants admit that the offer was for the full purchase price but plead that the offer contained conditions that placed a financial burden on the defendants which would have resulted in the Defendants not receiving the required net amount of R 2 700 000.00 as referred to by the Plaintiff in paragraph 5.3.2of its particulars of claim;

10.2.1 The offer was conditional on the Defendants "completing" renovations of the main and second bathroom (clause 13 of annexure X3 to the particulars of claim)";

10.2.2 The Defendants had renovated the main bathroom when the property was placed on the market;

10.2.3 The Defendants never undertook to renovate the second bathroom, which renovation would have cost a substantial amount of money resulting in the Defendants not receiving the required minimum net amount of R 2 700 000.00.'

[7] It is trite that in summary judgment applications a respondent is not required to deal exhaustively with the facts and the evidence, provided they have disclosed their defence and the material facts upon which the defence is based with sufficient particularity to enable the court to find that they have a bona fide defence (satisfy the court by affidavit). Satisfy does not mean prove. The appellants thus only needed to set out facts which, if proved at trial, will constitute an answer to the respondent's claim.¹

[8] In my view, the appellants have indeed done so, and the learned magistrate ought to have found that they have presented trial-worthy arguments and disclosed a bona fide defence to the action. I say thus because of the following alleged facts, which, should the appellants prove them, would negate the respondent's claim.

[9] First, the appellants assert that receiving a net sum of R2 700 000.00 from any sale of the property was a material term of the mandate. Implicit in this term is that the estate agent could not have included Clause 13, which would have made the transaction conditional and prevented them from receiving R2 700 000.00. The respondent will bear the onus in the main case to prove that the mandate did not

¹ *Breytenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T); IPH Finance Proprietary Limited v Agrizest Proprietary Limited* (unreported, WCC case number 21771/2023 dated 28 February 2023 at para [11].

include such term. See *Van Huyssteen NO and Another v Mila Investment and Holding Company (Pty) Ltd.*²

[10] Second, the appellants contend that the respondent knew full well that Clause 13 was outside the purview of its mandate and that its inclusion made the transaction conditional. When the respondent sent the appellants the offer to purchase, the estate agent issued an email on 13 September 2021 in which he stated the following: 'In my opinie is dit 'n baie goeie offer... Die enigste voorwaarde is dat die tweede badkamer ook oor gedoen word en dat dit steeds n bad en stort het. Die koper hou van die kleure, afwerking ens van die eerste badkamer en sal graag die tweede badkamer naastenby sg (sic) wil he.'

[11] This is disputed by the respondent. In the affidavit supporting the application for summary judgement, it is argued that since the appellants already had the necessary samples, it was 'only reasonable and good practice to record that such renovations should be completed.' It is further alleged that the appellants have already started these improvements. The appellants contested this, claiming that once they made the decision to sell the house, they had no plans to carry out the second bathroom's renovations.

[12] Third, the respondent's claim is not for damages for breach of contract. It is a claim for specific performance based on the respondent's alleged due performance of its mandate which it claims contained no other or further material/special terms, (a contention that is being contested). Under the circumstances it was premature for the learned magistrate to find that it was "incumbent" on the appellants to have signed (and presumably to have accepted) the offer.

² (593/16) (2017) ZASCA 84 (2 June 2017) at [26].

[13] There are clear factual disputes raised by both parties. In the context of a summary judgment application, the court is not charged with ascertaining the substantive merit or likelihood of success of a defence. In *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd*³ the Supreme Court of Appeal held that such court 'is concerned only with an assessment of whether the pleaded defence is genuinely advanced as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case.'

[14] The appellants have disclosed the nature and grounds of their defence with sufficient particularity and have set out the material facts upon which their defence is based. The learned magistrate erred in granting an order for summary judgment. The order of the Magistrate's Court, Pretoria, under case number 42935/2021 thus falls to be set aside on appeal.

[15] In the result the following order is made:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following order:
 - 2.1 The application for summary judgment is refused and the first and second defendants are granted leave to defend the action.
 - 2.2 Costs in the cause.

³ (3670/2019) (2020] 2AWCHC 28; 2020 (6) SA 624 (WCC) (30 April 2020)

**L WINDELL
JUDGE OF THE HIGH COURT,
PRETORIA**

I agree

**R MKHABELA
ACTING JUDGE OF THE HIGH COURT,
PRETORIA**

Delivered: This judgement was prepared and authored by the Judges whose name are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 23 April 2024.

Date of Hearing: 30 January 2024

Date of Judgment: 23 April 2024

Appearances:

For the Appellants: **Adv Y Coertzen**

Instructed by: Walters Attorneys

Pretoria

For the Respondent:

Mr J Nysschens

Instructed by:

Johan Nysschens Attorneys

Pretoria