



**IN HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG**

CASE NO: 14175/13

HAIGH FARMING (PTY) LTD

PLAINTIFF

And

E.G. ELLIOT REAL ESTATE CC

DEFENDANT

JUDGMENT

Delivered on: 18 November 2014

MBATHA J

[1] The defendant seeks absolution from the instance at the close of the plaintiff's case. The test for such an application is well known and both counsel referred to the appropriate case law in their respective heads of argument.

[2] The application is based on three issues that defendant claims are each essential for a case to have been made out by the plaintiff and which it is

submitted, plaintiff has failed to do. These are that the plaintiff failed to prove the agreement as alleged in its declaration; whether the plaintiff was a “consultant” and not an estate agent with respect to the agreement, and lastly, whether the plaintiff was the contracting party and not Mr Brad Haigh in his personal capacity.

[3] Mr Brad Haigh testified about the conclusion of the agreement in terms of which he would introduce and in the one claim negotiate all but the whole agreement and then pass it on to the defendant, who is a registered estate agent, for the latter to secure the commission on the deals and then pay plaintiff an agreed portion of such commission.

[4] The nature of this application is such that I should say as little as possible about his evidence and merely contend myself by taking as benevolent an interpretation as I can about the nature of his evidence. I am satisfied that *prima facie* it has been established that he acted on behalf of the plaintiff and that contracts were concluded as alleged.

[5] Assuming that these two issues are resolved for the purpose of considering this application, the only other issue that requires consideration is if the contract was of such a nature that Mr Haigh was performing work as an

estate agent and is claiming against the defendant money that he is not entitled to claim as it is common cause that Mr Haigh was not an estate agent and therefore not entitled to any remuneration arising from the performance of work that fits the definition of “estate agent” as defined in the Estate Agency Affairs Act 112 of 1976.

[6] The plaintiff did not charge a commission from the party involved in the contract. The commission on both deals were charged by the defendant. Plaintiff claims that in terms of the agreement between it and the defendant, the latter was obliged to pay it a portion of the commission thus earned by the defendant on the deals.

[7] The legal question properly formulated would therefore not be whether the plaintiff did work as an estate agent for which he requires remuneration but whether it is in law illegal for a member of the public to enter into an agreement with an estate agent commonly referred to as a “spotter’s fee” whereby the member of the public is paid by the estate agent for such a listing resulting in a sale. The same question *might* arise in respect of the commission which plaintiff claims where the agreement is described as a “consultancy fee” that became payable to the plaintiff.

[8] I have not been referred to any authority that such an agreement would be illegal or for that matter *contra bonis mores* and of no force and effect nor could I find any cases in point.

[9] No doubt further argument on this point may be advanced in due course, suffice to say that for now I am not persuaded that the application for absolution from the instance ought to be granted for the reasons advanced by the defendant.

[10] The application is dismissed with costs to be costs in the cause.

MBATHA J