

SPLITTING HAIRS OVER SPLITTING COMMISSION

Beijers v Harlequin Duck Properties 231 (Pty) Ltd t/a Office Space Online (1216/2017) [2019] ZASCA 89 (31 May 2019)

This judgment deals with a dispute between two commercial brokers regarding payment of commission. In the written appointment of Agent A at the estate agency, it was recorded that Agent A was entitled to commission where she was the effective cause of a transaction. Agent B, a colleague who in some way assisted with the transactions, later argued that as he assisted Agent A, he was entitled to part of her commission because Agent A was not the sole cause of the successful deal. Was such interpretation warranted in the context? Could Agent B rely on a so-called tacit term that such was their arrangement; or, rely on an oral agreement changing the terms of the written appointment where the written appointment contained a non-variation clause?

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

FACTS

In October 2011, Harlequin Duck Properties 231 (Pty) Ltd t/a Office Space Online (Harlequin), an estate agency, appointed Beijers as a commercial property broker. The written agreement provided that if Beijers was the 'effective cause' of a sale of any property, Harlequin would pay commission on the terms set out in clause 5.1 of the contract. This clause provided that she would be "... remunerated on a commission only basis. Commission shall include any remuneration directly or indirectly earned in the course of business and will be calculated as follows: 50% of total commission earned by the Company from Completed Deals effected by yourself ...".

The contract also included the following important provisions:

- Clause 20: "No variation of the contract will have any effect unless reduced to writing and signed by both parties thereto."
- Clause 21: "The contract constitutes the sole agreement between the parties and no representation which is not contained in this agreement shall be of any force or effect between the parties."
- Clause 23: "Prior drafts of this contract shall not be admissible in any proceedings as evidence in any matter relating to any negotiation preceding the signature of this contract."

In December 2013, Beijers instituted action against Harlequin as the commission earned in respect of two related transactions was not paid to her in full. Beijers evidence was that she had known the buyer previously and had started negotiations with him. The buyer had been interested in buying one property with funds from the sale of another. Beijers stated that she had done virtually everything to complete the deals and that one Bosman (from Harlequin) had, upon his insistence, attended one or two meetings with the client. Bosman had also communicated with the client contemporaneously with her. She was adamant that without her efforts, the transactions would not have been concluded successfully. Although Bosman assisted with one transaction when she was overseas, that transaction had already been concluded between the parties.

Bosman argued, in essence, that both he and Beijers were effective causes of the sales and that she was therefore only entitled to half of the commission, as is the (alleged) practice amongst brokers in the area. Bosman argued firstly

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that, on a proper construction of clause 5.1, Beijers would not be allowed to full commission unless she was the sole effective cause of a transaction. In that instance, the practice of Harlequin would govern how much commission would be paid by way of a tacit term. (An aspect of this was that an agent would share her 50% commission with another agent who provided assistance.) Secondly, if the aforementioned argument was not accepted, Bosman argued that they had entered into an oral agreement in April 2013, to the effect that they would share the commission, and that proof of such agreement should have been allowed in the circumstances and had been wrongly excluded by the magistrate.

The issue then was whether the words 'effected by yourself' in clause 5.1 of the agreement required the broker to have been the sole or only effective cause of the transactions. The regional court accepted Beijers's evidence and found in her favour. It disallowed evidence on the oral agreement contended for by Bosman.

On Bosman's appeal, a full bench court set aside the judgment and remitted the matter back to the regional court 'to consider further evidence the parties may lead', which order appeared to relate to evidence regarding the alleged prevailing practice of 'commission splitting' outside of the written contract which, according to Bosman, the parties had agreed to in the April 2013 meeting.

Beijers appealed to the Supreme Court of Appeal.

HELD

Meaning of 'effected by you'

- The words used in clause 5.1 - 'effected by yourself' - are unambiguous. The plain meaning of the clause is that commission is paid on all transactions effected by Beijers. It cannot be interpreted to mean, as Bosman argued, 'effected by you alone'.

Allowing a tacit term

- As for the importation of a tacit term, this will relate in the present matter to an additional term relating to the payment of commission. Such a claim cannot succeed because: firstly, no such term was pleaded and it was only alleged to exist in Bosman's testimony. Secondly, the entitlement to commission is expressly dealt with in the agreement with Harlequin. Any additional term would then amount to a variation of the express terms, which variation is excluded by clause 20 of the agreement.

Oral agreement

- The question of whether evidence of an oral agreement can be led is dealt with in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* as follows: 'First, the integration (or parol evidence) rule remains part of our law If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning . . . '.
- In the present matter, it could not be said that such evidence would be allowed as it only amounted to evidence of context or surrounding circumstances (which would be allowable). Rather, it would constitute evidence which is at odds with the written contract. It was therefore clear that the regional court was correct to exclude any such evidence. It is equally clear that the full bench erred in finding that such evidence should have been allowed and referring the matter back to the regional court for it to be led. This is also clear in the present matter where clause 23 expressly excludes any prior drafts.
- The only way in which evidence contrary to the terms of the contract could have been led was in support of a

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claim for rectification of the written contract. Rectification is a well-established right that provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It thereby enables effect to be given to the parties' actual agreement. Harlequin however did not invoke rectification.

- Over and above this, in light of clause 21 of the contract, which provides that 'this contract constitutes the sole agreement between the parties and no representation which is not contained in this agreement shall be of any force or effect between the parties', the rhetorical question to ask would be, if splitting of commission was such an integral part of the business of Harlequin, why would it not include it in the clear terms of the contract of employment? Then employees of Harlequin would know without any doubt or recourse to extraneous evidence what they are signing up for, in the event of a dispute.
- In light of the evidence that both Beijers and Bosman were involved in securing both transactions, and that Beijers effected both transactions, the magistrate was correct to find in favour of Beijers that she was entitled to her commission.

CONCLUSION

The appeal succeeded.