

IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG DIVISION)

06/08/2009

Case No: 7467/07

DELETED WHERE NOT APPLICABLE  
(1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED  
30/09/09  
DATE  
[Signature]

In the matter between:

GROENEWALD, GRETE

Plaintiff

And

WEST COUNTRY ESTATES

Defendant

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**JUDGMENT**

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**The parties**

1. The Plaintiff, an elderly woman resident in Fichardt Park, Orange, Free State instituted action against the defendant, West Country Estates, a firm carrying on business at Flora Centre, Florida North, Gauteng as a property agent.

**Relief**

2. The plaintiff seeks the following relief against the defendant:

- 2.1 Payment of the sum of R294 520.00;
- 2.2 Interest thereon from date of summons to date of payment at the rate of 15.5% per annum;
- 2.3 Costs of suit.

3. The defendant is defending the action and denies liability to the plaintiff.

**Cause of action**

4. The cause of action is set out in the plaintiff's Particulars of Claim, the most pertinent of which are the following:

6.

*Gedurende ongeveer 1989 (1998) en te Florida, het die Eiseres, handelende in haar persoonlike hoedanigheid, en die Verweerder, behoorlik verteenwoordig deur J.J. Joubert 'n mondelinge, alternatiewelik skriftelike kontrak gesluit, die volle besonderhede waarvan nie meer binne die kennis van die Eiseres val nie, met die volgende die uitdruklike, alternatiewelik stilswyende, verder alternatiewelik geïmpliseerde terme:*

*6.1 Dat die Verweerder aangestel word as die Eiseres se verhuringsagent;*

*6.2 Dat die Verweerder die Deeltitel eenheid names die Eiseres moet uitverhuur teen die mees – voordelige huurinkomste;*

*6.3 Dat die Verweerder moes toesien dat die eenheid behoorlik onderhou word, en die Eiseres in kennis moes stel van enige gebreke of ander probleme wat uit die verhuring van die eenheid mog ontstaan;*

*6.4 Dat die Verweerder die ooreengekome maandelikse huurgeld namens die Eiseres vanaf die huurders moet invorder;*

*6.5 Dat die Verweerder uit die gevorderde huurgeld die volgende uitgawes en verpligtinge namens die Eiseres moet betaal:*

6.5.1 Die maandelikse verbandpaalement aan ABSA Bank;

6.5.2 Die maandelikse heffings verskuldig aan die Regspersoon van Cheviot aan die Regspersoon of sy aangewese bestuursagent;

6.5.3 Enige ander uitgawes in verband met die instandhouding van die eenheid.

6.6 Dat die Verweerder enige surplus-inkomste aan die Eiseres moet oorbetal;

6.7 Dat die Verweerder uit hoofde van sy posisie as agent van die Eiseres te alle tye bona fide en met die nodige sorgsaamheid, en in belang van die Eiseres, haar belange bestuur, beskerm en met die hoogste trou sal hanteer.

## 7.

Die Verweerder het sy mandaat gedeeltelik uitgevoer deur inter alia die Eiseres se deeltiteleenheid uit te verhuur, van tyd tot tyd huur in te vorder, van tyd huur oor te betaal aan die verbandouer, en ook van tyd tot tyd die heffings te betaal.

## 8.

Die Verweerder het sy kontraktuele verpligtinge teenoor die Eiseres verbreek deurdat:

8.1 Die Verweeder versuim het om stiptelik en elke maand die maandelikse heffings aan die deeltitelbestuurder, te wete Constantia Management oor te betaal;"

5. In response to these allegations, the defendant pleaded thus:

"6. AD PARAGRAAF 6

Die Verweerder pleit spesifiek dat gedurende of omtrent middel 1998 het die Verweerder, behoorlik verteenwoordig deur J.J. Joubert, en ene Ben Groenewald ("Groenewald") 'n mondelinge ooreenkoms aangegaan met die volgende terme en voorwaardes:-

6.1 Dat die Verweerder aangestel word om Groenewald se eiendom geleë te 17 Mount Cheviot, Cheviot Road East, Florida Hills, Roocepoort namens Groenewald te verhuur teen die mees voordeligste huurinkomste;

6.2 Dat die Verweerder die ooreengekome maandelikse huurgeld namens Groenewald vanaf die huurders moes invorder;

6.3 Dat die Verweerder soos en wanneer die gelde gevorder is die maandelikse heffings verskuldig aan die regspersoon van Cheviot of sy aangewese bestuursagent moes vereffen en die balans daarvan in 'n genomineerde rekening deur Groenewald verskaf moes inbetaal;

6.4 Dat die huurder in die eiendom aanspreeklik sou wees vir die betaling van alle water en elektrisiteit en ander gelde verskuldig aan die regspersoon en/of die plaaslike munisipaliteit en dat die Verweerder geen verantwoordelikheid daarvoor wou aanvaar nie." (My underlining)

6. It is within the context of these pleadings supplemented by evidence that the matter will have to be considered and decided.

### Background

7. The plaintiff was the owner of certain immovable property known as Unit 17 Mount Cheviot situate at Florida, under a sectional title scheme managed by the Constantia Body Corporate. She acquired the property in 1998 through finance from ABSA Bank. The property was initially occupied by her husband who, at the time of the purchase was working in Johannesburg. After he had left to join the plaintiff in the Free State, she decided to put the property on the rental market in a scheme managed by the defendant. Before her husband left Florida for Free State, he identified a letting agency known as West Country Estates. As he was not the owner of the property, he could not conclude any agreement with the defendant but merely furnished the plaintiff with the particulars of the latter.
8. During 1998 the plaintiff, in a telephonic conversation mandated the defendant through Jan Joubert Senior to manage the Unit on her behalf subject to the following terms and conditions:
  - 8.1 The defendant would manage and let the unit on her behalf on the most propitious rentals;
  - 8.2 Ensure that the unit is properly maintained and to notify the plaintiff of any defect or problems arising from the rental of the unit;
  - 8.3 The defendant shall pay expenses and meet the following obligations on behalf of the plaintiff :
    - 8.3.1 Pay the monthly instalments to ABSA;
    - 8.3.2 Pay the monthly levies due to the Body Corporate or its representatives;
    - 8.3.3 Pay any expenses relating to the maintenance of the unit;
    - 8.3.4 The surplus income be paid to the plaintiff.
9. The defendant, represented by Jan Joubert Senior, accepted the mandate and let the property to suitable tenants at a rental of R3000.00 per month. The first tenant was a Pakistani who occupied the unit for a few months

followed by Vanessa Jacobs. The third and last tenant was Mr. Summers who occupy the property from January 2003 to March 2004.

#### **Relevant events**

10. During the tenancy of Mr. Summers, certain events which formed the basis of this action occurred. It would appear that the defendant did not fulfil its duties properly and had fallen in arrears in respect of levies in an amount of R 8010.19. The Body Corporate then issued summons against the plaintiff for payment of the aforesaid amount; the summons was served by affixing a copy thereof on the front door of the Unit. On his return from work on the 22<sup>nd</sup> August 2003, Mr. Summers found the summons affixed to the main door of the residence. On the following day he took the summons and handed it to Joubert Junior at the offices of the defendant.
11. During September 2003, Mr. Summers found affixed to the main door of the Unit, a copy of a Warrant of Attachment in Execution. Realising the seriousness of the situation, he again proceeded to the defendant's offices; he demanded to see Joubert Junior and tried to establish why action had not been taken or whether the plaintiff had been notified of these court processes. Joubert Junior did not take lightly to Mr. Summers' alleged interference in their affairs and a verbal altercation ensued. Mr. Summers tried to obtain the particulars of the plaintiff but his efforts were in vain. Due to lack of action or any form of intervention by the defendant, the property was eventually sold in execution for the mere R 8 010.19 plus costs.
12. Word of the sale of the property eventually came to the attention of the plaintiff; she reported the matter to the Council for Estate Agents. During one of the sessions, she saw a copy of the summons in the defendant's (Joubert Junior) file. For some reason or the other, this matter was never resolved by the Council for Estate Agents.



**Plaintiff case**

13. It is common cause that the plaintiff telephonically gave a mandate to the defendant in terms of which the latter acted as a letting agent for the plaintiff subject to the terms and conditions set out in the pleadings. It is further common cause that the main functions of the defendant were, amongst others to let the premises at a market-related rental to suitable tenants, to collect rentals regularly from the tenants; service the levies and other services, deduct its standard commission and deposit the balance into the Plaintiff's nominated account. Between 2001 and 2003, the defendant let the property to three tenants, the last of whom was Mr. Summers whose contract commenced in January 2003 and was due to terminate in January 2004, subject to renewal for a further 12 months. The rental payable by Summers was an all-inclusive rental of R 3 000.00 the first of which was payable in February 2003.
14. The plaintiff testified that during the period 2003 – 2004 she didn't receive regular reports from the defendant except the report about the Pakistani and the question of the stove about which Mr. Summers complained. She was not kept abreast about the levies. At one stage she received notification from her bank, ABSA, that her account had accumulated a substantial amount of interests due to late payment. She did not receive a copy of the summons and Warrant of Execution neither did the defendants inform her about the action the Body Corporate has instituted against her for arrears rates and services. Had she been notified about this, she would have taken appropriate steps to settle the arrears as the Unit was her valuable investment. She was bitterly disappointed and aggrieved by the conduct of the defendants who failed to fulfil their mandate faithfully, honestly and with due diligence. Cross-examination of the defendants did not bring anything new facts to light nor where there any material contradictions in her evidence.

15. Mr. Summers' evidence was pertinent to the issue and demonstrated clearly that it was the attitude of the defendant which led to this unfortunate state of affairs. He acted in the most responsible manner and his response to the court processes reflected a sense of maturity, concern and responsibility which was lacking from the defendants. Had he been timeously aware of the plaintiff contact details, the latter would surely not have lost her valuable asset which was sold for a song under circumstances which call for an answer from the attorneys who handle the matter which, in my view, should have been taken up on appeal in accordance with the decision in ***Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)*** at 165d—e read with s66 (1) of the Magistrate Courts' Act 32 of 1944.

#### **The defendants' case**

16. The defendants aver that the levies were paid in accordance with whatever had been paid by or recovered from the tenants for that particular month; but denied that their duties encompassed payment to the Body Corporate for water and electricity services which, according to them, were the sole responsibilities of the tenants. They concede, however, that the levies were not paid punctually and regularly and accumulated interests. They deny emphatically any knowledge of the summons and warrant of execution. Joubert Senior states that he retired from the business during 2002 when his sons and daughter took over the administration of the firm. It is interesting that when he was told about the summons and Warrant of Execution, he responded that: *"had these processes come to my knowledge I would have driven to Bloemfontein to hand it over to the Defendant."*
17. A close scrutiny of the statement from Constantia Sectional Title Management (Pty) Ltd dated 23<sup>rd</sup> May 2006 for the period January 2001 to 2003, it appears that the levies payable in respect of the Unit for February 2001 was R532.00 plus a special levy of R98.00. From March 2001 the levy was R582.00. Levies were not paid regularly and at times double



payments were effect. For instance on 6<sup>th</sup> July 2001 an amount of R1090.00 was paid; in August and September up to December 2001 payment of R1190.00 was made. From August 2002 no payments were made except an amount of R612.00 in December 2002. Thereafter an amount of R1240.00 was paid in March 2003. This statement handed in as Exhibit "B" demonstrates in no uncertain terms that the maintenance of the levy account was totally irregular and this explains why the Body Corporate resorted to instituting action for the recovery of the arrears.

18. Mrs. Groenewald could not be described as the best witness. Her recollection of the facts was not that good but that could be ascribed to the fact that she was completely unaware of 90% of how the defendant administered her affairs. She was kept in the dark most of the time. One could also point a finger at her and ask why at any given time she had never come to Florida to check on the state of her property and the administration of her affairs; why she had not demanded a report/account from the defendant; or why she had not instructed an attorney to call upon the defendants to render a proper account of the administration of her affairs. On the whole, she was a good witness though sometimes talkative as a result whereof she could not answer some of the questions pertinently. Apart from these criticisms the Court accepts her evidence and cannot find any material contradictions or even conclude that she deliberately avoided some questions put to her during cross-examinations. The Court does not doubt the credibility of her evidence in so far as it relates to the merits of the case. The Court accepts that she was never informed of these processes otherwise she could take the necessary steps to protect her investment.

19. As for Mr. Summers, he was the most impressive of all the witnesses and he displayed the intelligence one could not ascribe to the defendants'. His evidence was to the point and he stated whatever he told the Court with conviction and shown no bias whatsoever in the matter. The Court was impressed by his concern about the consequences of lack of concern on the part of West Country Estates in protecting the interests of the plaintiff

in accordance with their mandate. The Court accepts his evidence and cannot doubt a single word of his evidence that he paid his rentals religiously. He answered all questions pertinently and without any degree of prevarication or even embroidering his answers.

20. As for the defendant, there is nothing to write home about it witnesses.

Both Joubert were very poor to the core and it is quite clear that they were strangers to veracity. I have no doubt that Johan Junior was given both these court processes personally by Summers and he, for some reasons better known to himself, refrained to take appropriate action nor did he, as a diligent agent would have done, take any steps to intervene, inform the plaintiff or even negotiate with the Body Corporate. Had the defendant fulfilled its mandate diligently and faithfully, the plaintiff would not found herself in this situation.

21. It is settled law that one of the natural incidences of a contract of mandate is that the agent is obliged to fulfil the agreed functions honestly, punctually, properly and with care and diligence. Secondly, and equally important is to account to the principal for all actions taken in pursuance of its functions. It is against this principle that the conduct of the defendant must be analysed and tested. In **David Trust and Others v Aegis Insurance Co. Ltd and Others 2000 (3) SA 289 SACC** the appellants had and trusted their business affairs to a partnership of chartered accountants, KS whom they have mandated to effectively run their business. Included in the mandate was the investment of certain surplus funds with certain banks. Due to theft by certain members of KS, the partnership had certainly suffered loss and liquidated. The court pointed that the mandate entrusted to KS was of utmost importance for the interest of the appellant just as it is important to the plaintiff in this matter. The court points out at 298 that one of the *naturalia* of a mandate in general is that:

*“...the mandatory was obliged, first, to perform her/his functions faithfully, honestly and with care and diligence, and, secondly to*

*account to her/his principles for her/his actions. KS has committed breaches of its mandate. It had done so, in the first place, by its failure to perform its duties honestly...or diligently."*

22. If there is compelling evidence that the defendant deviated from these standards and the principal have suffered loss as a result of their dereliction of responsibility, the defendant can certainly not escape any liability. When one considers the evidence, in particular the evidence of Mr. Summers, the conclusion is inescapable that not only did the defendant perform its functions perfunctorily, dismally or negligently but its conduct was without doubt deliberate. I cannot imagine how the defendants could let a pensioner lose what was a valuable investment in her life. This boggles my mind. Hence my conclusion that their conduct was deliberate, not even grossly negligent. If the defendant is still in business, I recommend that it be reported to the Board of Estate Agents and that the latter deals decisively with this matter.

23. I now turn to consider the question of quantum of damages. At the time of the sale in execution of the Unit, the balance owing on the bond to ABSA was the sum of R61 131.86, the net balance of the proceeds of the sale in the amount of R263 180.86 was paid over to the Plaintiff. According to the plaintiff the fair and reasonable market value of the property at the time of the sale in execution was in the region of R560 000.00. The plaintiff contends that had the property been sold in the open market it could have easily fetched the sum of R560 000.00. Consequently she had suffered a loss in the sum of R294 520.00 being the difference between what she received after the sale in execution and what the property could have fetched had it been sold in the open market. Although no valuation of the property had been placed before the court, it is common cause that the property market enjoyed a degree of buoyancy from about 2003 until 2007. This piece of evidence by the plaintiff has not been disputed by the defendant and the court accepts that the property could have been sold for the sum of R560 000.00 in the open market.

12. Having considered the quantum on the basis of the evidence before me, I come to the conclusion that judgment should be entered in favour of the plaintiff for the amount claimed.

I accordingly make the following order:

- 1) The defendants are ordered to pay plaintiff the amount of R294 520.00;
- 2) Interest thereon at the rate of 15.5% per annum from date of summons to date of payment;
- 3) Costs of suit.

  
T.J VILAKAZI

Acting Judge of the High Court