THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J2853/17

In the matter between:

SHIRLEY VAN RENSBURG **Applicant**

And

CAMEB CC t/a RAWSON PROPERTIES NORTHRIDING **Respondent**

Decided: **06 February 2020**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 28 June 2020.**

Summary: s 77 (3) of BCEA application – clam for admittedly outstanding commission – estate agency – met by demand of 30% administration fee – as per contract of employment – such stipulation found to be contrary to s 34 of BCEA – contrary to CPA –contrary to good morals of business society.

JUDGMENT

CELE, J

Introduction

[1] The applicant has brought this application against the respondent for payment in the sum of seventy-three thousand, ninety rand and twenty-four cents (R73 090.24), interest on the amount claimed at a rate of 10.25% per annum from date of service of the application to date of full payment and costs of the application. This amount is claimed as commission due to her, following the sales she concluded in respect of various residential properties whilst still in the employ of the respondent. The respondent opposed the claim on the basis that she is not entitled to R73 090.24 and tendered payment of the commission due to the applicant less 30% in terms of clause 6.5 of the agreement between itself and the applicant. The application is heard in terms of section 77 (3) of the Basic Conditions of Employment Act[1].

Background Facts

[2] The Respondent is an estate agency, currently trading as Rawson Properties in terms of a franchise agreement, with its principal place of business at Shop 11, Northriding Square, Bellair Drive, Northriding, 2169.

[3] On 1 July 2010, the Applicant and the Respondent entered into a written Estate's Agent's Appointment Contract ("the Employment Agreement"), the material express, alternatively tacit, further alternatively implied terms of which are as follows:

3.1 Applicant was appointed as a learner, alternatively a candidate, further alternatively a non- principal estate agent of the Respondent;

3.2 Her monthly remuneration was for R8, 000.00.

3.3 She was to receive 50 (fifty) percent of each net commission received by the Respondent in respect of a residential property sold;

[1] Act Number 75 of 1997, hereafter referred to as the BCEA.

3.4 The Respondent paid commission twice a month by means of a direct deposit into her bank account, depending on when the Respondent receives the money from a finalised residential property sale;

3.5 Any monies received by the Respondent between the 20th and 5th day of a particular month in respect of a concluded residential sale was paid to her by no later than the last working day of that month;

3.6 The Respondent upon termination of the Employment Agreement was to collect all outstanding commissions on her behalf and the Respondent would deduct 30 (thirty) percent as an administration fee of the total value of all outstanding commissions collected and due to her.

3.7 During the period of 16 May 2017 to 13 July 2017, while she was still in the employ of the Respondent, she concluded the residential sales as set out in the table hereunder:

Deal No.	Status Date	Deal info	Commission payable
205715	29 May 2017	11 Olive Road, Sharonlea, Ext 3	R8,336.84
206259	16 May 2017	56 Bellairs Drive, Sharonlea Ext 27	R15,570.00
207337	28 June 2017	133 Pritchard Street, Noordhang Ext 49	R35,843.15
207877	26 June 2017	10 Hyperion Drive, Northriding Ext 79	R13,340.25
		TOTAL:	**R73,090.24**

[4] According to the residential sales that the Applicant concluded as set out in the table above and in terms of the Employment Agreement, the commission due to her amounted to the sum of R73,090.24.

[5] On 14 July 2017, the Applicant tendered her resignation to the Respondent with effect from 1 August 2017 to 31 August 2017, when the Respondent requested her to leave its employ forthwith, which request she duly complied with. On 18 August 2017, she received a letter from the Respondent's attorney of record, Savage Hurter & Louw Inc wherein the Respondent, *inter alia*:

5.1 Admitted that an amount of R84,340.73 in commission, was due to her in respect of residential property sales that she had concluded;

5.2 Respondent advised her that the amount of R25, 302.22 as Administration Fee falls to be deducted from the commission due to her in respect of the residential property sales she had concluded, by virtue of clause 6.5 of the Employment Agreement, which Administration Fee amounts to 30% of the outstanding commission due to her.

[6] The Applicant elected not to claim the commission due to her in respect of deal no. 206709 at this time, as she subsequently established that the transfer of the respective residential sale had not yet been registered.

[7] The Applicant contended that clause 6.5 of the Employment Agreement, as relied upon by the Respondent to charge the Administration Fee from the total outstanding commission due to her, upon termination of the Employment Agreement, was unlawful for one or more of the following reasons:

7.1 clause 6.5 contravenes section 34 of the BCEA, as in terms of section 34(1) an employer may not make any deduction from an employee's remuneration unless:

7.1.1 the employee, in writing, agrees to the deduction in respect of a debt specified in the agreement; or

7.1.2 the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award;

7.1.3 furthermore, a deduction may be made to reimburse an employer for loss or damage only if:

7.1.3.1 the loss or damage occurred in the course of employment and was due to the fault of the employee and the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;

7.1.3.2 the total amount of the debt does not exceed the actual amount of the loss or damage;

7.1.3.3 the total deductions from the employee's remuneration do not exceed one-quarter of the employee's remuneration in money; *alternatively*

7.2 this clause is contrary to the provisions of the Conventional Penalties Act,[2] in that the Administration Fee charged by the Respondent is excessive; *alternatively*

7.3 *this clause is contra bonus mores* and utilised to the prejudice of any employees wishing to leave the Respondent's employ.

[8] On 25 August 2017, in a letter sent to the Respondent in reply, the erstwhile attorney of record of the Applicant demanded the outstanding commission due to her, in respect of the residential property sales she had concluded in the sum of R84, 340.73. That amount should have been R73, 090.24, to exclude commission due to her in respect of deal number 206709, to which reference has been made.

[9] Notwithstanding demand, no payment has been forthcoming from the Respondent. Furthermore, the Respondent maintained that it was entitled to charge the Administration Fee from the outstanding commission due to her, arising from her termination of the Employment Agreement. The Applicant submitted that the Respondent was not entitled to that claim. The Applicant contended that the Respondent failed, alternatively refused, further alternatively neglected to effect payment of the outstanding commission due to her in terms of the Employment Agreement.

[10] Under the testimony of Ms Taryn Steven, the Respondent denied the allegations of the Applicant, more so about the applicability of section 34 of the BCEA as alleged by the Applicant. She then said that the Applicant did not state why she believed the clause was unlawful. Section 34 clearly states that a deduction may be made if the employee agrees to it in writing, which the Applicant clearly did as per her employment contract annexed to the founding affidavit. The deduction was not for any loss or damage suffered and therefore

[2]Act Number 15 of 1962, hereafter referred to as the CPA.

clause 34(2) of the BCEA was not applicable. The deduction was also not made for goods sold and delivered and therefor Section 34(3) was not applicable. Sections 34(4) and (5) were also not applicable. The Respondent further said that the Applicant correctly referred to Section 34 of the BCEA but it only serves to confirm that the Respondent acted lawfully and correctly with respect to the BCEA.

[11] The Applicant was said to have agreed in writing to pay an administration fee to the Respondent to render administration services to the Applicant after the employment relationship has been terminated. These services were not part of the employment relationship but rather as a consequence of the employment relationship, after the Applicant terminated it. The Respondent said that the Applicant failed to stipulate what penalty stipulation she was referring to as specified in the CPA. Furthermore, the Applicant having resigned and terminated the employment relationship, failed to state where the Respondent was charging her a penalty fee for an act or omission in conflict with a contractual obligation as per the requirement of the CPA. To merely state that charging a fee for rendering services was *contra bonus mores* was frivolous, vexatious and grasping at straws.

[12] The Applicant was described as clearly having no grounds for success of her claim, rather that she submitted all the reasons in law why she should not succeed and why this Court ought to find in favour of the Respondent. As per the employment contract, which the Applicant is relying on, she was due commission less thirty percent as agreed between the parties and not the amount as claimed in these proceedings. The Respondent tendered the payment of the commission due, less 30% and less tax at the applicable rate.

Analysis

[13] Section 34 of the BCEA has been referred to by both parties and it is imperative that its terms be examined. To the extent relevant here, it states:

"Deductions and other acts concerning remuneration

34. (1) An employer may not make any deduction from an employee's remuneration unless—

(a) subject to subsection (2), the employee in writing agrees to the deduction in respect of a debt specified in the agreement; or

(b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award.

(2) A deduction in terms of subsection (l) (a) may be made to reimburse an employer for loss or damage only if—

(a) the loss or damage occurred in the course of employment and was due to the fault of the employee;

(b) the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deductions should not be made;

(c) the total amount of the debt does not exceed the actual amount of the loss or damage; and

(d) the total deductions from the employee's remuneration in terms of this subsection do not exceed one-quarter of the employee's remuneration in money

(3) A deduction in terms of subsection (l) (a) in respect of any goods purchased by the employee must specify the nature and quantity of the goods.

(4) An employer who deducts an amount from an employee's remuneration in terms of subsection (1) for payment to another person must pay the amount to the person in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award.

(5) An employer may not require or permit an employee to—

(a) repay any remuneration except for overpayments previously made by the employer resulting from an error in calculating the employee's remuneration;

(b) acknowledge receipt of an amount greater than the remuneration actually received. "

[14] The dispute revolves around the nature and interpretation of clause 6.5 of the employment agreement, which reads as follows:

> "The agent hereby authorises the franchise to, upon termination of this agreement, collect all outstanding commissions on his/her behalf and acknowledges that the franchise shall charge a 30 (thirty) percent administration fee of the agent's share on the total value of all outstanding commissions due to the agent and collected by the franchise as and when collected. The agent hereby authorises the franchise to deduct such fee from the outstanding commissions due to him or her as and when payment is made".

[15] While the Applicant was in the employment of the Respondent, the Respondent would ordinarily collect similar commissions on behalf of its agents such as the Applicant and would distribute a portion thereof to such agents, sans the deduction of any administration fee. Conveyancing attorneys normally attended to the payment of commission through electronic funds transfer to the Respondent in terms of the sales agreement upon registration of the property in the purchaser's name. I have not been able to find from evidence any additional role-played by the Respondent in the recovery of commission, in the event its agents have resigned. I conclude therefore that upon resignation of an agent, the Respondent has no additional role to play to recover the commission, after the transfer registration of the property by the Master. The purchaser is the one that is normally settled with having to pay transfer fees.

[16] The Respondent justified the entitlement to 30% by referring to the contract of employment signed by the Applicant, that is clause 6.5 and to the recovery process by means of section 34 of the BCEA. In the employment agreement clause 6.5 appears immediately above clause 7 that deals with restraint of trade. As a whole this contract of employment appears to be the general terms and conditions of employment applicable to all and any agents who take up employment with the Respondent. It does not appear to have been drawn only at the instance of the Applicant. Reference to the Applicant is by the general generic "agent".

[17] Reference in clause 6.5 to "....all outstanding commission..."is reference to commission that had not yet been earned on the date of signing the agreement. Put differently, on the date of signing the agreement of employment, the Applicant had no debt owing to the Respondent. Yet section 34 (1) (a) of the BCEA, relied on as a tool for the recovery of the 30%, states that an employer may not make any deduction from an employees' remuneration unless subject to subsection (2) the employee in writing agrees to the deduction in respect of a debt specified in the agreement. Section 34 contemplates that there is or will be a debt owing or to be owed by the employee to the employer, as the basis for the deduction to be allowed. Further, a deduction in terms of subsection (1) (a) may be made to reimburse an employer for loss or damage ***only if*** (my emphasis) the loss or damage occurred in the course of the employment and was due to the fault of the employee.

[18] Clearly, the use of section 34 of the BCEA was intended by the Legislator to be circumscribed or to be in limited situations as are only envisaged in the section itself. The reliance on section 34 of the BCEA by the Respondent means that the Respondent had to demonstrate that the Applicant owed the Respondent a debt, **as a result of a loss or damage** (my emphasis) which occurred in the course of employment and was due to the fault of the Applicant. No such pleaded facts have been placed before me in defence against an admitted claim of the Applicant. On this basis alone, the case raised in the papers by the Respondent does not constitute a valid, solid and meritorious defence. The claim of the Applicant should succeed.

[19] In the event, for any reason my finding is wrong, it is better to err on the side of caution. Clause 6.5 was said to be contrary to the provisions of the CPA, in that the Administration Fee charged by the Respondent is excessive. Further, both parties have deliberated on whether clause 6.5 is *contra bonus mores* and is utilised to the prejudice of any employees wishing to leave the Respondent's employ.

<u>Clause 6.5 v CPA</u>

[20] The submission by the Applicant is that the nature and effect of clause 6.5 of the agreement is that of an unenforceable penalty. It was said that in order for the administration fee to be an enforceable penalty (which it is not), it must comply with the provisions of the aforementioned CPA (which it does not do). It will be of great assistance if the object of the CPA, to the extent relevant, is examined. Snyman J has undertaken this exercise in *Van Staden v Central SA Lands & Mines*[3], where the following was said:

> "This Act may be said mainly to aim at two things:
>
> (1) To make it plain beyond doubt that a penalty stipulation arising out of the contractual obligation is enforceable at law; and
>
> *(2)* To prevent the exaction of unfair or excessive penalties being stipulated for in contracts, and in this respect also to prevent both a penalty and damages being claimed in respect of the same act or omission on the part of the debtor."

[21] From the above case, penalty stipulations are enforceable in contracts. However, such contracts must comply with the provisions of the CPA. The applicant contended that clause 6.5 of the agreement was indeed nothing but a penalty stipulation. She said that it is an unenforceable stipulation because it does not comply with the provisions of the CPA. I have already found that upon resignation of an agent, the Respondent has no additional role to play to recover the commission, when awaiting the transfer registration by the Master. Put differently, there are no administrative functions proved to have been done by the Respondent to earn any administration fees. The purchaser is the one that is normally settled with having to pay transfer fees. The "administration fee" is thus only payable by agents upon their resigning from the Respondent's employ. I conclude that the "administration fees is indeed a penalty stipulation, as averred by the Applicant.

[22] Section 1 of the CPA does apply to an agreed penalty or pre-estimate of damages for the breach of a contract. Clause 6.5 of the agreement relates to the termination of the employment agreement by resignation and it is not breach

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[3] 1969 (4) SA 349 (W) at 351.

of a contract. Consequently, I find that the penalty envisaged in clause 6.5 of the agreement is not an enforceable penalty in terms of section 1 of the CPA.

[23] Section 4 of the CPA provides that the provisions regarding penalty stipulations also apply in respect of forfeiture stipulations. However, clause 6.5 of the agreement clearly is not a forfeiture stipulation. Thus, the clause 6.5 is, again essentially, an unenforceable penalty. The respondent is silent on the purpose of clause 6.5 of the agreement save to say that it is for services rendered to the applicant by collecting the commissions on behalf of the applicant. As I have found, no collection services were proved to have been rendered by the Respondent to justify this income. This stipulation in the contract of employment is found to be contrary to sections1 and 4 of the CPA. It is therefore an unlawful stipulation.

Contra bonus mores

[24] The Respondent is running a business by selling property out of which it earns an income. It relies on the services of its agents to earn such income. Once an agent has done everything there was to be done and awaits the transfer of the property, as the *merx* to be sold, the agent becomes entitled to income as stipulated in the contract of employment. Resignation of the agent at this stage of the sale agreement becomes irrelevant to her earning her income. Put differently, the earning of commission is no longer dependant on any action by the estate agency. The next step is then dependant on the actions of the conveyancing attorneys. For the estate agency to charge an administration fee of 30% on commission earned by the estate agent, is not justifiable on any business grounds. Such administration fee is contrary to the good morals of a business society. On this basis too, the defence raised by the Respondent against the admitted claim of the Applicant must fail.

[25] I shall accordingly proceed to issue the order to follow, being mindful that these are civil proceedings, in terms of section 77 (3) of the BCEA. I am of the view that the costs should follow the results.

Order:

1. The respondent is ordered to pay to the applicant the sum of R73 090.24 (Seventy-three thousand and ninety rand and twenty-four cents) within 3 business days from the date of uplifting of the regulations in terms of the Disaster Management Act Number 57 of 2002, in relation to coronavirus 19, preventing normal business functioning in South Africa.

2. The respondent is ordered to pay to the applicant interest on the sum of R73 090.24, at the rate of 10.25% per annum from 20 November 2017, until date of payment in full. Such payment to be made within 3 business days from the date of uplifting of the regulations in terms of the Disaster Management Act Number 57 of 2002, in relation to coronavirus 19, preventing normal business functioning in South Africa.

3. Costs of suit of this application.

Cele J

Judge of the Labour Court of South Africa.

Appearances:

For the Applicants:	Advocate B Da Costa
Instructed by:	Kern & Partners Attorneys
For the Respondent:	Advocate G Fourie SC
Instructed by:	Savage Hurter Louw & UYS Inc.