<u>Claiming commission – Part 06</u>

Last week, we discussed the decision in *Jacquelyn Ann Hardman v Warehouse Finder CC*, primarily dealing with the issue of what happens to outstanding commission when an estate agent leaves an agency and there is still commission owing to them.

This week we analyse the decision in *Property Knight (Pty) Ltd v Van Niekerk and Others*.

The facts of the case are as follows:

1. On 6 September 2021, a seller (VW Trust) concluded a written agreement of sale of a property to a purchaser (Mary Tshabalala) for an amount of R1 500 000. The sale agreement provided for payment of commission calculated at 5% inclusive of VAT on the purchase price to Agency B (Virtual Realty Group (Pty) Ltd).
2. At the time of the conclusion of the sale agreement, Agency A (Property Knight) employed a certain person as an intern estate agent (Bernard). However, it appeared from the sale agreement that Bernard, acted as an agent on behalf of the Trust and he had offered the property for sale to the purchaser via the agency of Agency B. **Importantly, it appears from the court case judgement, that Bernard had set up Agency B**. A firm of attorneys (VGV) was instructed to attend to the transfer of the property.
3. On 12 October 2021, Agency A instituted urgent proceedings in the Magistrates Court in which it sought to interdict VGV from paying the commission to Bernard and Agency B, and an order directing VGV to pay the commission to Agency A on registration of transfer of the property. This application was dismissed on 23 November 2021.
4. On 30 November 2023, having received a copy of the order dismissing the urgent application, VGV informed Agency A's attorney (Fotoh) that it would proceed to pay the commission over to Agency B's attorneys.
5. On 1 December 2021, Fotoh sent correspondence to VGV in which he stated that he was of the view that the order dismissing the urgent application did not permit VGV to pay the commission over to Agency B's attorneys. Fotoh further stated in the correspondence to VGV that "the seller's position is that Bernard must provide a valid FCC under Agency B at the time of the sale, failing which [VGV] must pay the commission to the seller"
6. On the same date, Agency B's attorney (Moosa) in response to Fotoh's correspondence advised VGV that he was of the view that VGV was contractually bound to pay the commission over to Agency B on registration of transfer, and that in light of the dismissal of the urgent Magistrate's Court application, there was no longer a live dispute between Agency B and Agency A as regards the entitlement to payment of the commission. Moosa further advised that unless the commission was paid into his firm's trust account by close of business that day (that is 1 December 2021) urgent proceedings would be launched against VGV for failure to pay over the commission to Agency B.
7. Agency A sued Agency B in the Magistrate's Court. The position of Agency A and B was quite clear. Agency B was of the view that on a proper interpretation of the terms of the sale agreement, Agency B was entitled to payment of the commission because the sale agreement identified Agency B as the party to which the commission is payable. Agency A was of the view that it was entitled to payment of the commission because Bernard (a) was the effective cause of the sale; (b) was employed by Agency A at the time that the sale was concluded; and (c) held a fidelity fund certificate that identified him as an intern estate agent operating under the supervision of Agency A.
8. The Magistrate ultimately found that Agency A had failed to make out a case that it was entitled to payment of the commission in that Agency A was not referred to at all

in the sale agreement, and that Agency B is entitled to payment of the commission on the basis of the terms of the sale agreement. Consequently, the Magistrate ordered that VGV pay the commission to Agency B. The Magistrate further ordered that Agency A pay Agency B's costs on an attorney client scale, and VGV's costs on a party and party scale.

9. Agency A appealed to the High Court. The High Court indicated that the question to be answered was whether on a proper interpretation of the sale agreement, Agency B or Agency A was entitled to payment of the commission
10. In the appeal case, Agency A still contended that notwithstanding the terms of the sale agreement, it was entitled to payment of the commission because Bernard, as the effective cause of the sale, was employed by it and held a fidelity fund certificate that identified him as an intern estate agent operating under the supervision of Agency A.
11. Acting Judge Adhikari and Judge Binns-Ward were quite certain that it was clear from the terms of the sale agreement that the commission was to be paid to Agency B on registration of transfer. The sale agreement was unambiguous in this regard. The sale agreement did not contain a single provision that could reasonably be interpreted as entitling any party other than Agency B to payment of the commission. There was no reference at all to Agency A in the sale agreement. Further, none of the evidence established that it was the common intention of the parties to the sale agreement, that Agency A be entitled to payment of the commission.
12. Hence, Agency A lost the appeal to be paid commission.

Adhikari and Binns-Ward also highlighted the following, which is important for property practitioners (PP) to take note of:

1. The Estate Agents Board (as it was then, now the PPRA), had issued an intern's FFC in respect of Bernard in his capacity as intern in the employ of Agency A.
2. There was no evidence that Bernard held a FFC as an employee or intern of Agency B.
3. The regulations to the Property Practitioners Act, impose strict constraints on the ability of an intern to act as an estate agent, save under the direct supervision of a suitably qualified full status estate agent. The judges noted strongly that the regulatory provisions in question are directed at the protection of the public and it is therefore in the public interest that they be properly policed and enforced.
4. **IMPORTANT TO NOTE:** Part of the order made by the court, was that due to the non-compliance with the Estate Agency Affairs Act and the Property Practitioners Act by both Bernard and Agency B, **"…that they are questions deserving of investigation by the Property Practitioners' Regulatory Authority, which is the statutory successor to the erstwhile Estate Agents Affairs Board. We shall therefore direct that the Registrar forward a copy of this judgment to the Chief Executive Officer of the Authority for the attention of the Authority's Board."**

Some comment on this case next week .