

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2012/34717

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED ✓
30/09/2016	
DATE	SIGNATURE

In the matter between:

CROUS INTERNATIONAL (PTY) LTD

Plaintiff

and

PRINTING INDUSTRIES FEDERATION
OF SOUTH AFRICA

Defendant

J U D G M E N T

COPPIN, J:

[1] In this action the plaintiff, an estate agency, claims an amount of R1 570 087,00 (alternatively R1 535 087,00) from the defendant¹ as commission for the sale of the defendant's property, situated at erven 1 and 2, Laser Park, Honeydew (*"the property"*), during about 2008 (or 2009), to First Ready Development 695 Ltd, trading as the African Leadership Academy (*"ALA"*).

[2] The issues are relatively crisp. The first and main issue is whether the plaintiff introduced ALA to the defendant and was the effective cause of the sale. The second issue is whether the plaintiff is entitled to payment of a commission in circumstances where during 2008 and 2009, crucial periods in the history of the conclusion of the sale, it was not in possession of a valid fidelity fund certificate (referred to in this judgment as a *"certificate"*, and in plural as *"certificates"*) as contemplated in sections 26 and 34A of the Estate Agency Affairs Act² (*"the Act"*).³

[3] The first issue is mainly factual, whereas the second issue is mainly legal.

[4] The plaintiff called four witnesses in the following order: Mr Moletsane Lebone, a manager at the Estate Agency Affairs Board (*"the Board"*), who

¹ A company incorporated in terms of section 21 of the Companies Act 61 of 1973. It is sometimes referred to in correspondence discussed in this judgment by the acronym of its name, namely, "PIFSA".

² Act No 112 of 1976.

³ In terms of section 26: "No person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him or her, and if that person is a company to every director of the company." In terms of section 34 of the Estate Agency Affairs Act: "No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act as estate agent, unless at the time of such performance a valid fidelity fund certificate had been issued to that estate agent and, if it is a company, to every director of that company."

testified concerning the issue of certificates by the Board; Mr Timoteus Crouse, a director of the plaintiff, who was primarily involved with the mandate given to the plaintiff by the defendant (represented by its Chief executive Officer at the time, Mr Sykes) to find a buyer and/or tenant for its property. He was the primary witness for the plaintiff. Thirdly, Ms Deli Nkambule, a legal manager employed in the compliance department of the Board who also testified about the issue of certificates by the Board, including concerning the reasons the plaintiff was not placed in receipt of such certificates for 2008 and 2009. The next witness called was Mrs Heleta Getruida Crouse, the daughter-in-law of Mr Timoteus Crouse and also co-director of the plaintiff. She testified mainly concerning the plaintiff's execution of the mandate given to it by the defendant and her evidence supplemented and corroborated that of Mr Crouse in certain respects. Lastly, the plaintiff called Mr Haasbroek, an accountant, who testified concerning the financial statements of the plaintiff for, *inter alia*, the periods 2008 and 2009, and including about the directorship of the plaintiff.

[5] The defendant only called one witness, namely Mr Patrick Lacey, who is now retired, but who, before his retirement, was Chief Executive Officer ("CEO") of the defendant after the retirement of Mr Sykes. He testified generally about the efforts to sell or lease the property at the time when Mr Sykes was the CEO of the defendant and subsequently when he became CEO and specifically concerning the conclusion of the sale agreement between the defendant and ALA.

[6] All the witnesses, generally, made a reasonably good impression in the witness stand. In the final analysis the differences in their actual evidence, dealing with the same aspect, was minimal. Mr Lacey, for example, disputed that the plaintiff was the effective cause of the sale and therefore entitled to a commission, merely on the basis that ALA's representative dealt and negotiated directly with him, without the intervention of the plaintiff or its representative(s), but did not dispute the facts testified to by Mr and Mrs Crouse which, according to them, established that the plaintiff was, indeed, the cause of the sale. The background facts regarding the lease and sale of the property are largely, common cause and are also borne out by the minutes of the management committee of the defendant and correspondence which were introduced as evidence by consent of the parties. I will discuss aspects of the witnesses' evidence insofar as may be relevant when dealing with the issues and the extent to which I accept or reject their evidence in respect of those issues.

[7] I shall now proceed to set out the background and chronology of events, which, as I have stated, is by and large common cause. Having done so, I will proceed to deal with the two main issues referred to at the outset. In respect of each I shall relate the arguments advanced by the parties, then deal with the applicable law and my findings.

BACKGROUND AND CHRONOLOGY OF EVENTS

[8] During about 2007, before any involvement of the plaintiff, or Mr, or Mrs Crouse, the defendant, which until then, was operating a printing college on the property through its subsidiary, known as Media Training Centre ("*the Centre*"), no longer required the use of the entire property for its own purposes and entered into a written lease agreement with ALA during about May 2007 in terms of which the ALA was to occupy part of the property and use the Centre's facilities on the property for an agreed rental amount.

[9] In terms of their agreement ALA was *inter alia* to rent the property for the period 1 September 2008 to 20 December 2009 and then from 5 January 2009 to 30 June 2009. ALA also had an option to extend its rental of the facilities on the property until the end of June 2010. In entering into the agreement, ALA was represented by its founder and CEO, Mr Fred Swaniker and the Centre was represented by Mr Nick Delport, its Managing Director. Mr Christopher Bradford of ALA and Ms Lynne Hetherington of the Centre, signed the rental agreement as witnesses.

[10] On 19 June 2007 ALA, represented by Mr Swaniker and the Centre, represented by Mr Delport, also entered into a further agreement in terms of which ALA was given the right of first refusal to purchase the property. It was, *inter alia*, a condition that the right had to be exercised within the first two years of occupancy, or prior to the expiry of the lease agreement that ALA had with the Centre.

[11] It is common cause that at the management committee meeting of the plaintiff, held at the property on 27 February 2008, Mr Sykes *inter alia* reported to the meeting that ALA had been informed that the property was valued at between R70 million and R72 million, excluding subdivision.

[12] It is not disputed (as reported by Mr Sykes at the said meeting) that ALA had made an initial offer to purchase the property for R35 million in cash and a further R25 million in deferred payments and allowing for discounted use of the property by the Centre. In terms of its first offer ALA wanted the property to be transferred to it upon payment of the R35 million.

[13] Mr Sykes reported at the same meeting that ALA had been advised that the offer was not likely to be accepted by the defendant and that the property would be put on the market, albeit subject to ALA's right of first refusal.

[14] According to Mr Sykes (as recorded in the minutes which were accepted as true and what they purport to be) the original developer of the property had been approached and had been given until the end of March 2008 to find a buyer. The president of the defendant, one Mr E V Ronne and the past president, one Mr L P Retief, were to be involved in any sale negotiations.

[15] During about March 2008 discussions were held between Mr Swaniker of ALA and Mr Sykes of the plaintiff. Pursuant to such discussions per letter

dated 25 March 2008 ALA made another offer to the defendant to purchase the property. According to Mr Swaniker's letter, ALA's bankers had valued the property at R64 million. The offer included purchasing the land, buildings and "some base furniture". In essence, ALA offered to pay the amount in instalments. The total purchase price increasing with the time it took to complete the payment. Thus, if payment was completed by 31 December 2008, ALA was going to pay R65 million; if payment was completed by 30 June 2009, ALA was going to pay R68 million and if completed by 31 January 2010, ALA was going to pay R70 million for the property.

[16] On 7 May 2008 the management committee of the defendant met again where Mr Sykes reported that two valuations of the property had been obtained, one valuing the property at R70 million and the other valuing it at R72 million. He also reported on the offer of ALA and that it was agreed not to accept ALA's offer, unless it was unconditional and accompanied by financial guarantees. It was decided that the CEO, at that stage Mr Sykes, would write to ALA and continue negotiating with ALA.

[17] ALA submitted an updated offer to the defendant for the purchase of the property. It is contained in a letter dated 6 July 2008, from Mr Swaniker to Mr Sykes, informing that, following their discussions of 24 June, ALA was presenting an updated offer. The terms of the updated offer were *inter alia* that the purchase price would be R70 million, payable by way of a deposit of R10 million, of which R2 million was non-refundable, and a balance of R60 million payable in three instalments, as follows: R10 million by 31 April 2009,

R10 million by 30 September 2009 and R40 million by 31 December 2009. There were other conditions.

[18] The defendant's management committee met on 9 July 2008. Mr Sykes reminded the meeting that the sale of the property was in progress; that the offer received from ALA was not a clean offer, but final negotiations were taking place at the time, which were expected to be finalised by the end of July. Of importance, it was agreed that ALA's updated offer be declined and that Mr Sykes, Mr M Birch and Mr M Delport meet with ALA to explain to it the defendant's position, including its desire to receive a guaranteed offer to purchase.

[19] On 3 September 2008 the defendant's committee met. It is recorded that Mr Sykes updated the meeting by noting that the defendant was waiting for the South African Police Service ("SAPS") to accept the defendant's offer for the sale of the property. SAPS had indicated that they were willing to purchase the property but a process had to be followed in terms of which the defendant had to make an offer to SAPS which SAPS was to accept. The process was to be lengthy. It was also noted that ALA would be given the opportunity to respond to the SAPS offer. Mr Sykes was to report to ALA and to keep them abreast of developments. Mr Sykes informed the meeting that ALA offered no guarantees and payment was dependent on ALA's ability to raise the necessary funds. It was noted that the defendant required guarantees and it was also agreed that the property would be sold as a whole

without subdividing it, as subdivision was no longer viable and would be costly.

[20] In the minutes of the defendant's management committee meeting held on 5 November 2008 it is noted that three parties were at that stage interested in purchasing the property. A special resolution had to be passed by the defendant in terms of which the sale of the property would be agreed to. The president of the defendant was mandated to agree to a price of R70 million for the property, if necessary. The president (Mr Ronne) and Mr Sykes (the CEO at the time) were to represent the defendant in negotiating the sale of the property, together with attorneys Cliffe Dekker.

[21] Of relevance to this matter, in the management committee minutes of 25 February 2009 it is recorded *inter alia* that there was a concern about the ALA's payment of its rental; and that ALA had paid an amount late. Mr Sykes informed the meeting that ALA's roll-over rental option had lapsed in 2008; That even though ALA were advertising the property as their facility and would find it difficult to move, the defendant was willing to sell the property to anyone who made an acceptable offer to the defendant and that ALA would be obliged to move in that case.

[22] It was mentioned in those minutes that ALA had made an offer of R40 million "*to take ownership plus another R20 million (unsecured by the end of 2009)*". ALA had indicated that they would make another offer if that offer was not acceptable to the defendant. It was noted further that the property was

valued at R77 million on the open market. Of significance, Mr Sykes proposed that additional agents be employed and that the defendant should advertise the property. Mr Sykes was also mandated to negotiate with ALA concerning the cession of the lease to the defendant. It was noted that *"the objective was to sell by June"*.

[23] In an email dated 20 March 2009, from Mr Crouse to Mr Sykes, the former thanks Mr Sykes for *"again confirming"* the defendant's mandate to market the property. For the sake of completeness, the email of Mr Crouse continues as follows:

"Elda and I had a long session yesterday thinking strategically on how to find the correct buyer for your property.

We have drawn up a provisional list of institutions and people that will be approaching during the next few weeks.

Attention has also been given to our modus operandi.

- 1. We will advise you of the names of persons we have contacted on a regular basis.*
- 2. If we have an interested party whether it be a potential buyer, an estate agent or an auctioneer we will personally bring such a person to view the property.*

We want to suggest that you or Nick will not be introduced to such a person on that occasion. Please point us to a staff member that can open any area for us that we might not have access to without a key. Such a party will not be allowed to visit the property without being accompanied by either Elda or myself.

- 3. You will refer any interested parties that may approach you directly to us.*
- 4. We will approach one or two estate agents provisionally.*

5. *At this stage we will not bring an auctioneer to the college but will make enquiries anyhow. This information will be shared with yourselves.*
6. *We have noted that the present lease over the property will expire by the end of June 2009. You will consult with us before you give any extension thereof.*

We are confident that we will be successful in finding you a suitable buyer or tenant. ..."

[24] It is important to note, as confirmed in subsequent correspondence, that the defendant had in 2008 already given the plaintiff a sole mandate to market the property. The evidence – which was undisputed – was that the plaintiff was given a mandate by Mr Sykes on behalf of the defendant to find a buyer for the property and that this mandate was given in February or March 2008. SAPS' offer was a product of the plaintiff's marketing of the property. Other offers that came through the plaintiff for the property were from ADV Tech, the For Change Foundation and Buffshelf (Pty) Ltd.

[25] Mr Sykes responded to Mr Crouse' email in an email of the same date (i.e. 20 March 2009), in which he states:

"Thank you for your note. PIFSA's objective is to get our property marketed as widely as possible as soon as possible and I am happy with your proposal in principle.

Would you please confirm your commission structure? I know we discussed it last year, but I don't want to rely on memory in something as important as this!

Our contact person on site will be Chris Mason until August, but I hope we have a sale well before then."

[26] In a further email dated 23 March 2009 Mr Crouse informed Mr Sykes as follows:

Elda took Les Fatherly of SA Land to visit the College site with a view to send out a flyer to all the investors on his database. We will send you a copy when it comes to hand.

We would also like to put up a large Crous International 'For Sale' board up at the Zeis Road corner of the property. Will it be okay by you?

Regarding our commission structure: We normally use the SAPOA suggested scale which is:

*5% on the first R1 million;
3½% on the second R1 million;
2½% thereafter.*

Should we work with another agent we will share commission but the split will be stipulated in the Deed of Sale or Offer to Purchase.

Please rest assured that we will be giving our best attention to the sale of your property."

[27] From the defendant's management committee's minutes for the meeting held on 13 May 2009 it is, *inter alia*, apparent that the defendant was having issues with ALA about payment for services and there was a fear of litigation that may result from improvements which ALA had made to the property and in particular concerning the tennis courts which it built there. Regarding the sale of the property the following is recorded:

"6. Sale of Honeydew Property

It was reported that the property details had been given to various agents and about 600 different companies. Interest had been shown by the For Change Foundation and Crawford College. The asking price was R70 million for us plus the agent's fee on top of that. Investors had suggested a price of R56 million, subject to an anchor tenant being secured. Mr M Bath suggested that PIFSA could consider it an investment and

profit from it if it was managed professionally. SAPS may be willing to sign a lease and there were other possibilities. Mr Bath and Mr Sykes were asked to investigate alternatives to an outright sale."

[28] In an email dated 4 June 2009 from Mr Sykes to Mr Crouse, the former provides Mr Crouse with the lease agreement ALA had with the Centre. He informs Mr Crouse that the defendant *"would not enter into such an agreement again because we would want a clean rental with the other charges either being paid by the tenant or reimbursed. ALA is not very good at reimbursement or paying on time"*.

[29] By letter dated 22 June 2009 Mr Sykes, on behalf of the defendant, confirmed the mandate which the defendant had given to the plaintiff. The letter states:

"Confirmation of revised mandate

In 2008 PIFSA gave Crous International the sole mandate to market our property situated in Laser Park, Honeydew. As you will recall, this mandate included the brief to work with any other agent, or auctioneer and share the commission payable on a sale.

On 18 May 2009, following a meeting held to discuss the property options available to PIFSA, I was requested by the chairman of our central chamber, Mike Bath to contact Crous International and then expand the mandate to include the possible finding of a tenant for the premises, and for Crous International to manage the letting of the property.

The purpose of this letter is simply to formally record the amended mandate that up to now has been a verbal agreement."

[30] In a letter dated 22 June 2009 Mr Crouse, on behalf of the plaintiff, refers Mr Sykes to a meeting that he had with Mr Sykes on 17 June 2009 and included certain information for the defendant's consideration. It included an offer from Buffshelf 10 Trust for the purchase of the property for R60 million, but of greater significance, it informed that the plaintiff had received an offer of lease from ALA for the entire property for 10 years (which meant the defendant would have to find alternative premises for itself by no later than 1 September 2009). The offer included a right of ALA of first refusal to purchase the property at any time during the tenancy and an option to buy the property for R70 million during the first year of the lease and for an amount escalated by 7% more per annum as from the second year of the lease.

[31] In the letter Mr Crouse informs Mr Sykes that if the defendant decides to enter into the lease with ALA the plaintiff could arrange for the drafting of a formal lease agreement to be signed by ALA and the defendant. Further, that the plaintiff would take responsibility for the rent collection and management of the property at a fee of 5% (excluding VAT) of the rental income. Further and of significance for the issues to be decided in this case, that should a sale agreement with ALA be entered into "*in terms of the lease agreement*" the plaintiff "*will be entitled to sales commission at the suggested SAPOA rate*".

The letter concludes as follows:

"We await your decision and want to assure you of our continued service to your best interest."

It is common cause that over the period from about 26 June 2009 the defendant's management committee considered the proposals and ALA's offer and the defendant's members made counter-proposals.

[32] It is further not disputed that the plaintiff negotiated the rental agreement with ALA. This is confirmed in an email dated 29 June 2009 from Mr Crouse to Mr Sykes. The latter part of the email's concluding paragraph states:

"If everything goes according to plan we hope to get the signed lease agreement from ALA by Friday 3 July. Herewith a copy of the rental agreement we will use. As you will notice the agreement is somewhat in favour of the lessor. We will keep you informed of any developments."

[33] ALA dealt with the plaintiff in negotiating the lease agreement.

[34] It is common cause that at its meeting of 8 July 2009 the defendant's management committee discussed the proposals received, including ALA's offer to lease. The overall attitude towards the lease proposal of ALA seems to have been positive. Of importance, it was resolved that Mr Birch and Mr Sykes of the defendant would set up a meeting to propose and approve the terms of the lease agreement.

[35] The terms of the lease were negotiated with the plaintiff's involvement. This is confirmed in a letter dated 9 July 2009 from Mr Crouse to Mr Sykes. Accompanying the letter was a signed agreement of lease for two years

entered into between ALA and the defendant. The lease commenced on 1 August 2009 and was to terminate on 31 July 2011, and it included an option to renew the lease for a year. Notice of intention to renew had to be given six calendar months prior to termination of the lease. ALA also had the option to purchase the property until 31 July 2011 for an amount of R75 million (inclusive of VAT at 0%) escalating at the rate of 7% per annum as from 1 August 2010. It was also agreed that the defendant "*may not sell the property during the term of the lease without the written consent of*" ALA.

[36] It was not seriously disputed that early in November or December 2010 Mr Patrick Lacey telephoned the plaintiff where he spoke to Mrs Crouse and enquired from her whether ALA was still interested in purchasing the property. He testified that he contacted the plaintiff because he must have been asked by either Mr Sykes or Mr Latter to find out what ALA's attitude was and since he did not know and had never dealt with ALA before, that is, either with Mr Bradford or Mr Swaniker, he enquired from the plaintiff, who has had dealings with them. It is not disputed that early in December 2010 Mr Bradford of ALA contacted Mr Lacey directly and they had a meeting at which Mr Bradford informed Mr Lacey of ALA's intention to purchase the property and its financial standing in that regard. Negotiations followed which, eventually, culminated in the sale. It is not disputed that the plaintiff, including Mr and Mrs Crouse, were not included in these negotiations.

[37] Bowman Gilfillan Attorneys (Mr Van Hoogstraten) were engaged to prepare an agreement of sale. By 27 January 2011 they had emailed a draft

agreement to ALA and the plaintiff was copied in the email. Shortly thereafter (in February 2011) the agreement was concluded between ALA and the defendant in terms of which the defendant sold the property to ALA for a total purchase price of R 61 403 508-99.

WAS THE PLAINTIFF THE EFFECTIVE CAUSE OF THE SALE OF THE PROPERTY TO ALA?

[38] It is trite that the *onus* is on the party in the position of the plaintiff to prove that it was the effective cause of the sale. I consider it useful to first relate the submissions made by the parties in support of and against a finding that the plaintiff was the effective cause of the sale.

[39] The defendant's counsel submitted that the plaintiff was not the effective cause of the sale for the following reasons: The plaintiff did not introduce ALA to the property or to the defendant and did not negotiate the sale agreement which was ultimately concluded between ALA and the defendant. The defendant's counsel submitted that the "*primary reasons*" for the sale were the following: From the time ALA was first introduced to the property in 2007 it considered the property suitable for its purposes and wanted to buy the property; prior to 2008 ALA "*had become ensconced in the property*" i.e. had made substantial improvements to the property, including building a tennis court and basketball court and installing an electrical fence, etc., on the property for which it was not compensated; since 2007 the defendant wanted to sell the property and made desperate efforts to sell it in

2009, including by closing its training facility that was housed on the property; since 2008 ALA was prepared to purchase the property and the defendant was prepared to sell it for R70 million; the only reason ALA's offer was not accepted was because it could not pay the full price immediately upon transfer; in February 2011 ALA was prepared to make a cash offer and the defendant was prepared to accept a lower offer than previously because of the increased financial pressures brought to bear upon the defendant.

[40] The defendant's counsel further submitted that "*it is common cause*" that the plaintiff played no role in persuading ALA to make a cash offer or in persuading the defendant to accept an amount for the property which was less than what was previously expected. It was further submitted by the defendant's counsel that the plaintiff's contentions as to why its efforts were to be regarded as constituting the effective cause of the sale "*varied as the case progressed*". In this regard it was pointed out that in its particulars of claim the plaintiff alleged that it had introduced ALA to the property. In its further particulars for purposes of trial the plaintiff alleged that this introduction occurred when the plaintiff informed the defendant that ALA was prepared to lease the property with the option to buy; in his opening address counsel for the plaintiff reiterated that the plaintiff had introduced ALA as a potential purchaser of the property and ALA, in purchasing it, was exercising the option to purchase contained in the lease agreement it concluded with the defendant that had been negotiated by the plaintiff; Mr Crouse, according to defendant's counsel, "*disavowed any reliance on introducing ALA as a potential purchaser of the property*".

[41] According to this argument of the defendant's counsel, Mr Crouse in his evidence, in effect, conceded that Mr Sykes had told him that the defendant was in discussion with ALA about the latter buying the property, but was sceptical about the eventual conclusion of the sale with ALA and that the defendant thus wanted the plaintiff to find other purchasers. According to this argument, Mr Crouse's understanding was that if the defendant sold to ALA then "*they were the agent*". However, it was only strained relations between ALA and the defendant that prevented the conclusion of an agreement directly between them. Counsel for the defendant further, still on the theme of varying versions, submitted that Mr Crouse testified in chief, *inter alia*, that it was the plaintiff that caused ALA and the defendant to conclude the lease agreement which, subsequently, caused the sale take place, but under cross-examination, according to this argument, Mr Crouse's version "*became that the plaintiff was entitled to commission because it brokered the lease agreement*" which "*contained an option to buy and this option was exercised*".

[42] The defendant's counsel described the reasons, which the plaintiff proffered for being the effective cause of the sale, as "*a theory*" and submitted that it was an "*unsustainable*" theory because "*as a matter of law*" the option in the lease was not exercised and the offer made by ALA to the defendant was lower than the amount stipulated in the option and was in fact "*a new offer*". It was further submitted that the plaintiff had not played any role in the acceptance of this "*new offer*". According to the defendant's counsel, Mr

Lacey denied that there was a strained relationship between the defendant and ALA and submitted that his evidence in that regard was not challenged.

[43] It was further submitted that during the cross-examination of Mr Lacey *"a new theory was propounded"* by the plaintiff that it was the effective cause of the sale, namely, that the conclusion of the lease agreement in 2009, in which the plaintiff was involved, gave ALA enough time to raise the funds with which to purchase the property. According to the defendant's counsel, this theory is *"entirely speculative and not supported by any evidence. There is also no evidence that the lease agreement was a sine qua non of the sale agreement"*.

[44] The defendant's position, thus summarised, was that the plaintiff did not introduce ALA to the property or to the defendant; its efforts were confined to brokering a lease agreement between ALA and the defendant for which it was paid in excess of R600 000,00; ALA and the defendant independently, eighteen months later, negotiated and concluded the sale agreement; the plaintiff did not contribute to the negotiation and conclusion of the sale. Further, that there is no evidence from which it could be inferred that the plaintiff was the effective cause of the sale and the plaintiff's claim ought thus to be dismissed with costs.

[45] The plaintiff's contentions, briefly, were the following: The lease agreement, which was negotiated by the plaintiff and entered into between ALA and the defendant on 9 July 2009, contains an option to purchase, and

"must be seen holistically as one with the eventual purchase agreement concluded between ALA and the defendant". The plaintiff's counsel explained that this meant that *"one cannot think away certain parts of the transaction without the transaction falling away in its entirety"*. Plaintiff's counsel gave as an example *"if we think away either the lease or think away the negotiated improvements or think away the option, all of which had been negotiated by the plaintiff, there would have been no eventual sale agreement"*. The plaintiff, seemingly, was submitting that the sale was caused by the lease which contained the option and if there was no lease or no option there would have been no sale.

[46] Elaborating on this theme, the plaintiff's counsel further submitted that even though ALA always wanted to purchase the property the offers it made directly to the defendant were always rejected, but the lease was then negotiated in terms of which a future sale was envisaged at the time when ALA was able to purchase. Relying on a passage in *"South African Property Practice and the Law"*⁴ to the effect that an *"able"* buyer is one who is only at the time of the conclusion of the sale agreement in a financial and legal position to carry out its terms – it was submitted on behalf of the plaintiff that the fact that ALA did not have the money to purchase the property at the time of the conclusion of the lease with the defendant did not mean it was not an able buyer. It was such a buyer because it had the money at the time of the conclusion of the sale.

⁴ Delport H J ' *South African Property Practice and the Law* '(Juta; 2001) at 315.

[47] Relying on the decision in *Vanarthdoy (Edms) Bpk v Roos*⁵ (“*Vanarthdoy*”), plaintiff’s counsel submitted that if a potential purchaser is aware of the property and has procured a right of first refusal (i.e. an option to buy) from the seller and the seller sells the property to that same purchaser through the efforts of an estate agent, the seller is liable to pay the estate agent’s commission.

[48] Plaintiff’s counsel also referred to the decision in *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd*⁶ (“*Nach*”) and submitted that an estate agent was entitled to commission in circumstances where it sold the property to an existing tenant who had a right of pre-emption. The plaintiff’s counsel pointed to similarities between the facts of the present case and those in *Nach* and in particular to the fact that the Appellate Division in *Nach* went further, because even though there the agent had found another purchaser (i.e. other than the tenant with the option to purchase) and the sale eventuated after the offer of this other potential purchaser was presented to the tenant, who then exercised its option to purchase, the agent was still held to have been the effective cause of the sale, which entitled it to its commission.

[49] Seemingly, drawing from the *Nach* decision, plaintiff’s counsel submitted that “*the mere fact that ALA was a tenant and might have had the right of pre-emption, which had expired or not, does not detract from the fact that the plaintiff was the effective cause of the sale*”.

⁵ 1979 (4) SA 1 (AD).

⁶ 2001 (3) All SA 295 (A).

[50] It was further submitted on behalf of the plaintiff that even though ALA did not purchase the property for R75 million (as per the option) and only purchased for approximately R61,5 million, the plaintiff was still the effective cause of the sale. The mere fact that the defendant agreed to accept a lower price does not result in the plaintiff being deprived of its commission. In that regard reference was made to the decision in *Burt v Ryan*⁷ ("Burt").

[51] The plaintiff has to prove on a balance of probabilities that it had a mandate to find a purchaser for the property⁸ and that it has duly performed its mandate.⁹

[52] Even though it appears to have been in contention at some point, it can hardly be said that the plaintiff did not have a mandate to find a purchaser for the property. Secondly, it is perhaps true that it could hardly be contended that the plaintiff introduced ALA to the defendant, because ALA had been a tenant and an aspirant purchaser of the property long before the plaintiff was given a mandate. That fact, however, is irrelevant, unless the plaintiff and the defendant had agreed, as part of the plaintiff's mandate, that the commission will only be earned if the sale was to a purchaser that had been introduced by the plaintiff to the defendant. There was some suggestion by the defendant in another context that that was the case, but it was not placed in issue during

⁷ 1926 TPD 680 at 682.

⁸ See Harms *Precedence of Pleadings* (8th edition) (LexusNexus) p 20 and the authorities cited there, including *Botha v Smith* 1976 (4) SA 885 (A).

⁹ See Harms *ibid* at 21; *Phillips v Aida Real Estate (Pty) Ltd* 1975 (3) SA 198 (A).

testimony and I cannot find on the evidence that that was the term of the plaintiff's mandate.

[53] The defendant's counsel, for example, relied on what Mr Crouse said in his evidence-in-chief concerning what Mr Sykes had told him about ALA and its intentions to purchase the property. According to Mr Crouse, Mr Sykes told him at the time of the mandate that the defendant (or Mr Sykes and his colleagues) were in discussions with ALA to see if ALA wanted to purchase the property, but he (i.e. Mr Sykes) did not believe that the sale with ALA would eventuate. According to the defendant's counsel's interpretation of this evidence – "*the defendant thus wanted the plaintiff to look for other purchasers*". Counsel also submitted that Mr Crouse testified that his understanding with Mr Sykes was that if the defendant sold to ALA "*is hulle ... die agente ...*"

[54] The defendant's counsel's submissions were in another context and vaguely suggested that Mr Crouse testified that the mandate of the plaintiff was to find a purchaser other than ALA who had already been introduced to the defendant.

[55] However, Mr Crouse testified that the terms of the plaintiff's mandate did not exclude finding ALA as a tenant, or as a buyer of the property. Mr Crouse's evidence is corroborated by *inter alia* his email to Mr Sykes dated 20 March 2009 and Mr Sykes' reply to him on that same date; a follow-up email from Mr Crouse to Mr Sykes dated 23 March 2009 and the defendant's letter

to Mr Crouse dated 22 June 2009. In none of those missives is it stated or suggested that the plaintiff's mandate did not include bringing about a lease (or sale) between ALA and the defendant. On the contrary, the fact that the plaintiff did, in fact, with the approval of the defendant (and Mr Sykes), negotiate the 2009 lease that was entered into between ALA (or First Ready Development 695 Ltd.) and the defendant, which also gave ALA an option to purchase the property, puts paid to the defendant's counsel's suggestions. Mr Sykes was also not called as a witness.

[56] There was no real issue made of ALA's willingness and ability to purchase. The latter aspect has to be adjudged as at the date ALA concluded the sale with the defendant.

[57] The main remaining issue under this heading, regarding the proof of the plaintiff's mandate, therefore, is whether the plaintiff was the effective cause of the sale agreement between ALA and the defendant.

[58] It has been stated that to be an effective cause the agent's conduct must not only be a *causa sine qua non* but a *causa causans*¹⁰ as held in *Webranchek v L K Jacobs and Co Ltd*,¹¹ which is also referred to in *Nach*¹². These are relative concepts and the distinction between them is not as crisp and clear as their frequent use might suggest. When a *sine qua non* emerges as the only causative factor it is readily accepted as also being the *causa*

¹⁰ See *LAWSA* 2nd edition Vol 9 para 583 and the cases cited in footnote 5.

¹¹ 1948 (4) SA 671 (A) at 679.

¹² Para 10 at p 298.

causans, but it is only where there are a number of causes competing to be the effective cause that the distinction has any meaning¹³.

[59] An agent's conduct, even though it is a *causa sine qua non*, will only be an effective cause (*causa causans*) if there is no new, sufficiently weighty intervening cause breaking the chain of causation between the agent's conduct and the eventual conclusion of the sale.¹⁴

[60] But it is established, generally, that in the absence of a new weighty intervening cause between the estate agent's endeavours, in relation to the sale and the conclusion of the sale, those endeavours constitute the effective cause of the sale¹⁵. Each case has to be decided on its own facts.

[61] Even though ALA was a tenant and interested in purchasing the property the evidence shows that the defendant had negative perceptions toward ALA and was sceptical of its ability to afford, or even to sustain, its tenancy of the property. The plaintiff, armed with a mandate to find a tenant and/or buyer for the property, saw potential in ALA and, successfully and with the defendant's apparent approval, negotiated and caused the conclusion in 2009 of the new lease between ALA and the defendant. The plaintiff was also instrumental in negotiating the option of ALA to purchase the property which option was made part of the lease.

¹³ LAWSA 2nd edition Vol 9 para 583 *et seq.* and the cases cited there.

¹⁴ See *Mano et Mano Ltd v Nationwide Airlines (Pty) Ltd and Others* 2007 (2) SA 512 (SCA).

¹⁵ *Ibid.*

[62] In terms of the option the defendant was obliged, for its duration, to keep the offer to purchase the property, open for acceptance and to do nothing to prevent ALA from exercising the option to purchase the property.

[63] The plaintiff's conduct in *inter alia* negotiating the lease with the option, has, in my view, on a balance of probabilities, been shown to be a *condictio sine qua non* of the sale. It was also the *causa causans* of the sale, or to put it another way, there was no weighty new intervening cause between the plaintiff's endeavours to present ALA as a potential purchaser and the conclusion of the sale. On the authority of the decision in *Burt*, the mere fact that ALA purchased for less than the option price does not detract from the plaintiff having been the effective cause of the sale.¹⁶

[64] The option in a sense committed the defendant to selling to ALA for the duration of the option, unless ALA was not willing to purchase.

[65] In conclusion on this point, I find on the facts that the plaintiff has established on a balance of probabilities that it had carried out the terms of its mandate to find a buyer for the property- that buyer being ALA- and that the plaintiff was the effective cause of the sale between ALA and the defendant. Mr Lacey's contrary opinion is rejected.

IS THE PLAINTIFF NEVERTHELESS ENTITLED TO BE PAID A COMMISSION?

¹⁶ See *Burt v Ryan* 1926 TPD 680 at 682.

[66] The mere fact that the plaintiff fulfilled its mandate and was the effective cause of the sale does not entitle it to be paid the agreed commission. In terms of section 26 read with section 34A of the Act, which were referred to at the outset of this judgment, the plaintiff would only be entitled to the commission, if at the time of performing the acts as estate agent (i.e. its endeavours, which are the effective cause of the sale) those sections had been complied with.

[67] As pointed out at the outset, it is common cause that during 2008 and 2009, including the dates of the conclusion of the lease between ALA and the defendant, which the plaintiff was actively involved in, the plaintiff itself was not in possession of a certificates because certificates had not been issued to it.

[68] The plaintiff's case, concerning compliance with sections 26 and 34A, was, essentially, that although it was not in physical possession of certificates, those certificates ought to have been issued to it, because it had complied with the requirements for their issue and the failure to issue was purely due to a technical system problem at the Board, as a result of which certificates were not printed and consequently issued to the plaintiff.

[69] The evidence of both, Mr Lebone and Ms Nkambule, who were called by the plaintiff, was to the effect that the plaintiff had complied with the requirements for the issue of the certificates but that they were not printed due

to a technical problem at the Board and consequently were not issued to the plaintiff.

[70] The evidence of those two witnesses was further to the following effect: A certificate is only valid for a year. When an estate agent, such as the plaintiff, applies for a new certificate, the Board establishes whether the requirements for the issue of the certificate had been met, before issuing the certificate to the agent. If the requirements are satisfied, a certificate is issued, not only to the company, but also to the principals (i.e., directors) of the company. If the company does not comply with the requirements for issue then no certificates are issued to either the company or to its principals (directors).

[71] It is common cause that even though the plaintiff had not been issued with certificates for 2008 and 2009, its directors, Mr Timoteus Crouse and Mrs Crouse, had been issued with certificates for those years. The plaintiff's counsel resultantly argued to the effect that this was a unique situation and that for all intents and purposes it ought to be assumed that the company, i.e. the plaintiff, had been issued with certificates for those years, as it complied with the legal requirements and the failure to issue was due to a technical glitch at the Board. The fact that the principals were issued with certificates, according to the plaintiff's counsel's argument, is further confirmation of the plaintiff's compliance with the requirements of the Act.

[72] The plaintiff's counsel further submitted that the object and purpose of sections 26 and 34A, *inter alia*, is to regulate the activities of estate agents and to maintain and promote their standard and conduct, but more particularly, to prevent persons and entities, who do not meet the legal requirements set, from operating as an estate agents, or from conducting business as estate agents. Relying on the decisions of the Supreme Court of Appeal in *Cape Killarney Property Investments (Pty) Limited v Mahamba*¹⁷ ("Cape Killarney") and in *Theart and Another v Minnaar NO, Senekal v Winskor 174 (Pty) Limited ("Theart")*¹⁸ the plaintiff's counsel submitted, in essence, that form should not be elevated above substance; the plaintiff complied with the requirements for the issue of certificates for 2008 and 2009 and certificates were issued to its principals in recognition of such compliance; The certificates for plaintiff were merely lacking because of the Board's technical difficulty in printing them. The argument was to the effect that the requirements of sections 26 and 34A of the Act had been substantially complied with, because the general purpose of those sections had been achieved.

[73] Plaintiff's counsel submitted further that nothing turned on the points that the defendant tried to make concerning the audit report, particularly, regarding the erroneous recording in it that Mr Dawie Crouse was a director of the plaintiff, whereas he was not. And the evidence presented by the plaintiff, through Mrs Crouse and Mr Haasbroek, in that regard and to that effect, was not countered and ought to be accepted.

¹⁷ 2001 (4) SA 1222 (SCA).

¹⁸ 2010 (3) SA 327 (SCA).

[74] The defendant's argument, in essence, was that section 34A of the Act was strict and the plaintiff's failure to possess actual certificates for 2008 and 2009 was fatal to its case. It was submitted that the term "issue", in the context of *inter alia* sections 26 and 34A of the Act, meant that a certificate must have been produced and given to the plaintiff. A person who wants to do business legally and effectively as an estate agent is required by the Act to obtain a certificate. When the certificates were not issued to the plaintiff for 2008 and 2009 the plaintiff had a duty to rectify the situation. The plaintiff has remedies against the Board for not issuing it with a certificate for the relevant years, but the failure to have such certificates, for whatever reason, did not entitle the plaintiff to conduct business as an estate agent for the period(s) during which it did not have such certificates.

[75] In supplementary heads of argument counsel for the plaintiff relied on the Supreme Court of Appeal's decision in *Taljaard v T L Botha Properties* ("*Taljaard*")¹⁹ which dealt, *inter alia*, with the seller who tried to recover the commission he paid from an estate agent who did not have a certificate at the relevant time. The plaintiff's counsel in particular referred to what was held there, namely, that section 34A of the Act does not invalidate the contract of mandate of an agent who acts contrary to the provisions of section 26 of the Act and that section 34A was not enacted for the benefit of clients who have a contractual obligation to pay an estate agent which performed its mandate, but was intended to penalise estate agents who have breached that section.

¹⁹ 2008 (6) SA 207 (SCA).

[76] The plaintiff's counsel also relied on the decision in *Theart* where the Supreme Court of Appeal was dealing with the requirements of a notice issued in terms of section 4 of the Prevention Of Illegal Eviction From And Unlawful Occupation Of Land Act ("PIE")²⁰ read with Rule 55 of the Magistrate's Court Rules and *inter alia* held that even though the provisions of section 4 of PIE were peremptory and the notice, which had been served on the respondent, was in some respects deficient in respect of the requirements of section 4(2) of PIE and Rule 55, it would not be fatal if the notice achieved the purpose contemplated in those provisions. Whether the purpose had been achieved could not be determined abstractly, but had to be determined in the light of the facts of the particular case.²¹

[77] The plaintiff submitted with reference to the decisions in *Taljaard* and *Theart* that on the evidence, in the present case, the Board had applied its mind and had accepted that the plaintiff had complied with the requirements for the issue of certificates for the relevant years and, accordingly, the Board had issued certificates to the principals of the plaintiff, but, due to a technical error on the Board's part, failed to issue certificates to the plaintiff itself. The mere fact that certificates were not printed and issued to the plaintiff was not fatal, because the legislative purpose had been achieved in the case of the plaintiff. The plaintiff had applied for their issue and had submitted its financial statements to the Board which found them to have been in compliance.

²⁰ Act No 19 of 1998.

²¹ See at 333H-334G para 50.

[78] The defendant's further argument on this point was, briefly, the following: Legally it is irrelevant why a certificate was not issued to the plaintiff; Section 34A is clear and unambiguous and requires that a certificate must have been issued to the estate agent. Relying on the decision in *Cool Ideas 1186 CC v Hubbard*²² it was submitted that the plain wording of the section cannot be ignored because of "*some perceived inequity in its operation*".

[79] It was further submitted on behalf of the defendant that "*if the approach proposed by plaintiff was adopted it would mean that in respect of the myriad of laws which require a citizen to hold some or other licence, certificate or permission, the citizen would be at liberty to ignore the law if it believed that the licence, certificate or permission ought in fact to have been issued to him or her*". According to this argument the plaintiff's approach is "*inimical*" to the rule of law.

[80] In supplementary heads of argument the defendant's counsel submitted further that it does not assist the plaintiff to attempt to distinguish between the issuing and the printing of the certificates. To physically exist the certificate needs to be printed and if it is not printed it cannot be issued. The fact that the Board might have applied its mind and accepted the fact that there had been compliance by the plaintiff, or had approved the renewal, does not amount to issuing the certificates.

²² 2014 (4) SA 474 (CC) para [52].

[81] According to the defendant's counsel, the word "*issue*", in section 34A of the Act, is used as "*a transitive verb*", i.e. a verb which has an object, in this instance the certificate. In *Protea Assurance v Finger*²³ it was held that the word "*issue*" ordinarily means "*to send (hand) out, publish or put into circulation*". Reference was also made to *S v Paleka*²⁴, where, following an earlier decision in *Rajee v Zeerust Town Council*²⁵, the majority of the full court, having reviewed different usages of the word "*issue*" – concluded that "*the common denominator seems to be that the person who issues must have committed himself to the overt act of giving out or sending forth or communicating*".

[82] Referring to the facts of the present case, the defendant's counsel submitted that no certificates exist for 2008 and for 2009 and the only certificate which the plaintiff produced bears the date 5 August 2009 as the date of issue. To find on the evidence that certificates for 2008 and 2009 were issued would do violence to the wording of section 34A of the Act. The defendant's counsel further submitted that the *Taljaard* decision supported the defendant's argument. Section 34A has as its purpose to ensure that estate agents do not practice as such while they are not in physical possession of a valid certificate.

[83] Reference to the decision in *Theart* is perhaps appropriate to the extent that a purposive approach was adopted by the Supreme Court of appeal to

²³ 1970 (4) SA 663 (O).

²⁴ 1986 (1) SA 361 (T) at 401H.

²⁵ 1938 TPD 283.

determine whether the requirements of PIE were met. The facts and circumstances dealt with in that case otherwise differ materially from the facts of the present.

[84] The court in *Theart* found that even though the procedure of the High Court and that of the Magistrate's Court, as stated in its rules, differed, the number of notices to be issued to give effect to section 4(2) of PIE was not prescribed. The section merely required "*that written and effective notice of the proceedings be served on the unlawful occupier and the municipality fourteen days before an order for eviction could potentially be granted*". The Supreme Court of Appeal found that even though the notices in the two cases before it were not contained in separate documents and were not served separately, the notices that were served (duly authorised by the respective magistrates) "*complied with subsection 4(2) and (5) of PIE*" and that, on the facts, the object of section 4(2), to give the occupiers sufficient and effective notice of the intended eviction, was achieved.

[85] In this case sections 26 and 34A of the Act specifically require that a valid certificate be issued to an estate agent or to every person employed by him or her as an estate agent. Section 34A specifically provides that an estate agent would only be entitled to remuneration for an act performed as estate agent if at the time of performance of that act a valid fidelity fund certificate had been issued to that estate agent. In terms of both sections, where the agent is a company, certificates are issued to the company and its directors.

[86] In *Lek v Estate Agents Board*²⁶ the Cape High Court, upon considering the provisions of the Act as it stood then²⁷ held *inter alia* that “an application for a fidelity fund certificate is tantamount to an application for permission to trade, for without such certificate the appellant cannot carry on an estate agency business”.²⁸ On appeal the Appellate Division confirmed the decision of the Provincial Division.²⁹ Trollip JA, writing for unanimous court, in respect of the Act, as it stood then, *inter alia*, stated:

“The effect of the Estate Agents Act 112 of 1976 (‘the Act’) is that henceforth no person can perform any act as estate agent unless inter alia, a valid ‘fidelity fund certificate’ has been issued to him (s 26(a)). To get such a certificate he has to apply in the prescribed manner to the Estate Agents Board (s 16(1)). This is a body (herein called ‘the Board’) that is set up under the Act (see chap 1) to maintain and promote the integrity of estate agents in the Republic (s 7). If the Board is satisfied that the requirements of the Act have been duly complied with, it must issue the certificate, which is valid until 31 December of the year to which the application relates (s 16(2)). A certificate shall not be issued, or if issued, be valid, unless the provisions of the Act have been complied with (s 16(3)) ...”

[87] Since the *Lek* decision the provisions of the Act have been amended in certain respects, but the core of its provisions which have been referred to in this judgment are, basically, the same.

[88] Section 39(2) of the Constitution³⁰ requires every court when interpreting any legislation to promote the spirit, purport and objects of the Bill of Rights. In terms of section 22 of the Constitution “every citizen has the

²⁶ 1978 (3) SA 160 (C).

²⁷ The Act then was the “Estate Agents Act 12 of 1976” – the name of the Act was subsequently amended to the “Estate Agency Affairs Act No 112 of 1976”.

²⁸ See at 171H.

²⁹ The decision of the Appellate Division is reported as *Estate Agents Board v Lek* 1979 (3) SA 1049 (AD).

³⁰ The Constitution of the Republic of South Africa, 1996.

right to choose their trade, occupation or profession freely". The practice of a trade, occupation or profession may be regulated by law³¹. In the present case the Constitutionality of sections 26 and 34A of the Act was not challenged at all and in the absence of any obvious unconstitutionality in their provisions their validity is assumed.

[89] The sections do regulate the practice of the profession of an estate agent. The court is constitutionally obliged, when interpreting those sections, to seek to promote the right to freely choose a trade, occupation, or profession, rather than restrict that right. A strict, narrowly textual, or literal approach, as contended for by the defendant, is not apposite to achieving that objective. A more purposive, or substantive, approach is called for.

[90] As pointed out by Van Winsen AJA in *Maharaj and Others v Rampersad*³², "[t]he enquiry... is not so much whether there has been 'exact', 'adequate' or substantial compliance with this injunction ; but rather whether there has been compliance therewith. The enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold, that, even though the position, as it is is not identical with what it ought to be, the injunction has

³¹ For the application of section 22, see *Affordable Medicine Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC).

³² 1964 (4) SA 638 (A) at 646C. Also referred to by O'Reagan J in *African Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) para 24. See also *Shalala v Klerksdorp Town Council and Another* 1969 (1) SA 582 (T) per Colman J at 587H-588C; *Kopel v Marshall and Another* 1981 (2) SA 521 (W) per Margo J at 524E-F; and *Beukes NO v Mdhloose, Mdhloose v Mkhonza and Another* 1990 (2) SA 768 (N) per Wilson J at 774J-775C.

nevertheless been complied with. In deciding whether there has been compliance with the injunction the object sought to be achieved by the injunction and the question whether this object has been achieved, are of importance."

[91] In *Liebenberg NO and Others v Bergrivier Municipality*³³ the Constitutional Court held the approach or test to be "*whether there has been compliance with the relevant precepts in such a manner that the objects of the statutory instruments concerned have been achieved.*"

[92] The enquiry thus must proceed from the point of determining what the purpose(s) of the provisions under discussion is and whether that purpose has been achieved in circumstances where certificates for the relevant periods were not issued to the company, but only to its directors, because of a technical difficulty the Board had in printing the company's certificates.

[93] Section 26 of the Act provides that no person is to perform any act as estate agent unless a certificate has been issued "*to him or her*" and "*to every person employed by him or her as an estate agent*". The section then goes on to provide that – "*if such a person is a company*" a valid fidelity fund certificate must also be issued to "*every director of that company*"

[94] Section 34A of the Act is free from the slight (although insignificant) ambiguity to be found in section 26 caused by the reference in that section to

³³ 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) paras 22-26 (and the cases cited there).

estate agents as either "*him or her*", while, it is also intended to regulate the position of entities such as companies and close corporations that have no gender. Section 34A just refers to "*estate agent*" as defined in section 1 of the Act. That section provides that if the estate agent is a company the company will only be entitled to remuneration for acts performed as an estate agent if at the time of the performance of those acts a valid fidelity fund certificate has been issued to the estate agent (i.e. the company) and to every director of the company. In light of the fact that a certificate is only issued to the directors if the company has complied with the requirements for the issue of a certificate, it is uncertain what the position is where the company has complied and (a) certificate(s) have been issued to the directorship, but due to a printing problem the Board has a separate certificate was not printed and issued to the company.

[95] Nevertheless, if the purpose or object of those provisions have been achieved those sections would, substantively, have been complied with. They have a common purpose to ensure that those performing acts as estate agents are registered with the Board and meet the requirements for the issue, by the Board, of a licence, permitting them to perform those acts lawfully for remuneration.

[96] In terms of section 7 of the Act the objects of the Board, having regard to the public interest, are to promote the standard of conduct of estate agents and to regulate the activities of estate agents. In terms of section 9(1)(a) part of the funds of the Board consists of the prescribed levies paid by estate

agents to the Board. The Act in section 6(2) obliges estate agents to apply to the Board, within the prescribed period and in the prescribed manner, for a registration certificate and the application must be accompanied by the levy that is envisaged in section 9(1)(a). In terms of section 16(3), subject to sections 28(1), 28(5) and 30(6) of the Act, if the Board receives the application and the prescribed levy and is satisfied that the applicant is not disqualified in terms of section 27 from being issued with a certificate- it is obliged to issue the applicant with a certificate in the prescribed form. Section 16(4) provides that a certificate shall not be issued if the Act is not complied with.

[97] The evidence, that stands uncontested, is that the plaintiff has complied with all of the provisions of the Act and there was no reason at all why certificates for 2008 and 2009 could not have been issued by the Board to the plaintiff, save for the fact that the Board has not been able to print those certificates.

[98] The plaintiff, an artificial, though legal, person, can only execute acts through human agency, in this instance, through its directors, acting in their capacity as such. The directors of the plaintiff have been issued with certificates for the requisite periods and would not have been issued with such certificates if the plaintiff did not comply with the requirements of the Act and regulations (i.e., for the issue of a certificate(s)). In any event, the evidence given, in particular by Ms Nkambule, that the plaintiff had complied with the requirements, was not challenged or refuted. One can, therefore, conclude

that there has been compliance with sections 26 and 34A of the Act even though certificates were not issued to the plaintiff company itself due to a printing difficulty the Board experienced. In substance (though not form) the plaintiff was authorised by the Board to perform acts as estate agent for payment.

[99] The consequence of this is that the plaintiff's claim to be remunerated for the acts it performed as estate agent during 2008 and 2009 (when it was not itself issued with certificates) and which resulted in the conclusion of the sale agreement, ought to succeed. It was not disputed that if the plaintiff proves it is entitled to be paid commission for the sale, the amount of the commission would be calculated as agreed. Mr Crouse's evidence of the agreement on that issue, which is also corroborated by the correspondence that was exchanged between Mr Crouse and Mr Sykes, was not really challenged. I find on the evidence that it was proved that it was agreed between the parties, represented by Mr Crouse and Mr Sykes, respectively, that in the event of a sale, the plaintiff would be entitled to commission calculated on the SAPOA scale. Applied to the price for which the property was sold (i.e., R61 403 508-77), it comes to the following: 5% on the first R1million (i.e., R50000-00); plus 3 ½% on the second R1million (i.e., R35000-00); plus 2 ½% on the balance of the purchase price (i.e., R1485 087-00), giving a total of R1 570 087-00.

[100] Any and all costs previously reserved are to be costs in the cause.

[101] In the result the plaintiff is granted judgment against the defendant for the following:

1. Payment of the amount of R 1 570 087-00;
2. Payment of interest, at the applicable legal rate, from 15 September 2011 to date of payment ;
3. Costs of suit ;



P COPPIN

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

FOR THE PLAINTIFF

MR R DEN HARTOG

INSTRUCTED BY

HARVEY NOSSEL

FOR THE DEFENDANT

MS A DE KOCK

INSTRUCTED BY

FLUXMANS INC