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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

**REPORTABLE: NO
OF INTEREST TO OTHER JUDGES:NO
REVISED
DATE: 28 NOVEMBER 2023
CASE NO: A133/2022**

In the matter between

ZWANE, PHUMLANI ZWELITHINI RAPHAEL

Appellant

And

**RZT ZELPY 4695 CC t/a REMAX CENTRAL
(REG NO: 2010[...])**

Respondent

Coram: Thobane AJ et Millar J

Heard on: 24 October 2023

Delivered: 28 November 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 28 November 2023.

JUDGMENT

THOBANE AJ (MILLAR J CONCURRING),

Introduction

[1] This is an appeal against a judgment handed down by the Additional Magistrate M Khoele, in the Magistrates Court for the district of Tshwane Central, held in Pretoria on 29 March 2022. In terms of the judgment, the Magistrate found in favour of the Respondent (the Plaintiff in the Magistrates Court) and awarded damages in the sum of R18 500-00 plus interest thereon at the rate of 10.5% calculated from 04 October 2016 to date of full and final payment, plus costs on party and party scale.

[2] The Appellant (the Defendant in the Magistrates Court), aggrieved at the judgment and order, launched these proceedings. In the Notice of Appeal before us, the Defendant raises a myriad of grounds of appeal traversing evidence led during the trial as well as points of disagreement with the judgment of the Additional Magistrate.

[3] For convenience the parties in this appeal are referred to as in the court a *quo*. Because the Plaintiff is a legal person a distinction is drawn, where necessary in this judgment, between the "Plaintiff" and the "agent" who acted on its behalf. Where reference is made to "the agent" in this judgment it is meant to refer to Aneta Ruszkowska.

[4] The Defendant represented himself at the Magistrates Court from commencement of the action proceedings, drafted his own pleadings and notices and even cross examined the only witness who testified on behalf of the Plaintiff. After judgment was handed down, he personally drew the Notice of Appeal and executed it. Before us the Defendant argued his own appeal. The impression created was that the Defendant had a clear understanding of what the issues are in this matter and even referred us to several cases some of them decided by the Supreme Court of Appeal. Where he expressed a view that the Magistrate erred, he did so by juxtaposing his submissions with certain

decided cases. It appears he is a Chartered Accountant or at least that is how he represented himself in the documents he filed in relation to this matter. He was, in my view, of assistance to the court.

[5] Whereas the Defendant raised many issues in the Notice of Appeal, in the Heads of Argument and before us he canvassed and made submissions under the following topics;

[5.1] The mandate;

[5.2] Lease agreement;

[5.3] Fidelity Fund Certificate;

[5.4] Witnesses not called;

[5.5] Locus standi;

[5.6] No sole mandate and

[5.7] Representation of the parties, which we understood to mean legal representation of the Plaintiff. This point however was, correctly in our view, not persisted with before us.

[6] In so far as reference to the Magistrate is made, the following points were raised (in the Heads of Argument);

[6.1] that in relation to the mandate, its purported failed execution; its termination; the self-mandate (so named because the Defendant is of the view that the agent simply mandated herself); as well as the sole mandate, the Magistrate erred in finding that despite deliberate and serious transgressions of the law, the "transaction" (the mandate) existed without any substantive legal grounds;

[6.2] that the Magistrate having ruled the lease agreement invalid, incorrectly awarded agent's commission and costs to the Plaintiff on the basis of what was contained in said agreement;

[6.3] that in relation to the Fidelity Fund Certificates the Magistrate incorrectly found that they are "*of no moment*", and by so doing "endorsed" them without any valid legal grounds, such as concurrence by the Estate Agents Board;

[6.4] that in so far as the witnesses that were not called is concerned, the Magistrate erred in "overlying" (it is not known what is meant by this), verbal testimony without corroboration or documentary evidence. In addition, the Magistrate failed to take into consideration that the agent had a financial interest in the amount claimed;

[6.5] that on *locus standi* the Magistrate erred, in the following manner, which is difficult summarise so I quote it as it appears in the heads;

"It is respectfully argued; that Magistrate Khoele erred in disregarding this important legal principle despite the contention of the Appellant (Defendant) without any legal grounds cited in his judgment to do so".

[6.6] that the legal representatives of the Plaintiff are irregularly on record. The Defendant is of the view that the Magistrate among others failed to consider that the Plaintiff's erstwhile legal representatives did not formally withdraw and thereby erred;

[6.7] that the agent did not have a sole mandate to find a tenant. Further, that the tenant was introduced to the Defendant by another agent and not the Plaintiff. The Magistrate erred in imposing another agent's commission on the Defendant when he has already paid another agent.

Factual matrix

[7] On or about 6 June 2016 the Defendant gave the Plaintiff (also referred to in these proceedings as "*the agent*" as explained above), a mandate to market his property, 2[...] F[...] W[...] Street, Blue Valley Golf Estates ("*the property*"), for rental and further to find a suitable tenant¹. In the Heads of Argument, the Defendant admits that such a mandate or such instruction was given to the Plaintiff by him. The Defendant however contends that;

[7.1] The Plaintiff failed to execute the mandate and

[7.2] The mandate was in any event subsequently terminated by the Plaintiff before it could be executed.

[8] I shall return to the Defendant's contentions at a later stage, for now the factual matrix is being laid out.

[9] There were further engagements between the agent and the Defendant about the rights and obligations as would apply between the Defendant and the tenants that were at that stage in occupation of the property. Such have no bearing and are not relevant for purposes of the dispute under consideration, so they deserve no further mention. Suffice to say that the Plaintiff undertook to advertise the property and having done so, on 12 July 2016 the Plaintiff received a response from Ntlatleng Dikano Basil ("*Basil*"), together with his girlfriend Jayshree Govender, who had an interest in renting the property.

[10] The Defendant takes the view that, other than the placement of a web advert of the property by the Plaintiff coupled with the response thereto by Basil, "*... the Respondent (Plaintiff)'s witness showed no further evidence to*

¹ In an email from the Defendant to the Plaintiff dated 06 July 2016 stating among others, "*My instruction was that we put the house on the market today*"

confirm that the above mandate was executed as claimed. She further confirmed under cross examination that no client information was shared with the Appellant (Defendant), at any time." Evidence, including concessions made by the Defendant, however, suggests otherwise and it shall be returned to in due course.

[11] At this stage it is sufficient to say that, on the Defendant's own version, he was informed about the fact that a tenant had been found. Further, e-mails demonstrate that "*they*", the potential tenants, were keen to conclude a rental agreement at that time,' albeit that there were some concerns about the condition of the property. It was the prospective tenant's view that it appeared not to have been well looked after or maintained.

[12] Basil and his girlfriend viewed the property and thereafter they sent through a lease application form to the Plaintiff, who upon receipt did the necessary background checks, and found them to be suitable tenants.

[13] On 14 July 2016 the agent enquired from the Defendant if she could proceed to draw a lease agreement. On the same day the Defendant instructed the agent, by way of e-mail, to go ahead with the transaction.

[14] On 15 July 2016 Basil signed the lease agreement and on the same day the agent sent it to the Defendant for his signature. The agent's version is that from that day she struggled to get hold of the Defendant which caused her to write an e-mail to the Defendant on 22 July 2016 to the effect that;

[14.1] She has advised Basil (the potential tenant) to find another place to rent;

[14.2] She would like to cancel her mandate to continue marketing the property.

[15] To the above e-mail the Plaintiff received no direct response from the

Defendant. Instead, on 23 July 2016, the following day, Bongiwe Zwane ("Bongiwe"), the Defendant's wife, sent the following message;

"Hi Aneta so sorry about this. I've been ill for a few days and he's been home with me. He has been in and out of the office. He told me he did say to (sic) has accepted the lease just couldn't get around to signing it. He's in Mafikeng today and says you can bring the lease this evening or tomorrow for signing. Hope this helps."

[16] I interpose to mention that the only way Bongiwe could have become aware that there was a problem with the transaction and that the agent "would like to terminate" the mandate, would have been because she was informed by the Defendant. The version of the Defendant, namely, that upon realising that he was not prepared to go ahead with the transaction, the agent-initiated communication with his wife: cannot be true.

[17] The agent and Bongiwe, after Bongiwe had made contact, agreed that the lease agreement should be delivered at their property on 24 July 2016 at about 10:30 for signature by the Defendant and that it should be collected the same day at about 12:00. From the recorded evidence it is clear that the agreement was both delivered and collected. I interpose to mention that Bongiwe specifically mentioned in the correspondence that she was acting on instructions of the Defendant. In the message sent to the agent she said "...*He told me he did say... has accepted the lease just couldn't get around to signing it... and says you can bring the lease agreement this evening or tomorrow for signing*" (my emphasis).

[18] She also mentioned that whatever was being discussed between her and the agent, was to be conveyed or relayed to the Defendant. This is confirmed by the Defendant who states that upon receipt of the draft lease agreement, (which he could only have received from his wife since he, on his version, had accepted termination of the mandate), was prepared to sign, but because of the issues raised in the snag list, he was reluctant to do so. I must reiterate that the only

reason he could have come to know of the lease would have been because Bongiwe gave it to him.

[19] Bongiwe continued to speak to the agent. Among other things, she sought or requested the snag list and also arranged for the potential tenants to meet "*after church*" at about 12:30, for inspection of the property. It is immaterial whether the meeting took place. If it did take place, then it would simply corroborate the version of the agent that she arranged such a meeting. If it did not, given that the then potential tenants had already committed to the lease, it would simply confirm the introduction of the potential tenants to the Defendant, who subsequently concluded an agreement with them. The Defendant denies that the meeting took place. The snag list was sent directly to the Defendant on 24 July 2016. It is clear that at this stage the agent was speaking with both the Defendant and Bongiwe, the latter explaining each time that it was on instruction of the Defendant. The e-mails referred to demonstrate this.

[20] On 25 July 2016 the Defendant continued to exchange e-mails with the agent discussing issues raised in the snag list. At the same time, she was exchanging messages with Bongiwe discussing the same issues as well as a possible meeting with Basil. The exchange of e-mails between the Defendant and the agent continued on 26 July 2016, discussing among other things, whether the issues raised in the snag list were going to be fixed before Basil takes occupation of the property. While the Defendant admits that he spoke to the agent after the date of termination of the mandate, he argues that it was for a different purpose, other than preparing for occupancy of the property by the Basil. The facts however suggest that it was for purposes of insulating the Defendant from having to be saddled with costly and in his view unaffordable pre-occupation renovations.

[21] After signature of the lease agreement by Basil, and delivery thereof at the Defendant's place, the agent was eager to receive a signed agreement from the Defendant and when it was not forthcoming, she sent a message to Bongiwe advising her that she was frustrated by the Defendant's

unresponsiveness and further, that she was going to advise Basil to find another place to lease. Subsequent to this exchange of e-mails, the Defendant settled a lease agreement with Basil, who had been introduced by him by the agent, hence the action proceedings in the magistrate court.

[22] On the above facts the Magistrate made the following findings:

[22.1] That it was common cause that the Defendant gave the agent an oral mandate to advertise the property and thereafter find tenants;

[22.2] That the agent introduced the tenants, Basil and his wife, to the Defendant as tenants and that this was common cause;

[22.3] That while existence of a lease between the Defendant and Basil had not been proven, what is clear and was admitted by the Defendant in his plea, was that they, Basil and his wife, took occupation of the property;

[22.4] That when the Defendant concluded a private lease agreement with Basil and his wife, the agent was excluded therefrom;

[22.5] That the agent was the effective cause of the lease agreement between the Defendant and Basil;

[22.6] That the agent was in possession of a valid fidelity fund certificate;

[22.7] That the agent is entitled to remuneration.

[23] In the determination of remuneration due to the agent, the Magistrate took into account the submission made before him to the effect that it was customary to charge 7% of the monthly rental inclusive of VAT, over the duration of the lease alternatively, the equivalent of one month's rental. While accepting that the

lease agreement which was signed by Bongiwe was not binding on the Defendant, he nevertheless found that it was prepared on his instruction. The Magistrate took the view that the amount of R18 500-00, mentioned in the agreement, would have been payable by the tenants to the Defendant. He reasoned that the said amount and having regard to what was acceptable in the industry, would be fair and reasonable so he awarded it. He declined the claim for administrative costs in the sum of R1 035-00. He took the view that since the lease agreement has no binding effect, there was nothing from the evidence before him that would justify the award of such costs. He further could find no industry practice relating thereto.

The law

[24] An estate agent who wishes to claim commission must allege and prove:

[24.1] Compliance with the provisions of Section 26 of the *Estate Agency Affairs Act* ². In other words, an agent must show that he/she has a valid fidelity fund certificate;

[24.2] A mandate to find a purchaser or seller. But in this case the mandate was to find a tenant to rent the Defendant's property. The principle nevertheless remains the same. Such a mandate can be express or tacit. In this case the Plaintiff's case is that whereas initially the mandate was oral and express, the Defendant gave a tacit mandate subsequent the cancellation of 22 July 2016³. The agent contends that the Defendant's

² Estate Agency Affairs Act 112 of 1976

"26. *Prohibition of rendering of services as an estate agent in certain circumstances*

a) *No person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him or her and to every person employed by him or her as an estate agent and...*"

b) *he has, in respect of every person who is in his employment, taken out fidelity insurance an amount which is in the opinion of the Board sufficient*".

³ *Muller v Pam Snyman Eiendomskonsultante (Edms) Bpk* 2001 (1) SA 313 (C).

conduct lends itself to an inference that he was consenting, the cancellation of 22 July 2016 notwithstanding⁴. Such an inference is to be drawn from the proven facts and circumstances peculiar to each case and must show that the most plausible and probable conclusion is that a contract came into existence. (*Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd*; *Joel Melamed & Hurwitz v Vornier Investments (Pty) Ltd*, *supra*.) A court presiding over the matter considers the conduct of both parties objectively and the circumstances of the case generally⁵.

[24.3] Where reliance is placed on conduct, which must be unequivocal, it must be shown on a balance of probabilities that the parties intended to, and in actual fact did tacitly contract, on the terms that are alleged.

[24.4] Due performance of the mandate which normally depends on the terms of the mandate. Ordinarily this usually requires:

[24.4.1] an introduction of a tenant to the principal;

[24.4.2] that the tenant was willing and able to enter into a lease agreement;

[24.4.3] that a valid lease contract was concluded;

[24.4.4] that the introduction was the effective cause of the contract⁶; and

[24.4.5] the amount of commission payable in terms of the mandate⁷.

⁴ *Joel Melamed & Hurwitz v Vornier Investments (Pty) Ltd* 1984 2 All SA 110 (A); 1984 3 SA 155 (A).

⁵ *NBS Bank Ltd v Cape Produce Company (Pty) Ltd* 2002 (1) SA 396 (SCA); *Starways Trading 21 CC v Pearl Island Trading 714 (Pty) Ltd* [2017] 4 All SA 568 (WCC).

⁶ *Van Aswegen v De Clercq* 1960(4) SA 875 (A); *Van Heerden v Retief* 1981 (1) SA.

⁷ *Gardner & Another v Margo* 2006 (6) SA 33 (SCA).

[24.5] The onus rests on the agent to show that as a result of the introduction of the potential tenant, to the Defendant, a lease has been concluded and thus that she is entitled to the commission⁸.

Evaluation of evidence and application of the law to the facts

[25] Before evaluating evidence and subjecting the facts to the law, under the headings set out by the Defendant, it is important to set out a concise scene of the backdrop against which the evaluation will occur. During the trial at the Magistrates Court, only the agent testified on behalf of the Plaintiff. The Defendant chose to close his case without giving evidence or without calling any witnesses in support of his case.

The mandate

[26] It was common cause at the hearing that the Defendant gave the agent a mandate to get a tenant for his property. The contention by the Defendant is twofold. Firstly, that the agent failed to execute as mandated and secondly, that the mandate was cancelled by the agent, which cancellation he accepted, before the mandate could be executed. The Defendant relies on an e-mail from the agent dated 22 July 2014, in which he was advised by the agent that she was terminating the mandate and that she would advise the prospective tenant to go elsewhere. Although the Defendant asserts that he accepted the termination, there is no evidence of such acceptance either orally or in writing.

[27] The Defendant further states that the agent, after he had accepted the cancellation by the agent, then sought the involvement of his wife and started interacting with her. On his part, he states that he never interacted with the prospective tenant and further that after the cancellation he was in possession of offers from other property sources. He denied meeting the prospective

⁸ *Tyrone Selmon Properties (Pty) Ltd v Phindana, Properties 112 (Pty) Ltd* [2006] 1 All SA 545 (C) [53].

tenant on the 24th July 2016 to discuss the snag list and also denied interacting with the agent after the termination date. His interaction, so the argument goes, was limited to an e-mail he sent to the agent on 24 July 2016, advising the agent that he was not willing to commit to a lease agreement.

[28] Objective evidence, including documentary evidence from the Defendant as well as case law to which the Defendant referred this court suggests otherwise.

[29] On 23 July 2016 the agent, having communicated with the Defendant as well as his wife, delivered a draft lease agreement at the Defendant's place. The delivery is not disputed. The Defendant expresses surprise at such delivery in that he was of the view, at that time, that the mandate had already been terminated. He, nevertheless, admits that he had a look at the draft and decided that he was not going to sign it as it was going to commit him to renovations which he could not afford. It needs no mention that the potential tenant's details would have been clearly set out in such a draft. Thus far, it must be accepted that the potential tenant was introduced to the Defendant, even on the Defendant's own version, on 23 July 2016 when the draft lease agreement was delivered, and the Defendant had sight thereof. The Defendant was at that stage, on his version, prepared to enter into an agreement of lease with the tenant that was introduced by the agent.

[30] It cannot be disputed that the tenant, specifically Basil, was introduced by the agent to the Defendant on a much earlier date than the one relied upon by the Defendant, be it on the version of the Plaintiff or that of the Defendant. On the Defendant's own version, on 13 July 2016 the Defendant was informed by the agent that the prospective tenant was *"happy to sign"* the lease. In turn the Defendant responded as follows on the same day;

"The stuff they are raising hereunder is not real much work; its days or two at the most. I don't see this as much work really.

.....

.....
You therefore can respond to the interested tenant that I am happy to agree on pre- occupation fixing, on signature of the lease agreement"

[31] It is uncontested and therefore must be accepted as a fact, that the potential tenant referred to in the above correspondence was Basil. This is because the trail of e- mails attest that there was never reference to any other tenant other than him. Besides, the Defendant has not suggested otherwise.

[32] The Defendant's case is that after termination of the mandate, he never entertained the Plaintiff on the mandate, as he had accepted that the mandate to find a tenant had been terminated and further that at that point the agent engaged his wife. This is not borne out by objective evidence from all the parties, as the timeline, below, will clearly indicate.

[33] On 25 July 2016, after the termination alleged by the Defendant; his alleged acceptance thereof; delivery of the draft lease agreement as well as delivery of the snag list, the Defendant wrote the following e-mail (which I quote) to the agent, the subject was "*Snag List*";

"Hi there

Please advise the tenant on which areas they are require (sic) to address themselves from this list and when. This will impact whether they or not I can make a commitment to the lease for completion of this before occupation.

I informed the leasee as well that I will not be able to guarantee completion of this newest on the 11th hour. I was able to sign.....

.....
.....
.....

Personally I don't want a new tenant in the house who is not happy. I

would rather have a tenant until the house is ready. Neither do I want to do work under unreasonable pressure. I will therefore wait for the current tenant's response as above and will determine what is feasible and what is not."

[34] On 26 July 2016 and in response to a question as to what the prospective tenant was to be told, the Defendant among others responded thus:

"....Please note from the progress to date; its clear that the house will not be ready by month end. I think lets be transparent and tell him and let him make up his mind as to what plan 'B' would be for him..."

[35] It is clear from the above e-mails that the Defendant was simply continuing a discussion about the snag list, which began before the agent stated that she was cancelling the mandate. What is significant however, despite the Defendant's otherwise insistence, is that the Defendant acknowledges that he communicated with the potential tenant and informed him that he would not be able to guarantee completion of repairs of the things raised in the snag list within a particular timeline. The potential tenants, Basil and his wife, were introduced to the Defendant by the agent. The Defendant communicated with them directly and eventually, without the involvement of the agent, entered into an agreement of lease with them.

[36] In support of his case the Defendant during argument, referred this court to three cases, which he submitted are in his favour. It is clear however that none of them support his case.

[37] The first one is *Doyle v Gibbon*⁹. The facts of this case are briefly the following:

⁹ 1919 TPD 220.

[37.1] An agent shared with a potential purchaser that certain immovable property was up for sale. The then potential purchaser who was keen to purchase the property, sent his wife to have a discussion with the agent who was responsible for marketing the sale. She also obtained a card permitting her to view the property. She went and inspected the property but having done so, her husband decided that the price was too high. Months later they saw a "for sale" board at the property and remembered that it is the property that the wife previously visited and in addition it was a property in respect of which she, (the wife) had interviewed the agent.

[37.2] The purchaser again sent his wife to speak directly with the seller to determine if he was prepared to sell the property for a lesser amount. It is perhaps opportune to indicate that the property was advertised to be on sale for £650. The purchaser engaged the seller directly and it was agreed that the property would be sold for £600. The court was then called upon to determine if in such circumstances, the agent was entitled to commission. The court among others then referred to an earlier decision of *Schol/um & Co v Lloyd*¹⁰ and quoted the following;

"In order to entitle an agent for sale to his commission there must be both a contractual and a causal relation between him and the vendor. The mere finding of a purchaser without a contract will not justify the agent in claiming a commission..."

But if there is a contract under which the plaintiff is employed as agent and he introduces a person who subsequently purchases then he has earned his commission and it is immaterial that the first negotiations led to nothing and are afterwards renewed without any further introduction."

¹⁰ 1916 TPD 291.

[37.3] I consider this part to be extremely significant¹¹;

"... if a purchaser is introduced directly by an agent and he chooses to negotiate with the owner and obtains the property for a smaller sum, then still the owner is responsible for the payment of commission; the reason for this is that the contract between the commission agent and the owner is that if the commission agent finds a person who will buy the property and it is through his intervention that the sale actually takes place, then he is entitled to his commission even where the commissioner negotiates with such purchaser and reduces the price. The owner tacitly undertakes that if he sells his house at a lower price directly to a person who is introduced to him through the intervention of an agent, he will pay the commission; notwithstanding that the actual contract is not made by the agent. .. "

[38] The court found that the introduction of the seller was the proximate cause of the ultimate transaction. Similarly, in *Burt v Ryan* ¹² the court said the following:

"...Where an agent is given a mandate by his principal to sell property, the principal is entitled to claim exact performance of the terms of the mandate. But if the agent fails to find a person who will purchase on the terms of the mandate but introduces a person who negotiates with the principal and as result of the introduction and the negotiations the seller agrees to accept a lower price, the agent becomes entitled commission although he has failed to carry out the original mandate.

The principle applied is that either the seller must be taken to have tacitly novated his original mandate, or the agent must be regarded as having substantially carried out the agreement between himself and the

¹¹ *Ibid Doyle v Gibbon* page 223.

¹² TPD 1926 680

principal. The test is then applied whether the introduction is the proximate cause of the ultimate transaction."

[39] The court was also referred to *Webranchek v L K Jacobs & Co, LTD*¹³. The court dealt with an appeal against a decision of the trial court, which awarded the Plaintiff, estate agent commission for sale of a property in respect of which the Defendant had given a mandate to several estate agents. The court further dealt with failure to call a witness who was available to testify, as well as inferences that may follow. I will return to this topic in due course. The agent had contacted a purchaser who came to inspect the property and eventually a sale followed. The purchaser who was available to testify was not called by any of the parties. The appeal court dismissed the appeal effectively finding that the trial court was correct to find for the Plaintiff. It found that the sale was clearly attributable to the efforts of the Plaintiff, thus its finding that his efforts constituted the dominant or effective cause of the sale. What is key is the conduct of the parties which must show that the parties intended to and did in fact tacitly contract¹⁴. On the principle set out in the all three judgments it seems clear that the Magistrate correctly found for the plaintiff (agent).

[40] Lastly, termination of mandate does not disentitle the agent to agent's commission. If it can be shown that there is a subsequent lease or sale between the principal and the client that was introduced by the agent. Authority for that proposition is to be found in the unreported case of *Warren Farms CC v Ferreira N.O. and Another*¹⁵ where the following is said:

"[28] It is trite law that an estate agent may recover his or her commission even if the mandate was terminated or had expired by the time a sale is brought about by the earlier efforts of the agent. In Le

¹³ *Webranchek v L K Jakes & Co, LTD* 1948 (4) SA 671.

¹⁴ *NBS Bank Ltd v Cape Produce Company (Pty) Ltd* 2002 (1) SA 396 (SCA); *Starways Trading 21 CC v Pearl Island Trading 714 (Pty) Ltd* [2017] 4 All SA 568 (WCC).

¹⁵ (352/2015) [2017] ZAFSHC 63 (10 May 2017).

Grange v Metter the court said:

"Our law with regard to agents' commission has regard to the substance rather than the form and is singularly free from technicality. Thus a broker, or other selling agent, has (in the absence of any express agreement to the contrary) been held repeatedly to be entitled to his commission, when once it is established that he was the "efficient cause" of the sale, notwithstanding that such sale may only go through long after his active efforts have ceased, and notwithstanding that such sale may eventually be concluded directly between the parties without his participation, and notwithstanding that such sale may go through on different terms and conditions from those on which the broker or agent was employed to sell..."

Lease agreement

[41] It has become common cause that Bongiwe signed the lease agreement in circumstances where she was not authorised, on the Defendant's version, by a power of attorney. The Magistrate in his judgment states the following, *"The existence of the subsequent lease with Mr. Ntlatleng and Ms. Govender is not proved, however the fact that they took occupation of the property and became the defendant's tenants is admitted in the defendant's plea and in light of this admission it is not necessary for the plaintiff to prove this fact."*

[42] It has become academic therefore to seek to argue and make submissions on the lease agreement which the court has effectively found has not been proven. The structure of the document, its signature, and that according to the Defendant it is unlawful, is not helpful.

[43] The Defendant in his heads of argument as well as before us submitted that the Magistrate having found that the lease agreement had not been proven, he nevertheless proceeded to award costs based on the same agreement. In

paragraph 16 of his judgment, the Magistrate makes the point that in signing the lease agreement, Bongiwe confirmed the introduction of the tenants to the Defendant. In paragraph 19 he reiterated that the lease agreement signed by Bongiwe is not binding on the Defendant and the fact that the Plaintiff was not entitled to any benefit therefrom. The Plaintiff, he finds; "... *is entitled to fair and reasonable remuneration*" and that the sum of R18 500-00, would be regarded as customary in the industry. Applying the same approach to reasoning, he refused the award of R1 035-00 as he was not told what the industry practice was.

Fidelity Fund Certificate

[44] The attack of the Defendant was in fact two pronged. Firstly, that the agent, Aneta Ruszkowska did not have a correct Fidelity Fund Certificate. The certificate showed that it had been issued to a certain "*De Freitas Aneta Joana*". The explanation she gave was that she had been married to a De Freitas but later reverted to her maiden name. Secondly, that there was an anomaly with the certificate of the Plaintiff in that in the denounced contract, the Plaintiff is listed as a close corporation whereas in the certificate, the Plaintiff is listed as a company with limited liability.

[45] Section 34A of the Estate Agency Affairs Act 112 of 1976 (the Act) precludes an estate agent from claiming commission when, at the time the commission was earned, the estate agent had not been issued with a valid fidelity fund certificate by the regulatory statutory body, the Estate Agency Affairs Board (the Board).

[46] The purpose it would seem is to protect the public in that should anything go wrong with one's estate agent, recourse lies against the Fidelity Fund. The Defendant submitted that case law simply says "*No valid FCC, no commission*". He relied on two judgments for his proposition¹⁶. The judgment

¹⁶ *Signature Real Estate (Pty) Ltd v Charles Edwards Properties and Others* (415/2019) [2020] ZASCA 63; 2020 (6) SA 397 (SCA) (10 June 2020); *Tria Real Estate (Pty) Ltd t/a Pam Golding Bloemfontein v Labuschagne and Another* (5583/2018) [2018] ZAFSHC 198 (6 December 2018).

of *Tria Real Estate (Pty) Ltd t/a Pam Golding Bloemfontein v Labuschagne and Another* which is a judgment of a single judge in the High Court in the Free State. It is also an old judgment which is superseded by *Signature Real Estate (Pty) Ltd v Charles Edwards Properties and Others*, (hereinafter referred to as *Signature*), a Supreme Court of Appeal judgment which had to deal with a similar issue and is the second judgment we were referred to by the Defendant.

[47] The facts in *Signature* are briefly that the Western Cape High Court had found in favour of the respondent who had been sued for agent's commission, thus dismissing a claim by an estate agent. The estate agency Hidicol CC had traded as Signature Real Estate CC., before converting to Signature Real Estate (PTY) Ltd. The Board was advised accordingly and Signature (the company) met all the requirements of being issued with FFC. The Board issued them with certificates but in the name of Hidicol CC., its members and its agents. The entity that had been sued for agent's commission challenged the *locus standi* of Signature, on the basis that when the agreement of lease was brokered, Signature did not possess a valid Fidelity Fund Certificate. They further alleged that a FFC had in fact been issued to an entity that did not exist. The court then went on to find, relying on section 34A of the Act, that without FFC the estate agents were precluded from claiming commission.

[48] The Supreme Court of Appeal set aside the judgment of the court *quo* and found in favour of Signature. Certain comments made by Makgoka JA, are telling;

"[19] The Act provides a regulatory framework for estate agents. One of the key components of that framework is an estate agent's trust account. In terms of s 32 of the Act, every estate agent is required to open and keep one or more separate trust accounts with a bank into which money held or received by or on behalf of such estate agent shall be deposited. The estate agent is required to notify the board of

the details of such a bank account or accounts.

[23] In the present case the purpose of the Act was served. The public would have been protected. If, for example, a member of the public had suffered loss due to misappropriation by an estate agent involved in the agreement in question, the Board, in my view, would have been hard-pressed to argue that a claim against the fidelity fund should not succeed because a certificate had not physically been issued to the wrongdoer at the time of the conclusion of the agreement. Such an outcome would be contrary to the purpose of the legislation."

[49] By applying the same reasoning, it must follow that the agent and the Plaintiff had met the requirements to be issued with Fidelity Fund Certificates, they were issued with those however there were misdescriptions on them. The public would have been protected. The Magistrate found that the certificates and what is contained in them was of "*no moment*". His comment may be deemed by the Defendant to have been unfortunate, however his finding was correct, and was in accordance with the above mentioned SCA judgment.

Witnesses not called

[50] The defendant laments the fact that although at a pre-trial meeting the Plaintiff hinted that they had lined up three witnesses, they led evidence of only one witness. The defendant says other witnesses refused to testify, I take it he means Basil and his wife. A litigating party is at liberty to call any witness he chooses. The Defendant was at liberty to call Basil and his wife. The failure to call them cannot attract a negative inference either towards him or the Plaintiff. In *Webranchek v LK Jacobs*¹⁷ the Plaintiff closed his case without calling a witness who was available and walking the corridors of court.

¹⁷ 1948 (4) SA 671 (A).

[51] The Defendant on the other hand also failed to call the same witness. The witness was a purchaser who had negotiated a deal with whom I will refer to as agent A but signed a contract under agent B, just as the Defendant did. The court affirmed the legal position that a litigant is at liberty to call or not to call any witness and warned of the dangers attendant thereto. On the one hand it is the fact that failure to call a competent and available witness. On the other hand, it is that a witness may ruin your case. The court said the following:

"The potential witness may be untruthfully hostile, he may have a bad memory or an unfortunate presence. After all, plaintiff was entitled to rest his case upon evidence which he considered adequate to discharge the onus which lay upon him."

[52] In argument before us Mr. Zwane was confronted with this proposition, but he had no answer.

[53] The Defendant's wife was subpoenaed to give evidence and produce relevant documents. She was served with a Subpoena *Duces Tecum*. She would surely have been of assistance to both the Defendant and the Plaintiff. She would have confirmed that her contact with the agent was with the firm knowledge and consent of the Defendant. Or she also could have confirmed that she simply was on a frolic of her own when she signed the agreement that the agent delivered at their residence. She chose to invoke spousal privilege. Having done so, she cannot respond on the facts of the matter selectively. What the Defendant refers to as an affidavit where she denies the Plaintiff's case, is of no evidentiary value whatsoever, in light of the invocation of spousal privilege.

[54] In addition, the Defendant himself chose not to testify. This means there was only the version of the plaintiff before the trial Magistrate. A lot of information was within the knowledge of the Defendant personally, his decision to not testify under such circumstances is baffling particularly because on his version, he was getting updates from his wife and was prepared to sign the lease agreement. The point that witnesses were not

called, does not impact the findings of the trial court. The case for the Plaintiff was succinctly set out through the testimony of the agent.

Locus standi

[55]The defendant makes the following point in his "Opposing Affidavit" which in essence is his plea that:

"I submit that the Applicant's former agent (Anette Ruskowska); with whom I had dealt with in this failed transaction; is neither an employee of the plaintiff nor their appointed attorney; thus has no legal standing on this matter."

[56] In the heads of argument both in this court and the magistrates court, it is apparent therefrom that the Defendant is under the misconception that the agent, having left the employ of the Plaintiff, lacked *locus standi* in the trial proceedings. He labels the litigation against him "rogue". He goes further to say:

"Considering the conflicted employer/employee relationship between the witness in and Mr Hefferman; and the agent/witness/main beneficiary to the claim; it is clear that they are both working in cahorts (sic) towards unjustified enrichment by litigating a claim that they have no locus standi or mandate to."

[57]In the context of the Defendant having conducted his own trial and before us the appeal, it is understandable why some of the legal arguments are made. He is a lay person. It must be explained that the Plaintiff before the Magistrate's Court was RZT ZELPY 4695 CC t/a REMAX CENTRAL. The agent was called as a witness of the plaintiff. The point about lack of *locus standi*, of a witness who has been called to support the plaintiff's claim is totally without merit. So is the submission that as the person who in the end

was going to get a portion of the commission, there exists a conflict of interest.

No sole mandate

[58] The last issue raised by the Defendant is that the Plaintiff is not the only one to whom he gave a mandate. He pleaded that he received offers from prospective tenants through other "property sources". He asserts however that it is through the other property sources that the tenant was introduced. The Defendant admitted that the tenant was introduced to him by the agent, Aneta Ruszkowska. The Magistrate found that much. The Magistrate also found that the defendant failed to place before him any evidence of his interaction with the tenant other than through the agent. Before him, he reasoned correctly in our view, was only the unchallenged evidence of the introduction of the tenant by the agent, further evidenced by the copy of the lease agreement which Bongiwe signed.

[59] In arriving at the above finding the Magistrate relied among others on the principles set out in *Lieb and Another NND V I Kuper (Pty) Ltd*¹⁸ and *Aida Estate Ltd v Lipschitz*¹⁹. The Magistrate further borrowed generously from the dicta contained in the two judgments. The first principle is that the sale or tenancy that follows an introduction should be the effective cause of the ensuing cause of sale or tenancy. The second principle is that if there is an intervening factor, in this case the intervening factor would be the cancellation of the mandate by the agent on 22 July 2016, the question that arises is whether the new and intervening factor, (in our case the cancellation of the mandate), outweighs the effect of the introduction by being more than equally conducive to bringing about of the sale. And whether the introduction was still operative.

[60] The court did not simply enunciate the principles, it quoted from said cases:

[13] "...The ordinary law of agency requires the agent's efforts to be the

¹⁸ *Lieb and Another NNO v J Kuper & Co (Pty) Ltd* 1982 (3) SA 708 (T).

¹⁹ *Aida Real Estate Ltd v Lipschitz* 1971(3) SA 871(W).

effective or efficient cause of the ensuing sale. Whether one refers to those efforts as an introduction or as finding a purchaser or by any other words does not matter. As I have already shown, whether the introduction is of the property itself to the purchaser, or of the seller to the purchaser, matters not, so long as such introduction, or what followed upon it, was the efficient or effective cause of the sale."

And in *Aida Real Estate Ltd v Lipschitz* the court stated that:

"proviso has been added to the effect that the introduction of the able and willing buyer must have been the effective cause or causa causans of the sale. If a new factor intervenes causing or contributing to the conclusion of the sale and the new factor is not of the making of the agent, the final decision depends on the result of a further enquiry... did the new factor outweigh the effect of the introduction by being more than or equally conducive to the bringing about of the sale as the introduction was, or was the introduction still overridingly operative? Only in the latter instance is commission said to have been earned..."

[61] The court having done so, found that with the introduction of the potential tenants to the property or to him, (the landlord), having been admitted, coupled with evidence of the failure, of the principal, to place evidence of the first interaction with the tenant, the first interaction of the tenant with the owner was as evidenced by the tenant, unchallenged. The Magistrate found that the introduction was the effective cause of the subsequent lease between the Defendant and the tenants.

[62] That there were other agents involved and that in particular another agent has been paid commission does not defeat the plaintiffs claim. In *Webranchek v LK Jacobs* (supra) the principal had given a mandate to more than one agent. Introduction of the property was done by one agent, but the agreement was concluded with another. The court considered which of the two agents earned his/her commission. In applying the principle of 'effective

cause', it found that it was not through the efforts of the second agent, (under whom an agreement was concluded) that the transaction was concluded. It found that it is the cumulative importance of a number of causes that are attributable to an agent, that will determine if that agent is the 'effective cause'.

[63] The court looked at among others the exchange of correspondence and the preparedness of a client to conclude a transaction. In this matter, through the efforts of the agent, the defendant was prepared to sign an agreement. That the terms on which the agreement concluded with the involvement of the second agent are different to those of the first one who did the introduction and some other work, does not vitiate the claim for payment of commission the first agent has. It is not the absence of the introducing agent when the agreement is concluded that determines whether or not that agent is the 'effective cause'. The court said²⁰;

"Situations are conceivable in which it is impossible to distinguish between the efforts of one agent and another in terms of causality or degrees of causation. In such a situation it may well be (it is not necessary to decide the point) that the principal may owe commission to both agents and that he has only himself to blame for his predicament; for he should protect himself against that risk.

The dispute really turned upon the application of the law to the facts of this case. Both counsel agreed that if plaintiff had brought defendant and Baretta together and by his own efforts rendered the one ready for selling and the other ready for buying at an agreed price, he cannot be deprived his commission merely because the actual deed of sale was executed under the aegis of a competitor."

[64] By parity of reasoning, the agent cannot be deprived of and in our view, is

²⁰ *Ibid Webranchek v Jacobs* Page 678 line 30-40.

therefore entitled to her commission.

[65] We are of the view that the learned trial Magistrate was right in holding that the lease was chiefly attributable to the efforts of the agent, that she was the effective cause of the subsequent lease. Costs must follow the result.

Order

[66] In the circumstances, I propose the following order:

[66.1] The appeal is dismissed with costs.

**SA THOBANE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree, and it is so ordered

**A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

DATE OF HEARING: 24 OCTOBER 2023

DATE OF JUDGMENT: 28 NOVEMBER 2023

APPEARANCES:

FOR THE APPELLANT: IN PERSON

FOR THE RESPONDENT: MR S HEFFERMAN

INSTRUCTED BY: HEFFERMAN ATTORNEYS