Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)

Case number:	**493/2017**
Date heard:	**17/06/2020**
Date available:	**08/01/2021**

In the matter of:

PROPERTY ONE SHOP CC t/a
REMAX KALAHARI Plaintiff

and

WOUTER WESSEL SNYMAN N.O. First Defendant

CARINA MARANITA SWARTZ N.O. Second Defendant

ELMARI KRIEK N.O Third Defendant

Coram: Van Tonder, AJ

JUDGMENT

VAN TONDER, AJ

[1] This is a claim by the plaintiff for payment of estate agent's commission in the amount of R1 904 849-93 against the Johan Snyman family trust.

[2] The plaintiff relies on a partly oral and partly written, alternatively tacit agreement entered into between Mr van der Schyff on behalf of the plaintiff and Mr Hans Kruger and/or the first defendant, on behalf of the trust, which agreement was entered into between March to May 2016.

[3] The plaintiff relies on six emails exchanged between van der Schyff on behalf of the plaintiff and Kruger on behalf of the first defendant, in the period between 5 May 2016 and 18 May 2016 as the written part of the agreement.

[4] The plaintiff also relies on clause 11 of the sales agreement that was signed by the first defendant on the 18th of May 2016, which agreement states the following in clause eleven thereof:

"11. <u>AGENTS COMMISSION</u>

11.1 the PURCHASER (Assmang) warrants that he were introduced to the property by RE/MAX and by no other agent and that RE/MAX was the effective cause of the sale.

11.2 The SELLER (the trust) shall be liable to pay a professional fee to RE/MAX of R475-00 per hectare plus VAT as agreed upon."

[5] The defendants deny that the plaintiff traded as an estate agent and denied that the plaintiff as well as the members of the plaintiff and Mr van der Schyff possessed the necessary fidelity fund certificates in terms of section 26 of the Estate Agency Affairs Act, no 112 of 1976. This was however resolved prior to the commencement of the trial.

[6] The defendants also deny that there was any agreement and specifically a contract of mandate entered into between the plaintiff and the trust as pleaded by the plaintiff.

[7] The defendants however admit receipt of the six receipt and sending of the six emails relied upon by the plaintiff, and the defendants also admit that the first defendant had signed the agreement dated the 18 May 2016 (including clause 11 thereof).

[8] The basis of the defendants' denial in respect of the agreement is worded as follows:

> *"4.2 The Defendants further plead that any such a contract the court may find factually had been concluded (which remains denied) would in any event be invalid as all of the defendants would have had to act jointly in terms*

of the Johan Snyman Family Trust Deed in order to bind the Trust to such a transaction. They did not.

4.3 The Defendants moreover plead that any and all correspondences the parties had sent to and fro between each other, were precipitated by an agreement that Remax had concluded with Assmang (Pty) Ltd.

4.4 At no stage did there factually exist any agreement of mandate as alleged or otherwise, between Remax and the Defendants. Nor was there any agreement that the Defendants would pay Remax any commission from the proceeds of the sale. Any commission that the Defendants would have been liable for in terms of the transaction Remax had brokered on strength of its Assmang mandate, would have been added onto the price Assmang (Pty) Ltd paid for the merx.*"*

[9] The terms of the agreement (which are all denied by the defendants) were pleaded by the plaintiff as follows:

"9. Die volgende was die uitdruklike, alternatiewelike stilswyende, alternatiewelik geïmpliseerde terme van die voormelde ooreenkoms:

9.1. Verweerders het 'n mandaat aan die Eiser verleen om as eiendomsagent die plaas Watermeyer 576 namens die Eiser te bemark teen betaling van die gebruiklike kommissie. Die mandaat is aanvanklik deur die Eerste Verweerder gedurende Maart/April 2016 verleen en deur Kruger gedurende Mei 2016 bevestig;

9.2. *Die gemelde mandaat is mettertyd uitgebrei om ook die grond bekend as die resterende gedeelte van gedeelte 1 van die plaas O'Donogue 577 in te sluit;*

9.3. *Indien 'n koopooreenkoms tussen die verweerders en Assmang (Edms) Bpk gesluit word ten opsigte van die Plase genaamd Resterende Gedeelte van die plaas Watermeyer 576 en Resterende Gedeelte van Gedeelte 1 van die plaas O'Donogue 577, dan erken die verweerders dat die eiser die effektiewe oorsaak was wat aanleiding gegee het tot sluiting van die ooreenkoms. Die erkenning is vervat in die koopkontrak hierbo na verwys wat ook die ooreenkoms met betrekking tot die kommissie soos uiteengesit in die hieropvolgende paragraaf reflekteer.*

9.4. *Indien uitvoering aan die ooreenkoms gegee word deur die eiendomme oor te dra in naam van die koper, dan sal die verweerders aan die eiser kommissie betaal bereken teen R475.00 per hektaar plus Belasting op Toegevoegde Waarde."*

[10] The defendants admit that the sales agreement dated 18 May 2016 between the trust and Assmang was not brought to fruition, and admit that during or about October 2016 a new sales agreement was entered into between the defendants and Assmang in respect of the same farms, with a different property description.

[11] The defendants furthermore admit that the new (October 2016) agreement was fulfilled and that the aforesaid farms were indeed transferred from the trust into the name of Assmang on the 17th of February 2017.

[12] The defendants however expressly pleaded that:

"The merx *ultimately sold was however substantially different to the one Remax had – in terms of its Assmang mandate – brokered."*

[13] The plaintiff furthermore pleaded (all of which are denied by the defendants) that:

"13bis. Eiser was die effektiewe oorsaak van laasgenoemde verkoping en oordrag van eiendomsreg aangesien Eiser die koper, te wete Asmang (Eiendoms) Beperk, aan die eiendom en aan die Verweerders voorgestel het, welke voorstel gelei het tot die aanvanklike koopooreenkoms van Mei 2016 ooreenkoms asook die latere onderhandelinge en die aangaan van die Oktober 2016 ooreenkoms tussen Verweerders en Assmang (Eiendoms) Beperk.

14. In die vooropstelling is die verweerders aan die eiser die bedrag van R1,904,849.93 verskuldig, synde 3517,7284 hektaar maal R475.00 plus BTW teen 14%."

BACKGROUND

[14] During March 2016 Mr Dirk Coetzee of Assmang approached the plaintiff as an estate agent in order to find farms suitable for purchase by the mine, as the sellers normally drastically inflated their prices when being approached by the mine directly.

[15] One of the farms listed by Coetzee on the list that he provided to Remax was the farm Watermeyer.

[16] Coetzee had heard that Assmang had directly liaised with the owner of Watermeyer some years previously, but he nonetheless requested Remax to act as an intermediary with regard to this potential sale.

[17] Arising from the aforesaid, van der Schyff on behalf of the plaintiff contacted various farmers including the first defendant to enquire whether their farms were up for sale. The first defendant indicated that he would be willing to sell if the price were right and he mentioned a price of R6 500-00 per hectare.

[18] On 24 March 2016 van der Schyff on behalf of the plaintiff addressed an email to Mr Coetzee of Assmang which stated:

"Aangeheg is vorderingsverslag van die plase waarop julle navraag gedoen het. Ek kon nog nie met al die eienaars kontak maak nie, maar sal die inligting deurgee sodra ek dit bekom het."

[19] The summary contained references to a number of different farms (including a handwritten reference to the farm Gamasip) of which the farm Watermeyer, is listed as number 8 and a selling price of R7 000-00 per hectare (inclusive of commission) is mentioned.

[20] On 18 April 2016 van der Schyff again emailed Coetzee with particular reference to the three farms which Coetzee on behalf of Assmang had indicated they were interested in namely Beaumont, Watermeyer and Gomasip.

[21] In respect of Watermeyer the email reads:

"Die prys is huidiglik R7 000-00/hektaar (BTW uitgesluit), maar die eienaar het genoem hy sal kyk na 'n aanbod.

Die prys sal dan ook sekere diere in of uitsluit, maar dit het hy gesê ons sal bespreek as daar 'n skriftelike aanbod is."

[22] On 20 April 2016 Coetzee in an email asked van der Schyff to make an offer in respect of the farm Watermeyer at a price of R7 000-00 per hectare and to specifically include certain conditions precedent, in respect of approval by the Assmang executive committee for the purchase of the properties within 45 days from date of acceptance, and also approval by the Northern Cape Department of Environment and Nature conservation regarding the sale and purchase of the properties for the purposes of an offset area.

[23] Van der Schyff then took the first Remax offer to purchase to the first defendant, who subject to certain conditions accepted the offer in principle, including the fact that the farm O'Donogue had to be included in the sale.

[24] This was followed by an email from van der Schyff to Coetzee on the 27 of April 2016 which confirmed the following:

"*Soos gister per telefoon bespreek die volgende:*

1. Die eienaar aanvaar die aanbod wat julle hom gemaak het, maar ook onder sekere voorwaardes nl:

1. Ek moet hom 'n week kans gee om die aanbod ook met sy Trustees te bespreek – Plaas is in Trust geregistreer.

2. Hy wil ook net eers ander grond kry vir homself om na toe te skuif – Dit mag dalk 'n rukkie neem, maar hy sal volgende week meer duidelikheid kan gee insake die situasie.

3. Daar is 'n ekstra 900 ha (plaas O'Donnaghue – Suid van Watermeyer – Nie Noord soos ek genoem het nie) wat deel is van Plaas Watermeyer wat hy as 'n eenheid met Watermeyer wil verkoop. As julle nie die ekstra deel kan bykoop nie, moet ons/hy dalk met sy Buurman onderhandel om daardie deel terug te koop…

Ek sal Dinsdag – 2 Mei 2016 weer met eienaar in verbinding tree en terugvoer verskaf."

[25] On the 4th of May 2016 van der Schyff visited the farm Watermeyer for having the first defendant signed the second Remax contract, but the first defendant indicated that he first wanted his attorney to look at the contract.

[26] On 5 May 2016 van der Schyff then addressed an email to the trust's attorney of record, one Hans Kruger at Duvenhage and van der Merwe Attorneys to which he annexed a draft written contract of sale in respect of the farm Watermeyer.

[27] The agreement was made out in the name of the Johan Snyman Family Trust, IT64/2002 as the seller for the sale of the farm Watermeyer for a purchase price of R18 962 650-00, excluding VAT.

[28] Clause 11 of the agreement provided as follows:

"11 <u>AGENT'S PROFESSIONAL FEE</u>

11.1 The Purchaser warrants that he/she was introduced to the property by RE/MAX and by no other Agent and that the RE/MAX was the effective cause of the sale.

11.2 The Seller shall pay a professional fee of 7% INCLUDING VAT as agreed upon between the Seller and RE/MAX. The said fee will be earned upon acceptance of this offer and the subsequent fulfilment of any suspensive conditions contained herein, and shall be payable not later than the date of transfer of the property into the name of the purchaser."

[29] Also on the 5th of May 2016 van der Schyff sent an email to Coetzee which stated as follows:

"Soos per telefoon bespreek vanoggend die volgende:

Ek het gister laat weet dat eienaar van Plaas Watermeyer vandag sou teken, maar ongelukkig het dit nie gebeur nie.
Die eienaar wou nou eers saam met sy Prokureur deur die Koopkontrak/aanbod gaan.

Ek het die kontrak vir hul aangestuur en hoop om spoedig van hulle af terugvoering te kry.

Sal julle laat weet so gou moontlik wat die stand van sake is en wanneer die ondertekening sal geskied."

[30] The email sent by van der Schyff to Kruger was answered by Kruger on 9 May 2016 in which email the following was said:

"Aangeheg is die koopkontrak wat ons opgestel het ooreenkomstig die Trust se instruksies.

Het reeds aan Wouter bevestig dat jy en die voornemende kopers môre omstreeks 7:00 die eiendom sal besoek.
Ons het die Verkoper versoek om die koopkontrak te teken en aan jou te stuur.

Laat weet gerus indien enige voorgestelde wysigings aan die kontrak aangebring moet word.

Ons het ook instruksie ontvang van die Trust om met sekere plaaseienaars te onderhandel rakende die koop van nuwe plaaseiendom. Geliewe ons in kennis te stel wanneer hierdie transaksie verseker sal voortgaan sodat ons met sekerheid kan onderhandel met die nuwe verkopers."

[31] On the 17th of May 2016 van der Schyff sent an email to Kruger stating *inter alia* the following:

"Goeie dag Hans.

Hou die koopprys soos oorspronklik. R25 263 000-00
Maak my kommissie R475/ha plus BTW (Wouter kan BTW terug eis omdat RE/MAX en Wouter BTW geregistreer is)
Wouter kry dan R6 702/ha in sy sak."

[32] This email was answered by Kruger on the 18th May 2016 to which an amended contract for a purchase price of R25 263 000-00 excluding VAT for the farms Watermeyer 576 and O'Donogue 577, was attached, with the indication that the seller would sign the agreement on 14:00.

[33] The agreement attached thereto was then signed by the first defendant and sent to van der Schyff by Kruger via email at 14:53 on 18 May 2016.

[34] It is on this agreement that the plaintiff relies as part of the written portion of the agreement between the plaintiff and the trust.

[35] The heading of the agreement refers to AGREEMENT OF PURCHASE AND SALE OF FARM PROPERTY and the parties are recorded as follows:

"MEMORANDUM OF AGREEMENT MADE AND ENTERED INTO BY AND BETWEEN

THE TRUSTEES FOR THE TIME BEING OF THE
JOHAN SNYMAN FAMILIE TRUST
REGISTRATION NUMBER IT64/2002
Herein represented by ***WOUTER WESSEL SNYMAN***
In his/her capacity as Trustee
Duly authorised hereto by a Trust Resolution
(Hereinafter referred to as the SELLER)
and
ASSMANG PROPRIETARY LTD
REGISTRATION NUMBER 1935/007343/07
Herein represented by COPANO DAVID SALEMO
In his capacity as DIRECTOR of the
Company and duly authorised thereto
(Hereinafter referred to as the PURCHASER)
IN TERMS WHEREOF THE PARTIES AGREES AS FOLLOWS:"

[36] Clause 11 of the agreement refers to the agent's commission as set out above.

[37] Clause 12 of the agreement refers to the special conditions and states the following:

"Assmang's offer shall be subject to the following conditions:

12.1 Approval by the Assmang Executive committee for the purchase of the property within 45 (FORTY FIVE) days from date of acceptance of this offer by the owner.

12.2 Approval by the Northern Cape Department of Environment and Nature Conservation regarding the sale and the purchase of the properties for the purpose of and Offset area.

12.3 If the Seller does not find a suitable farm within 60 (SIXTY) days of acceptance of this offer by the Seller then the Seller and Purchaser can negotiate to extend the process for another fixed period. If the Seller does not find a suitable farm within the time period provisioned for them the contract will be cancelled."

[38] On 6 June 2016 Assmang requested certain changes to the contract and on the 17th of June 2016 a representative of Assmang, Mrs Retha Mboya, addressed an email to van der Schyff advising him that:

"Please note that Hans (the trusts attorney) has considered and accepted all my proposed changes. I now await the amended Agreement for my final consideration."

[39] On the 29th of July 2016 Assmang sent an email to Kruger which stated the following:

"Dear Hans

With reference to the above matter and to the Agreement of Purchase and Sale of Farm Property (the "Agreement") between Assmang (Pty) Ltd and your client, Johan Snyman Family Trust.

As you are aware, the agreement stipulates as a special condition that, Assmang's offer will be subject to its Executive Committee approving the purchase of the property by a proximately 4 July 2016.

Please take note that due to the fact that your client requested that the purchase price be increased to an amount of R30 million, the Assmang Executive Committee did not approve this transaction, and as such, shall not make a recommendation to the Assmang Board of Directors to proceed with this transaction.

In view of the above, the approval by the Assmang Executive Committee that is required by the Agreement has not been granted, and will not be granted, as such, we are of the opinion that the Agreement is still conditional, and shall remain conditional, and as such must unfortunately laps as at today's date.

Accordingly, Assmang will no longer be proceeding with this sale."

[40] On the 22 of August 2016, van der Schyff sent an email to Kruger indicating that he had heard that the defendants and Kruger have gone back to Assmang's representatives and that the original sales price was accepted. He rather sarcastically asked what the reasons were that he did not make out part of the negotiations anymore, as he had previously asked telephonically and via email that he be kept up to speed on the developments.

[41] On the same day Kruger answered the email as follows:

"Wat onderhandelinge tussen Assmang en Snyman Trust betref het daar geen feitlike ooreenkomste plaasgevind waarby jy nie ingsluit was nie! Indien daar enige noemenswaardige ooreenkomste tussen die partye gesluit word sal dit wel onder jou aandag gebring word.

Jy is in kennis gestel toe die koopooreenkoms finaal deur Assmang gekanselleer is. Geen een van die opskortende voorwaardes is vervul nie en derhalwe bestaan daar nie eens 'n koop-opsie nie.

Daar is wel verwikkelinge aan die Trust se kant en in die verband het ek Vrydag 'n e-pos gestuur aan 'n personeellid by Assmang om dit onder hulle aandag te bring nadat ek verneem het dat Assmang se finansiële committee op 31 Augustus 2016 vergader."

[42] On the 28th of September 2016 Mrs de Waal from the plaintiff, sent an email to Kruger stating that the mine (Assmang) had informed her that they are proceeding with the transaction and that Remax must make contact directly with Kruger. She also asked that all communication and progress in respect of the transaction be forwarded to her.

[43] The next day Kruger sent an email to de Waal which stated the following:

"Dit is vreemd dat die myn julle in kennis gestel het dat hulle aangaan met die transaksie aangesien die myn dit nog nie pertinent aan ons kantore of aan die verkoper gekommunikeer het nie. Daar is wel onderhandelinge aan die gang en het ons ook 'n konsep koopkontrak aan die myn gestuur vir oorweging.

Ons kliënt het 'n koop-opsie geneem op 'n ander plaas en is hy verplig kragtens die opsie om dit uit te oefen voor of op 30 Sept. 2016. Gevolglik vertrou ons dat die myn dieselfde inligting wat aan julle gekommunikeer is ook skriftelik aan ons sal kommunikeer voor môre. Sonder 'n skriftelike aanvaarding van die myn sal die koop-opsie van ons kliënt waarskynlik verval."

[44] On the 12th of October 2016 van der Schyff sent an email to Kruger enquiring as to whether there were any

developments with the sale of the farm to Assmang as Remax no longer took part in the negotiations between the parties.

[45] Kruger replied on the 17th of October 2016 in an email to van der Schyff which stated the following:

"Die koper en verkoper het tot 'n ooreenkoms gekom. Sien aangehegde e-pos wat dit bevestig. Sien ook Assmang se bevestiging dat hul nie verantwoordelik is vir agente kommissie nie. Volgens Assmang was daar nooit enige mandaat deur hulle gegee met betrekking tot 'n agent nie.

Die koopkontrak (wat jy beding het) waarin Remax as agent opgetree het, het finaal tot 'n einde gekom op 29 Julie 2016. Sien ook aangehegde e-pos van jouself waarin dit bevestig is dat daardie onderhandelinge finaal gestop was.

Sien verder hierby aangeheg dat daar op 17 Augustus 2016 met nuwe onderhandelinge begin is. Hierdie onderhandelinge het ontwikkel tot 'n ooreenkoms.

Tydens konsultasie met die Verkoper is daar vasgestel dat Assmang reeds in Julie 2013 'n aanbod aan die Verkoper gemaak het welke aanbod nie deur die Verkoper aanvaar is nie. (Sien hierby aangeheg die aanbod). Met verdere navraag aan die Verkoper is bevestig dat hy nooit enige mandaat aan Remax gegee het met 'n opdrag om die plaas Watermeyer te verkoop nie.

Met verwysing na bovermelde is dit derhalwe ons advies aan die Verkoper dat die effektiewe oorsaak van die transaksie nie deur Remax bewerkstellig is nie. Indien agente kommissie van R1.8 miljoen (soos deur julle geeis is in die eerste ooreenkoms wat ten einde geloop het) geeis word sou die Verkoper in elk geval nie tot die koop kon instem nie.

Indien enigiets onduidelik is kontak my gerus."

[46] It is common cause between the parties that during October 2016 an agreement was entered into between Assmang and the trust in terms of which the farm Watermeyer 789 was sold to Assmang for a purchase price of R25 600 000-00 excluding VAT.

[47] The heading of this agreement refers to AGREEMENT OF PURCHASE AND SALE OF FARM PROPERTY AND GAME and the parties are recorded as follows:

"MEMORANDUM OF AGREEMENT MADE AND ENTERED INTO BY AND BETWEEN

THE TRUSTEES FOR THE TIME BEING OF THE JOHAN SNYMAN FAMILIE TRUST
REGISTRATION NUMBER IT64/2002
Herein represented by ***WOUTER WESSEL SNYMAN***
In his/her capacity as Trustee
Duly authorised hereto by a Trust Resolution
(Hereinafter referred to as the SELLER)

and

ASSMANG PROPRIETARY LTD

REGISTRATION NUMBER 1935/007343/07

Herein represented by COPANO DAVID SALEMO

In his capacity as DIRECTOR of the

Company and duly authorised thereto

(Hereinafter referred to as the PURCHASER)

IN TERMS WHEREOF THE PARTIES AGREES AS FOLLOWS:"

[48] The sale also included game specified as follows:

15 x Oryx
15 x Blesbuck (grey)
2 x Blesbuck (White)
25 x Springbuck and
25 x Springbuck (copper)

[49] In clause 8 of the agreement the agreement provides as follows:

"8.1 Both the SELLER and PURCHASER shall not be liable to pay a professional fee to any estate agent as a result of the conclusion of this transaction."

[50] On the 28th of October 2016 an email was sent from Retha Mboya to Kruger:

"In the first instance, I would like to advise that at this moment there is no fully signed and/or binding agreement between Assmang and the Johan Snyman Familie Trust.

As all the parties are aware, at this late stage of finalising the sale agreement, there is now a dispute regarding Remax's commission on the sale: Remax believes that it is entitled to a commission, however Hans is of the view that they are not entitled to any commission – there obviously now exists a deadlock between Remax and the Seller.

At this point in time, the Assmang Exco expected for this agreement to be signed, however, Hans is of the view that no agreement can be signed until the issue of the commission is dealt with – I agree, as such, no agreement will be concluded until this matter has been resolved.

In view of the above, and in order to settle this matter amicably between us attorneys, can you both of you give me guidance on how you envision this matter should be resolved as a matter of urgency, noting that the dispute is actually between the Seller and Remax."

[51] The three issues that court need to determine is:

[51.1] Was the plaintiff mandated by the trust to sell the farms?

[51.2] Was the plaintiff the effective cause of the sale?

[51.3] Was the *merx* sold in terms of the first and second sale agreements the same or substantially similar?

THE PARTIES CONTENTIONS

[52] Adv van Aswegen on behalf of the defendants argued that the trust had never granted a mandate to the plaintiff to sell the farms Watermeyer and/or O'Donogue.

[53] He argued that it was in fact Assmang that had granted a mandate to the plaintiff in order to enable Assmang to purchase properties, including Watermeyer and O'Donogue.

[54] The defendants furthermore contended that any commission due to the plaintiff would therefore have had to be paid by Assmang.

[55] Adv van Aswegen furthermore argued that if the court should find that first defendant had in fact granted Remax a mandate to sell the farm, then and in that event, the mandate was not properly given in that the

mandate was not authorised, discussed and decided upon by both the first and second defendants who were the trustees at the time.

[56] It is common cause that during 2016 the third defendant was not yet a trustee of the trust.

[57] Adv van Aswegen argued that if a mandate was indeed given or a written sale concluded the trust denies that all the trustees at the time acted jointly in given the mandate and that the mandate was invalidly given.

[58] Adv van Aswegen argued that the written contract of sale fell through as a result of the fact that Assmang's executives had not approved thereof in terms of the suspensive condition.

[59] He also argued that the suspensive conditions regarding the obtaining of other properties by the first defendant was not timeously complied with, and that this also contributed to the fact that the first sales agreement did not proceed. This was not expressly pleaded in the defendants' plea.

[60] Adv van Aswegen then also argued that the second sale was negotiated by Kruger without any intervention and/or contribution by the plaintiff, and that these negotiations then resulted in the eventual sale of the property.

[61] The defendants furthermore contended that the first sales agreement was in respect of the farms Watermeyer 576 and O'Donogue 577 whereas the second sales agreement was in respect of the farm Watermeyer 789, which was a consolidation and subdivision of the up to then farms Watermeyer 576 and O'Donogue 577. Adv van Aswegen therefore argued that the *merx* that was sold in terms of the second agreement was not the same as the *merx* that was sold in terms of the first agreement.

[62] Adv van Riet SC on behalf of the plaintiff argued that there could be no doubt that the trust had given Remax a mandate during April 2016 to sell the property in question, at a purchase price agreed upon (R6 500-00 per hectare), which mandate was subsequently expressly confirmed by the trust when it agreed to pay the plaintiffs commission in terms of the first agreement of sale.

[63] Adv van Riet SC also argued that the reason why the first agreement fell through was because off the fact that the trust had decided to unilaterally increase the purchase price by nearly R5 000 000-00, whereas in the second sales agreement the defendants had reverted to almost the same purchase price as in the first sales agreement.

[64] Adv van Riet SC also argued that it was clear from the evidence of both Snyman and Kruger that they knew from the start that the consent of all trustees had to be obtained and this was duly done as was confirmed by Kruger's statement in his email of 9 May 2016, wherein he confirmed that he had prepared the sale "*ooreenkomstig die trust se instuksies*" and that his notation on the contract that Snyman was "*duly authorised by a trust resolution*" was indeed correct.

[65] Mr van Aswegen also argued that the plaintiff was not the effective cause of the sale and that the role played by van der Schyff on behalf of the plaintiff was merely the following:

[65.1] Van der Schyff phoned Snyman to enquire whether the farm was for sale.

[65.2] Van der Schyff established what price Snyman wanted for the farm.

[65.3] Van der Schyff met with Snyman twice to get more detail about the size of the farm, establish whether the game was included in the sale, and to discuss the conditions spelled out in Snyman's email to him.

[65.4] That van der Schyff drafted a first generic offer to purchase on a Remax letterhead.

[65.5] That van der Schyff later mailed a second generic offer to purchase on a Remax letterhead to Kruger.

[65.6] That van der Schyff showed the farm to Dirk Coetzee and Andrè Johnson on behalf of Assmang.

[66] Adv van Aswegen argued that the material events took place after van der Schyff's assistance, and occurred without van der Schyff's participation, and even without his knowledge, in view of the fact that finding a suitable farm for Snyman played a central role in the transaction.

[67] Van Aswegen argued that it was Kruger who:

[67.1] Played a prominent role in the decision-making process concerning the purchase of the farm Scholtz.

[67.2] Made the effort to move Assmang to increase the purchase price of the farms to ensure the financial viability of the purchasing of the farm Scholtz.

[67.3] Cautioned Snyman in August 2016 to consider selling the farms before the mines extracted all the groundwater of neighbouring land.

[67.4] Suggested to Snyman that he moves to the farm Dekeppi and brokered the deal with second defendant, that paved the way to do so.

[67.5] Ascertained that Assmang was locked in negotiations to purchase the farm Gammasip.

[67.6] Brokered the purchase of the farm Compton.

[67.7] Consolidated the farms in accordance with the conditions imposed by the Minister of Agriculture.

[67.8] Brokered a new (second) sales agreement deal with Assmang, free from the suspensive condition that effectively derailed the first sales agreement.

[68] Adv van Aswegen contended that it was Kruger's wisdom and business acumen that was the driving force behind the successful sale and that these intervening factors were such as to make van der Schyff's initial introduction relatively unimportant.

[69] Adv van Aswegen furthermore contended that the *merx* that was sold in terms of the first sale agreement, consisted of 2 separate farms and that when the pieces of land were consolidated, they took on a new character in law. The farms O'Donogue 577 and Watermeyer 576 did not exist anymore and a new farm Watermeyer 789 was registered, and transferred to Assmang.

[70] He also argued that the game identified in the second sales agreement did not form part of the *merx* sold in terms of the first agreement. As a result, Mr van Aswegen argued that the *merx* ultimately sold was substantially different to the one brokered by Remax in terms of its contract of mandate with Assmang and that being so Remax is not entitled to the commission that it claims from the defendants.

<u>THE LEGAL POSITION</u>

[71] As set out in LAWSA:

"The service expected of the estate agent is the introduction to the owner of immovable property of a person who is able, both legally and financially, to purchase the property, and who is willing to purchase, or (if the agent acts for a would-be buyer of immovable property) to introduce an owner who is willing to sell the property for the price which the buyer is willing to pay.

An estate agent is in a different position from most other persons who render professional services: sometimes he or she acts for the buyer sometimes for the seller or conceivably for both buyer and seller as a kind of broker"[1]

And also:

"The usual contract between the principal and the estate agent is that the estate agent is entitled to an agreed or customary commission if he or she succeeds in introducing to the principal a person who is able, both legally and financially, to purchase and who is willing to purchase; and if the introduction is the effective cause of the conclusion of the sale. No obligation is imposed on the agent to do anything; the contract is merely a promise binding on the principal to pay a sum of money on the happening of a specified event, which involved the rendering of some service by the agent."[2]

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[1] Lawsa, Volume 18 2nd Edition, Estate Agents par1

Low vs Shedden (2001)2 All SA 171 (c) at 180I-181B

[2] Lawsa Volume 18 2nd Edition, Estate Agents par 3

[72] As set out in **Miller vs Pam Snyman Eiendoms Konsultante (Edms) Bpk)**[3] a mandate may be express or tacit, and mandates are very seldom concluded by expressly using the word mandate by the seller and/or the estate agent in question.

[73] As set out by **Silke**:

"The agent is, in the absence of express agreement to the contrary, entitled to its commission, where once it is established that he was the efficient cause of the sale, notwithstanding that such sale: (1) May only go through long after his active efforts have ceased, or (2) may eventually be concluded directly between the parties without his participation, or (3) may go through on different terms and conditions from those on which the agent was employed to sell or after termination of the mandate." [4]

[74] The introduction of the eventual purchaser to the property concerned, in the event of an ultimate sale thereof, even in the case of the intervention of another agent, is a strong factor in favour thereof that the agent concerned was the efficient cause of the sale. [5]

[3] Miller v Pam Snyman Eiendoms Konsultante (Edms) Beperk 2001 (1) SA 313(C)

[4] Silke: The Law of Agency (3rd edition) article 56 page 395

[5] Pretorius vs Meyer 1975 (3) 279 (T)

Aida Real Estate vs Lipschitz 1971 (3) SA 871 W)

Wakefields Real Estate (Pty) Ltd vs Attree & Others 2011(6) 557 (SCA)

[75] In regard to the issue to effective cause the following extract from **Aida vs Lipschitz** is often quoted:

"If a new factor intervenes, causing or contributing to the conclusion of the sale, and the new factor is not the making of the agent, the final decision depends on the result of the further inquiry – viz, did the new factor outweigh the effect of the introduction being more than or equally conducive to the bringing about of the sale as the introduction was, or was the introduction still overridingly the operative?"[6]

[76] As well as:

"Often success is only achieved through the intervention of third parties, and quite often the agent himself is not a participant in the negotiations. It would, however, be a mistake to say that the occurrence of these financial obstacles and their removal without the assistance of the agent necessarily go to show that agent's introduction was not affective in bringing about the ultimate sale. Obstacles in the way of a sale and the fact that one or other or both of the parties, by independent effort overcame them, may indeed support the very opposite view. It may be a measure of the wisdom and the business acumen of the agent in introducing to each other a seller who is so keen to sell and/or a purchaser who is so keen to buy that even formidable obstacles in the way of the sale were overcome; or, to put it more crudely, the willingness and ability of the

[6] Aida vs Lipschitz supra at 873H-874A

purchaser introduced by the agent was so great that nothing could prevent the sale taking place. In such a case, the agent would be entitled to remuneration, no matter whether he selected the potential purchaser by change or by foresight. The commission agent is paid by results and not by good intentions or either hard work."[7]

[77] The Supreme Court of Appeal approved of the approach adopted in **Aida vs Lipschitz** in the matter of **Wakefield Real Estate vs Attree**, *supra*.

[78] In the matter of **Manu et Manu v Nationwide Airlines,**[8] the Supreme Court of Appeal held that the test in circumstances where there are competing agents is in determining whether the intervening cause was "*sufficiently weighty*" to break the chain of causation between the agent's endeavours and the eventual transaction. The Supreme Court of Appeal observed that:

"Although every commission claim depends on its own facts, second agents seldom seem to succeed; the introduction of a purchaser by the first agent remains the effective, or … 'the dominant' cause of the sale." [9]

[7] Aida vs Lipschitz supra at 875F

[8] Manu et Manu vs Nationwide Airlines (Pty) Ltd 2007(2) SA 512 SCA

[9] Manu et Manu vs Nationwide Airlines (Pty) Ltd 2007(2) SA 512 SCA at paragraph 18

[79] Where an estate agent has furnished the principal with a binding offer from a person able to purchase and if a sale to that person results, the agent has earned his or her commission and the principal cannot lawfully avoid paying that commission should the principal for any reason decide to cancel the sale.[10]

[80] Even if an estate agent does not sign the written sales agreement between a seller and purchaser which agreement provides for the payment of commission to the estate agent, that agreement is binding on the seller and/or principal.[11]

[81] As also set out in the case of **Vanarthday (Edms) Bpk vs Roos** where it was found that where an estate agent introduces a person who subsequently purchases, the agent has earned the commission and it is immaterial that the first negotiations led to nothing and that the negotiations are afterwards renewed without further introduction.[12]

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[10]Glickman vs Landau & Co 1944 TPD 261 at 268

Watson vs Fintrust Properties (Pty) Ltd [1987] 2 All SA 62 (C) also reported as 1987 (2) SA 739 (C) at 752 I-J

[11] Baker vs Afrikaanse Nasionale Afslaers en Agentskap Mpy (Edms) Bpk 1951 (3) SA 371 (A) 375G tot 376H also reported as [1951] 3 All SA 306 (A)

Tyrone Selmon Properties (Pty) Ltd vs Phindana Properties 112 (Pty) Ltd [2006]1 All SA 545(C) at paragraph 33

[12] Vanarthday vs Roos 1979 (4) SA (aa) at 11fF–G also reported as [1979] 2 All SA 315 (AA)

[82] In the event of the court finding that the trust did give a mandate to the plaintiff, in respect of the alleged lack of authority on the side of first defendant in giving the mandate, the onus is on the trustees to establish such a lack of authority as the aforesaid denial is based on facts exclusively within their knowledge.[13]

WAS THE PLAINTIFF MANDATED BY THE TRUST TO SELL THE FARMS?

[83] The first defendant, Mr Snyman's evidence that the only reason why mention was made of the trust paying estate agent commission to the plaintiff, was because he believed that that was the way that it works, and that no mandate was given by the trust to the plaintiff, is difficult to understand, especially in view of the correspondence and terms of the first agreement referred to above. His direct evidence was the following:

"omdat ek geglo het dit is hoe dit werk."

[13] Moraitis Investments (Pty) Ltd & Others vs Montic Dairy (Ptd) Ltd 2017 (5) SA 509 (SCA) at paragraph 21, 33 and 35, also reported as [2017] 3 All SA 485 (SCA)

[84] The question arises as to how the trust would agree to pay over an amount of almost R2 000 000-00 in estate agent's commission, without having provided the plaintiff with a mandate to sell the farm Watermeyer.

[85] Adv van Aswegen's argument that van der Schyff negotiated his commission directly with Assmang, which commission would be added to the purchase price, and thus be paid by Assmang as a result of the mandate given to the plaintiff by Assmang, requires scrutiny.

[86] It is common cause that when van der Schyff approached the first defendant the first defendant indicated that the trust required an amount of R6 500-00 per hectare in its pocket, in order for the sale to proceed.

[87] On that basis the first agreement was drafted with such a purchase price that the plaintiff would be entitled to claim 7% commission on the transaction, which would result in the trust receiving an amount of R6 500-00 per hectare in its pocket.

[88] The first defendant thereafter indicated that he wanted to have an amount of R6 700-00 in his pocket in order for the sale to proceed, as a result of which van der Schyff agreed to limit the plaintiff's estate agent's commission to an amount of R475-00 per hectare.

[89] This would, based on the purchase price, ensure that the trust would receive R6 702-00 per hectare, as per the first defendant's requirements.

[90] The estate agent's commission limited to R475-00 per hectare was in fact added to the amount that the trust wanted in its pocket, R6 702-00, and the purchase price remained an amount of R7 200-00 per hectare.

[91] There were even negotiations on behalf of the trust, to reach some sort of agreement that the estate agent's commission would be divided between the trust and Assmang, i.e. that half would be paid by Assmang and half by the trust, which proposal was not acceptable to Assmang.

[92] Adv van Aswegen's argument that Assmang was liable for the payment of commission as a result of the fact that it was Assmang that had given a mandate to the plaintiff, loses sight of the fact that the total purchase price was R7200-00 per hectare, consisting of a purchase price of R6702-00 per hectare that the trust wanted in its pocket, as well as a reduced commission of R475-00 per hectare that was agreed between the trust and the plaintiff.

[93] This result of this was that Assmang would have paid both the purchase price required by the trust, as well as the commission agreed to between the trust and the plaintiff, to the trust, i.e. the commission would indirectly be paid by Assmang. There can therefore be no question that no estate agent's commission would therefore be paid in addition to the purchase price of R7200-00 as the defendants allege.

[94] This agreed commission in the amount of R475-00 per hectare was also expressly included in the first sales agreement when it was drafted by Kruger on behalf of the trust.

[95] What is also clear from the evidence of van der Schyff, Coetzee, the first defendant, as well as Kruger, is that up until the end of July 2016 it was not only contemplated, but also agreed by all the parties involved, that the plaintiff would be paid estate agent's commission by the trust.

[96] As set out above there were also discussions between van der Schyff on behalf of the plaintiff and Kruger on behalf of the trust to reduce the plaintiff's commission to an amount of R475-00 per hectare, in order to enable the trust to receive R6 702-00 per hectare after the deduction of the estate agents commission agreed to between the parties. It begs the question as to why these negotiations would be necessary if the trust did not give a mandate to the plaintiff and agreed to pay it commission.

[97] This is also confirmed by the fact that Kruger attempted to negotiate that the estate agent commission be divided between the plaintiff and Assmang, to which Assmang was not prepared to agree.

[98] In view of the evidence, the correspondence via email and the provisions of clause 11 of the first sales agreement, it is difficult to understand on what basis the defendants deny the fact that they had given a mandate to the plaintiff, wherefore I am satisfied that the plaintiff had proven the mandate that was given to the plaintiff by the trust, as well as the terms thereof.

[99] As set out above the case law is also the effect that even though an estate agent is not a party to a written agreement entered into between parties, in terms of which a certain estate agent commission is negotiated on behalf of the estate agent, such an agreement is nonetheless enforceable also by the estate agent.

[100] In view of the aforesaid, the onus was on the defendants to show that the mandate that was given to the plaintiff and the agreement that was entered into the first sales agreement was not done by all the trustees acting jointly.

[101] At that point in time there were only 2 trustees namely the first and the second defendants, and it is clear from the evidence that from the outset the first defendant as well as the plaintiff as well as Kruger, were aware of

the fact that in view of the seller being a trust, all the trustees had to act jointly.

[102] The first sales agreement expressly stated that the first defendant was authorised by a resolution of the trustees of the trust to enter into the sales agreement, which was clearly done on the trust's instruction, as well as the fact that the trust had expressly therein agreed to pay the agreed (and reduced) estate agent's commission of R475-00 per hectare (in accordance with the mandate that the trust had given to the plaintiff).

[103] This also accords with the correspondence between the parties, *inter alia*:

[103.1] The email from van der Schyff to Coetzee on the 27 of April 2016 which confirmed that:

"1. *Die eienaar aanvaar die aanbod wat julle hom gemaak het, maar ook onder sekere voorwaardes nl:*

1. Ek moet hom 'n week kans gee om die aanbod ook met sy Trustees te bespreek – Plaas is in Trust geregistreer"

[103.2] The email from Kruger to van der Schyff on 9 May 2016 which email expressly stated:

"Aangeheg is die koopkontrak wat ons opgestel het ooreenkomstig die Trust se instruksies.

[104] On this basis I find that the defendants have not discharged the onus of proving the alleged lack of authority relied on by the trust, in order to avert the plaintiff's claim for commission.

WAS THE PLAINTIFF THE EFFECTIVE CAUSE OF THE SALE?

[105] There was no reason why the first sales agreement could not be finalised, and it is clear that the reason why Assmang's executive committee did not approve and proceed with the first sales agreement, was due to the fact that Kruger on behalf of the trust had informed Assmang that the purchase price had to be increased to an amount of R30 000 000-00.

[106] It is clear that the suspensive condition regarding the approval of the transaction was not complied with, due to the trust unilaterally deciding to increase the purchase price to R30 000 000-00.

[107] In respect of the second suspensive condition, referring to alternative land being available to the trust to purchase, the contract expressly made provision for an extension of this time period, by agreement between the parties, to enable the trust to find alternative land to purchase in order to continue with its farming operations thereon.

[108] Less than a month after the first sales agreement falling through, Kruger and the trust proceeded to again resume negotiations with Assmang in respect of the sale of the properties. (These negotiations were resumed on 17 August 2016, less than 3 weeks after the first agreement fell through). If the trust had required more time to purchase alternative land, there appears to be no reason why the trust could not request an extension in terms of the agreement, which would probably be agreed to by Assmang.

[109] In this regard the email from Kruger to the plaintiff dated the 17 October 2016, requires closer examination with application of the facts herein, as well as the evidence of the parties.

[110] The aforesaid email confirms that the purchaser and the seller did reach an (second) agreement.

[111] The email also stated that Assmang confirmed that they were not responsible for estate agent commission. This is clearly in accordance with the whole basis upon which the negotiations proceeded with regard to the first sales agreement, in view of the fact that the plaintiff even reduced its commission, in order to make it agreeable to the trust. An attempt by Kruger to negotiate that Assmang would pay half of the estate agents commission and the trust the other half, also clearly came to naught as Assmang was not prepared to consider such a proposal.

[112] The email expressly states that the sales agreement that was negotiated by van der Schyff on behalf of Remax who acted as agent, had come to an end on the 29 of July 2016. As set out above, up until the end of July 2016, there was no anticipated dispute or difficulty regarding the estate agent commission that was due to Remax, and which would be paid by the trust.

[113] Kruger's email then states that during consultation with the seller it was established that Assmang had already in July 2013 made an offer to purchase to the seller which offer was not accepted by the trust. Clearly nothing came of the offer to purchase which was made

during 2013, and more than three years had passed since that offer was made and not accepted by the trust. This can clearly have no bearing on the plaintiffs claim for estate agent commission during 2016.

[114] The email further confirms that upon further enquiries to the seller it was confirmed that he (presumably the first defendant on behalf of the trust) had never given any mandate to Remax with an instruction to sell the farm Watermeyer. This allegation clearly flies in the face of the whole process of negotiation, including the first sales agreement in which it was expressly confirmed that Remax was the effective cause of the sale, and that the seller would pay estate agent's commission in a reduced rate of R475-00 per hectare.

[115] The said email clearly states that in view of the aforesaid it was Kruger's advice to the seller that the effective cause of the sale was not the plaintiff. The email also expressly states that if the estate agent's commission of an amount of R1 800 000-00 was in fact claimed the seller would not have consented to the sale of the farm. This is patently wrong as the seller had effectively already on the 18th of May 2016, accepted the offer to purchase based on the agreement that the plaintiff would limit its estate agent's commission to

R475-00 per hectare in order to accommodate the trust to make the whole transaction financially viable.

[116] During the evidence of Kruger he expressly testified that he had asked the first defendant whether he had granted the plaintiff a written mandate. At no point in his evidence did Kruger indicate that he and the first defendant had discussed or enquired or considered an oral mandate granted to the plaintiff by the first defendant on behalf of the trust.

[117] It is clear that up to and until the 29th of July 2016, the trust had no difficulty or objection to paying estate agent's commission to the plaintiff. This position however changed after the advice of Kruger, to the effect that the plaintiff was not entitled to commission on the transaction.

[118] In his evidence Kruger persisted with his view that the plaintiff was not entitled to estate agent commission.

[119] No mention is made in the correspondence, the defendant's plea and/or the defendant's affidavit in the summary judgement application, of the allegation that Kruger was indeed the effective cause of the second

sales agreement, and that Kruger's efforts had overcome any obstacles in respect of the first sales agreement, to such an extent that Kruger's intervention was "*sufficiently weighty*" to break the chain of causation between the plaintiff's endeavours and the eventual transaction, and that Kruger was in fact entitled to estate agent's commission.

[120] The second sales agreement also fails to mention that Kruger would be entitled to or be paid estate agent's commission in respect of the transaction. On the contrary, the agreement expressly stated in clause 8 thereof, that both the seller and the purchaser would not be liable to pay a professional fee to any estate agent as a result of the conclusion of the transaction.

[121] Likewise the defendants and Kruger failed to disclose that Kruger had received any commission on the transaction, despite being expressly asked this information in the plaintiff's request for further particulars as well as the plaintiff's rule 35(3) notice. The defendants failed to disclose any such information and failed to discover any documentation pertaining to agent commission being paid to Kruger.

[122] Even in his evidence Kruger was unwilling to disclose that he had earned commission on the sale of the farms, and in his evidence testified that his firm was paid an amount of R800 000-00, in respect of both the divorce proceedings conducted on behalf of the first defendant, as well as the consolidation of the properties, the drafting of the sales agreements and the negotiations conducted therein.

[123] This was referred to by Kruger as a "*Boeresom*" with no mention of any part of it consisting of commission on the sale of the property. Only during cross examination did it come to light that of the amount of R800 000-00 only an amount of R300 000-00 was paid to the defendant's attorneys of record (the firm of which Kruger is a director) and that an amount of R500 000-00 was in fact paid to Kruger in his personal capacity.

[124] If the objective facts are viewed in consideration of the legal position as set out above, Kruger's efforts were not of such a nature that it overcame insurmountable obstacles to the first sale proceeding.

[125] During Kruger's evidence he testified that he simply received a "*professionele fooi*" in an amount of R800

000-00, in an attempt to not disclose the fact that he was in fact paid an estate agent's commission of R500 000-00.

[126] This must be taken in context to Kruger's reply to the Rule 35(3) notice where he expressly indicated that the documentation pertaining to commission payable on the second sales agreement was irrelevant to these proceedings.

WAS THE *MERX* SOLD IN TERMS OF THE FIRST AND SECOND SALE AGREEMENTS THE SAME OR SUBSTANTIALLY SIMILAR?

[127] The farms Watermeyer 576 and O'Donogue 577 were consolidated into the farm Watermeyer 789, which in essence remained the same properties as was involved in the first sales agreement.

[128] A small portion of the farm was subdivided and sold to a neighbouring farmer, although in essence the two properties prior to consolidation and the one property after consolidation relates to the same immovable property.

[129] This is also confirmed by the fact that the farms Watermeyer and O,Donogue consist of 2708.9495 hectares and 810.7174 hectares respectively, totalling 3 519.6669 hectares, whereas the farm Watermeyer 789 consist of 3517.7284 hectares.

[130] Also the argument that the sale of certain game also changed the whole tenor of the first sales agreement, is clearly unfounded as from the initial discussions and negotiations between van der Schyff and the first defendant, mention was already made that the sale of the farms may include the sale of some of the game on the farms. This is therefore not a novel new part of the second agreement, but was already contemplated and considered even during the initial negotiations.

CONCLUSION

[131] Wherefore I make the following order:

Judgment is granted for the plaintiff against the defendants for:

1 Payment of the amount of R1 904 849-93;

2 Interest *a tempora morae*;

3 Costs of the suit.

AG VAN TONDER

ACTING JUDGE

On behalf of the Plaintiff:	Adv. R.S. van Riet SC (oio Haarhoffs Inc)
On behalf of Defendants:	Adv W.A. van Aswegen(oio Duncan & Rothman Attorneys.)