



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 352/2015

In the matter between:

WARREN FARMS CC

Plaintiff

and

ANDRE MIKRO FERREIRA N.O.

1st Defendant

ALBERTUS JACOBUS SAAYMAN N.O.
(CINTI-SHAE BOERDERY TRUST)

2nd Defendant

HEARD ON: 31 JANUARY 2017 & 01 FEBRUARY 2017

JUDGMENT BY: CHESIWE, AJ

DELIVERED ON: 10 MAY 2017

- [1] The plaintiff claims payment of an estate agent's commission of the sum of R160 740.00 together with interest calculated from the 24 March 2014 to the date of payment, arising from the sale of an immovable property being farm Treur Fontein No. 76, owned by

Cinti-Shae Boerdery Trust (IT1400/2007) in the district of Aliwal North.

- [2] The issue in the present matter is whether the plaintiff, as estate agent who introduced a purchaser to the seller, was the effective cause of the sale and entitled to the commission.
- [3] The plaintiff pleads that at all relevant times it was the holder of a valid fidelity fund certificate issued pursuant to the provisions of section 26(a)¹ of the Estate Agency Affairs Act 112 of 1976. On or about 9 and 12 December 2011, the defendant's Trust, represented by the 1st defendant, extended a sole mandate to the plaintiff to market its farm property to the Department of Rural Development and Land Reform of the Republic of South Africa (hereinafter referred to as the department. As a direct result of the introduction, the aforesaid immovable property was purchased at a price of R2 350 000, 00 (VAT exclusive). According to the plaintiff, it performed in terms of its mandate and was the effective cause of the sale. It was therefore entitled to the payment of the agreed commission. During the trial, reference was made to the deed of sale attached to the documents marked annexure A1 & A2. In terms of paragraph 1 and 2 thereof the seller was liable for the payment of the agent's commission in respect of the sale.

¹ Section 26(a) of the Estate Agency Affairs Act 112 of 1976 states that

"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, if such person is-

(a) a company, to every director of that company"

- [4] The defendant admitted that Mr Garth was introduced to the property, but denied that as a result of this introduction or if indeed the deed of sale was entered into at all, the plaintiff was the effective cause of the sale or that the plaintiff performed his obligation in terms of the mandate. The defendant submitted that the sole mandate expired after six months and the deed of sale did not refer to any agent's commission at all. The defendant further submitted that the plaintiff did not establish its entitlement to the payment of the commission and in the absence of any connection between the introduction and conclusion of the sale ultimately to the government, the plaintiff was therefore not entitled to payment of commission.
- [5] The plaintiff called Mr Garth who testified that he was an estate agent for 10 years and worked for the plaintiff. He assisted the department to find farms for "their beneficiaries" who are emerging black farmers whom the department wanted to benefit for land reform purposes. Mr Garth requested the information of the farm from Mr Strydom who in turn gave Mr Garth the contact details of Mr Ferreira. Mr Garth met with Mr Ferreira and the deed of sale was signed by Mr Garth as the agent of the plaintiff and Mr Ferreira as a trustee of Centi-Shae Boerdery Trust (IT1400/2007).
- [6] Mr Garth prepared all the documents for a presentation. He put the information of the farm on the website and the information was sent to prospective buyers as well as to the department. Mr Vincent Paul from the department contacted Mr Garth, requesting him to do a sole mandate with the 1st defendant. Mr Garth

informed the 1st defendant that the department requested that a sole mandate should be signed by the seller. The 1st defendant informed Mr Garth that he can only have a sole mandate for one month. Mr Garth accordingly advised the 1st defendant that the sole mandate should be for a period of 6 months as the department required a longer period. Mr Garth testified that he wanted the sole mandate to be for 12 months, but Mr Ferreira insisted on a six months' sole mandate. The parties agreed on a six month mandate and it was signed by both of them.²

[7] Mr Garth said after all the documents were provided to Mr Vincent Paul, he took him to the farm. Mr Vincent was impressed with the farm and indicated to Mr Garth he would discuss the farm with the committee. Thereafter, Mr Garth had regular telephone contact with 1st defendant. On 6 March 2013 the department sent a letter to Mr Garth on behalf of Mr Ferreira. In the letter the department made an offer to purchase the farm for an amount of R2 350 000, 00. Mr Garth forwarded the letter to Mr Ferreira in order for Mr Ferreira to acknowledge and respond to the letter of the department. Mr Ferreira responded and indicated in a letter dated 10 July 2013 that the offer of R2 350 000, 00 was accepted.

[8] Mr Garth testified that soon after Mr Ferreira acknowledged the letter from the department the latter ignored his phone calls and emails. He later did his own researched with the deeds office and

² Annexure A1, the one month mandate showed 6% commission and A2 one of 6 month the percentage was not inserted on the document. Mr Garth testified that it is generally accepted that the commission is 6% for a farm being sold at that price and the size of the farm.

discovered that the farm was registered on 24 March 2014. He immediately attempted to contact Mr Ferreira, but all his calls were unanswered. He said that he was not aware of any other agent that had marketed the property other than him. He added that he dealt exclusively with farms and has successfully sold 15 farms to the department.

- [9] Mr Garth, under cross examination, explained that it was the norm to sign a deed of sale and the sole mandate at the same time; that the purpose of the sole mandate was to get the department involved; as the department did not wish to deal with too many estate agents. He explained that he found it difficult to understand why the 1st defendant denied that he had introduced the farm to the department even though he was in constant contact with the 1st defendant. He said the 1st defendant had no issue after the six month period had expired with regard to the continued correspondence between them. The 1st defendant did not mention anything about the sole mandate having expired, neither did Mr Ferreira, during their phone calls, make him aware that there was another agent; or that Mr Ferreira himself was also involved in marketing the farm. Mr Garth rejected the version of Mr Ferreira. That concluded the plaintiff's case.

- [10] The 1st defendant Mr Ferreira testified that when the sole mandate was signed at Wimpy, Mr Christo Strydom, Mr Jooste and Mr Garth were all present. He did not dispute that the sole mandate was signed but that it was only for one month. He said Mr Garth had requested that the mandate be signed for a longer

period of 12 months but that he only agreed to a sole mandate of six months. He refused to have a longer sole mandate. Mr Ferreira said the commission part was left blank as the parties had not yet agreed on the percentage of the commission. He further mentioned that the word "sold" was left out in the paragraph of the sole mandate, which was to read as:

"The property is sold during the currency of this sole agency a price acceptable to me."

- [11] According to Mr Ferreira the sole mandate expired in June 2012. After the sole mandate expired, he proceeded to sign new mandates to sell the farm to other people. He mentioned some of the people as Mr Tobie Myburg Auctioneers, Oom Alex but could not remember his surname. He also proceeded to show the farm to other people; Mr Abednigo Mxigi was one of the interested people to buy the farm. He continued to have contact with Mr Abednigo Mxigi. He said he did that as the department and Mr Garth were quiet for a long time.
- [12] He testified that when he received the offer letter from the department he took it immediately to his attorneys, as he did not know what to do with the letter after the mandate had expired. Mr Ferreira explained that he did avoid the phone calls of Mr Garth, as he did not want to sign a new sole mandate with the agent.
- [13] Mr Ferreira, under cross examination, accepted that the farm was marketed on the web page of the plaintiff. He said when he completed the sole mandate form, he only later realised that the

word 'sold' was not in the contract. He did not explain what he did when he realised the word 'sold' was not in the sole mandate. He insisted that he wanted the farm to be sold within six months. Mr Ferreira further accepted that all the documents of the farm were given to the department. He accepted that the mandate had expired and therefore did not discuss the expired mandate with Mr Garth.

- [14] He testified that he introduced Mr Abednigo Mxigi to the department. It was put to him that the department identified the person who the farm must be allocated to. He did not dispute that. He said he did not pay plaintiff the commission as Mr Garth did not sell the farm within six months. He was the person who marketed the farm to other potential buyers. He acknowledged that if Mr Garth had sold the farm within the six months of the mandate, he would have paid the commission.
- [15] Mr Ferreira in his pleading, had disputed that he had no mandate to sign the mandate without the assistance of the second defendant. That he was not as the 1st defendant authorised to present the Trust. However, during the trial he conceded.
- [16] With regard to defendant's plea that the proper interpretation of the written mandate did or did not require that for its fulfilment, the plaintiff had to secure the sale of the farm within six months. The Estate Agency Affairs Board Code of Conduct determines that:

an estate agent shall offer:

1. "Immovable property for saleunless he has be given a mandate to do so by the seller of the property, or his duly authorised agent;
2. Accept a sole mandate, or the extension of the period of an existing mandate, unless all the terms of such a mandate or extension, as the case may be are in writing and signed by the client.
3. The expiry date of the mandate or extension as the case may be which shall be expressed as a calendar date, specifically recorded in the sole mandate."

[17] The documents, annexures A1 and A2, are easily discernible. The 1st defendant argued that the parties where not in agreement on an open ended mandate and their contract did not have a mandate to that effect. In respect of the conduct of the plaintiff, I cannot see any misconduct on his part with regard to the manner in which the mandate was presented to the 1st defendant. The 1st defendant submitted that the minds of the parties did not meet as they interpreted the mandate in different ways.

[18] The rules of interpretation of a mandate requires that it be interpreted to its context as a whole: the language used in the mandate, the circumstances within which it was concluded, the purpose of the document and any particular clause or portion thereof, the avoidance of absurdity and inconsistency giving the document a good business sense in accordance with sound commercial practice. Mr Garth has been an agent from 2006. He had sold over 15 farms to the department. It is therefore

expected of him that he understood the rules of interpretation of a mandate, as well as ensured that the defendant fully understood the contents of a sole mandate. Mr Ferreira on the other hand signed the sole mandate, that being in agreement with the mandate.

- [19] This matter amounts to one of interpretation and it is incumbent upon the court to ascertain the intention of the parties which, in the first instance, must be gathered from the language of the clause itself³. The words of a contract must be given their plain, ordinary, popular and grammatical meaning, unless it clearly appears from the context that the parties intended them to have a different meaning.⁴ As the Supreme Court of Appeal stated in Natal Joint Municipal Pension Fund v Endumeni Municipality⁵ that:

“...Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is

³ *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA)

⁴ *Ibid* para [5]

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”⁶

In my view, the contract was clear and plain to understand, as it made good business sense with sound commercial principles.

[20] The court has to guard against changing the agreement of the parties. Its purpose is to determine the meaning of the document⁷. Thus if the word ‘sold’ is inserted by the court, it would be changing the meaning of the document and it is not for the court to impose the views of the party on a contract they had both signed while fully alert to its contents.

[21] The primary and determinative issue between the parties is whether the plaintiff was the effective cause of the sale and if the plaintiff introduced the purchaser to the property, which will result in the plaintiff being entitled to commission.

[22] The usual or customary terms of the mandate are that, in the event of the estate agent introducing to his principal, the owner of the property, a purchaser for the property who is willing and able to purchase it and the transaction is successful and finalised, then in that case, the agent is the effective cause of the sale. As such, the estate agent is entitled to payment of an agreed commission. The plaintiff in the papers and Mr Garth during his evidence, confirmed and testified that he sent the sale documents to the department. Mr Garth took Mr Vincent Paul of the department to

⁶ Ibid para [18]

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18]

the farm for an inspection of the farm. Mr Paul immediately required that a sole mandate must be signed by the seller.

[22] In the matter of Lieb and Another NND v I Kuper (Pty) Ltd⁸ the court was of the view that:

“...The ordinary law of agency requires the agent's efforts to be the 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.”⁹

[23] In Aida Real Estate Ltd v Lipschitz¹⁰ the court stated that:

“A 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...”¹¹

⁸ *Lieb and Another NNO v I Kuper & Co (Pty) Ltd* 1982 (3) SA 708 (T)

⁹ *Ibid* at 713 f-g

¹⁰ *Aida Real Estate Ltd v Lipschitz* 1971 (3) SA 871 (W)

¹¹ *Ibid* at 873 H- 874A. See also *Mano ET Mano Ltd v Nationwide Airlines (Pty) Ltd and Others* 2007 (2) SA 512 (SCA) and *Wynland Properties CC v Potgieter and Another* 1999 (4) SA 1265 (C)

- [24] The 1st defendant denied that the plaintiff introduced the farm to the department. In his evidence the 1st defendant indicated that he was also involved in taking potential buyers to the farm. However, none of those that the defendant introduced bought the farm. The 1st defendant claimed that Mr Abednigo Mxigi was one of the people that were introduced to the farm and he became the successful buyer. Mr Mxigi was the beneficiary that the farm was allocated to by the department. Bearing in mind that the department has a reform objective and that land is simply not acquired for the sake of it. There would always have to be a beneficiary in that process. Mr Garth clearly explained this process and that the department was responsible for identifying the beneficiaries for which it bought the land.
- [25] Adv. De La Harpe on behalf of the plaintiff submitted that the plaintiffs' introduction of the farm to the department and the department to commence with its internal process was predominantly due to the initiated introduction by the plaintiff which in the event led to the cause and effect of the sale. The plaintiff's witness, Mr Garth struck me as a person who understood the internal process of the department. Mr Garth explained in detail to the court the process which he followed when working with the department to introduce it to potential sellers and was able to explain the different committees that the process must go through to be eventually finalised.
- [26] The approach adopted by the court in determining the effective cause of the sale has been illustrated in a number of judgments

which serve as a useful guide¹². In Webranchek v IK Jacobs & Co Ltd¹³ Heever JA held that:

“...the sale is chiefly attributable to the efforts of plaintiff; in other words that those efforts constituted the dominant or effective cause of the sale...¹⁴”

In the Aida Real Estate Ltd v Lipschitz¹⁵ which is more instructive, the court held that the agent was the effective cause of the sale and was entitled to commission.

[27] I now turn to deal with the issue of tacit agreement on the commission percentage. The 1st defendant claimed that the plaintiff's mandate had expired after six months, and did not necessarily deprive the agent of his claim of commission as the introduction was still the overriding factor¹⁶. The commission payable depended on the terms of the mandate and both parties confirmed that there was no agreement. The plaintiff indicated that it was assumed that the commission would be the usual rate of six percent. If nothing was said, plaintiff may rely on an implied term to the effect that the commission was payable according to the generally accepted tariff¹⁷.

¹² See *Aida Real Estate Ltd v Lipschitz* above, *Webranchek v L K Jacobs & Co, Ltd* 1948 (4) SA 671 (A), *Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd* [2001] 3 All SA 295 (SCA) and also *Basil Elk Estates (Pty) Ltd v Curzon* 1990 (2) SA 1 (TPD) amongst others.

¹³ *Webranchek v L K Jacobs & Co, Ltd* 1948 (4) SA 671 (A)

¹⁴ *Ibid* at 685

¹⁵ *Aida Real Estate Ltd v Lipschitz* above

¹⁶ *Basil Elk Estates (Pty) Ltd v Curzon* 1990 (2) SA 1 (TPD) and see also *Aida Real Estate Ltd v Lipschitz* above at 874

¹⁷ *Muller v Pam Snyman Eiendoms Konsultante (Edms) Bpk* 2001 (1) SA 313 (C)

[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 Grange v Metter¹⁸ 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..."¹⁹

[29] Mr Garth's evidence was that it was customary and the usual rate of commission of six percent is charged for a farm of that size and for the price of R2 350 000 (VAT exclusive.) Page 4 of the trial bundle provided for the payment of commission at six percent of the selling price, and page 16 of the trial bundle implied that the same rate of commission was to be applied. Mr Garth testified that he could not fill in the blank, as Mr Ferreira had signed the document and he accepted that it was common cause. Mr Ferreira testified that there was no agreement on the percentage of the commission, but did not plead a different rate of commission. Nor was the evidence of Mr Garth challenged in

¹⁸ *Le Grange v Metter* 1925 OPD 76

¹⁹ *Ibid* at 80

respect of the six percent commission that was not indicated on the sole mandate documents.

[30] In my view, the estate agent's wisdom and business acumen brought the seller and the purchaser together. In such instances the agent would be entitled to remuneration. Commission of the estate agent is paid by results and not by good intentions or even hard work²⁰. Accordingly, the plaintiff's introduction was the effective cause of the sale. The plaintiff is therefore entitled to that commission at the rate of six percent which is customarily applicable in such transactions.

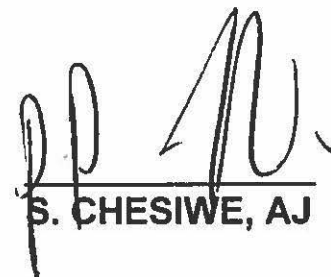
[31] Under the circumstances, I am satisfied the plaintiff has established on the balance of probabilities that he introduced the department to the farm and the departmental activities as a causative factor in the conclusion of the sale of the farm and that the plaintiff is entitled to the payment of commission and that the plaintiff established the existence of a tacit term as to the rate of commission payable in a sum equal to six percent of the selling price.

[32] I am further satisfied that transfer of the property occurred on 24 March 2014 and thus interest on commission should accrue from this date.

²⁰ *Aida Real Estate Ltd v Lipschitz* above at 875 E-H.

[33] In the result, I make the following order:

1. The defendants to pay the sum of R141 000, 00 (inclusive of vat) of R19 740, 00 of the selling price of R2 350 000, 00.
2. The defendants to pay interest on the sum of R141 000, 00 calculated at the legal rate of interest from 24 March 2014 to date of payment.
3. The payment of the plaintiff's taxed party and party costs of suit.



S. CHESUWE, AJ

On behalf of plaintiff:
Instructed by:

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A G Cooper Majiedt Inc.
BLOEMFONTEIN

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