NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EAST CAPE LOCAL DIVISION, EAST LONDON

Case no: EL556/2012
ECD 1256/2012

In the matter between:

KEVIN GLYNN ROUX and
ELIZABETH VAN NIEROP **Plaintiff**

vs

MAGNOLIA RIDGE PROPERTIES 197 (PTY) LTD **Defendant**

ZAMBLI 216 (PTY) LTD **Third Party**

Date Heard	:	9 -11 December 2013; 28 July 2014; 15 September 2014
Date Delivered	:	3 February 2015

SUMMARY :

Plaintiff herein, an estate agent partnership represented by *Colin Roux (Roux)* was given a mandate, which it accepted, to find a purchaser of defendant's immovable property in East London for the sum of R55 000 000.00 or at a sum acceptable to defendant.

After *Roux* had completed its task, the property was sold by defendant to *Zambli 216 (Pty) Ltd (Zambli*) in the sum of R52 000 000.00. Defendant refused to pay plaintiff's commission plus VAT thereon on grounds, *inter alia*, that plaintiff was not responsible for the introduction of the property to *Zambli* and, therefore, was not the direct and effective cause of the sale.

Court held that there is sufficient evidence mainly based on probabilities to show that plaintiff has proved its case and therefore, is entitled to its commission plus VAT thereon. Defendant was ordered to pay costs of the action.

JUDGMENT

TSHIKI J:

A) INTRODUCTION

[1] The plaintiff herein is a partnership existing between *Kevin Glynn Roux* and *Elizabeth Johanna Van Nierop* who trade as estate agents under the name and style *Kevin Roux Properties* at 65 Beach Road, Nahoon, East London. For the sake of convenience, the plaintiff shall be referred to as *Roux*. Defendant is *Magnolia Ridge Properties 197 (Pty) Ltd* a company with limited liability and duly registered as such in accordance with the laws of the Republic of South Africa with its registered office at 80 Frere Road, Vincent, East London. For the sake of convenience, unless for the purpose of avoiding confusion, defendant shall be referred to as *Magnolia*. The third party is Zambli 216 (Pty) Ltd the company which bought the property in question from *Magnolia*. The third party shall be referred to as *Zambli*.

[2] It is common cause between the parties that at all material times hereto *Roux* and its partners were the holders of valid Fidelity Fund Certificates issued in terms of section 26 of the Estate Agents Act 112 of 1976.

[3] In his evidence, *Mr Roux* who testified on behalf of the plaintiff, told the Court that on or about August/September 2009 at East London defendant, represented by its Managing Agent and representative of its major shareholders, *Colin Victor*, extended to plaintiff, represented by *Kevin Glynn Roux*, a mandate to find a purchaser of *Magnolia*'s immovable property, Erf 16249, East London (the property) for the sum of R55 000 000.00 or at a sum acceptable to defendant.

[4] *Roux* testified further that the implied terms of the mandate extended to *Roux* would be to pay to the plaintiff a commission equal to the generally accepted rate of commission for selling a property of the nature of that owned by *Magnolia* in East London area. In addition, value added tax and commission would be payable upon transfer of the property in consequence of a successful sale to a purchaser introduced by *Roux*. The generally acceptable rate of commission for a property of the nature of that then owned by *Magnolia* in East London area was 5% of the selling price.

[5] According to *Mr Roux,* the plaintiff accepted the defendant's mandate. It is also the evidence of *Roux* that the latter introduced *Zambli 216 (Pty) Ltd* to the property. As a direct consequence of *Roux*'s introduction of *Zambli 216 (Pty) Ltd* (hereinafter referred to as *Zambli*) a written option for the purchase by *Zambli* of the property from *Magnolia* was concluded. This was followed by a deed of sale inclusive of the clause entitling *Roux* to receive payment of commission in the sum of one million rand plus value added tax (VAT) from *Magnolia* in the event that a sale followed. This written option to purchase was marked "A". Subsequently and on the 1st February 2011, *Zambli* concluded a further option for the purchase of the property from *Magnolia* whose copy is marked "B". This also entitled *Roux* to receive payment of commission in the sum of R1 million plus VAT from *Magnolia* in the event that a sale followed.

[6] On the 31st January 2011 as well as on 1st February 2011 *Magnolia*, represented by *Warren Geyer*, and plaintiff represented by *Roux,* orally agreed that in the event of a successful sale of *Magnolia*'s property to *Zambli,* defendant would

pay to plaintiff a commission of R1 000 000.00 plus value added tax. On the 30th November 2011, *Magnolia* and *Zambli* concluded an Agreement of Sale in terms thereof, defendant sold the property to *Zambli* for the sum of R52 million rand exclusive of value added tax, a copy of that agreement is marked as annexure "C". *Zambli r*eceived transfer of the property from *Magnolia* on the 11th May 2012 and the latter received payment of the agreed purchase price. That then would have entitled *Roux* to be paid its commission together with value added tax thereof.

[7] *Magnolia* refused to pay *Roux* its commission of R1 000 000.00, demand notwithstanding. Its contention when refusing to pay the money being that the option agreement dated November 2010, annexure "A", and the option agreement dated 31st January 2011 marked "MRP1" to the defendant's plea lapsed on account of the failure by the prospective purchaser to fulfil the conditions precedent contained therein. Therefore, according to *Magnolia*, there was no Agreement of Sale resulted either from the options marked "A" or "MRP1". At the trial it contended that there is no term of any agreement relating to any commission payable came into existence between the parties. It is the further contention of *Magnolia* that as a result of annexure "MRP2" a further written Addendum to annexure "B" which was also amended, *Roux* played no role in the conclusion of that Deed of Sale dated the 30th November 2011 marked "B" to the particulars of claim. *Magnolia* consequently contended that *Roux* played no role in the negotiations of the further option agreement signed by *Magnolia* and *Zambli* on or after the 31st January 2011 inclusive of the agreement dated the 9th November 2011 and or the 30th November 2011 inclusive of the Addendum. For the above reasons, *Magnolia* contended that it did not owe *Roux* any money and more so, according to *Magnolia* the two option

agreements of November 2010 annexure “A” and that of 31st January 2011 marked “MRP1” lapsed on account of the failure by the prospective buyer to fulfil its conditions of the agreement.

[8] That the commission which would be paid to plaintiff is R1 000 000.00 is borne by the contents of the agreements which were signed by the defendant and the third party which reflects a sum of R1 000 000.00 to be paid to the plaintiff should the sale succeeds. In my view, if the plaintiff was not involved in this sale and was not the effective decisive cause of the sale, his name would never even for a moment been reflected in no less than three option agreements prepared by defendant’s attorneys and signed by the defendant which were marked “KRP14”. On clause 9 of “KRP14”, plaintiff is named as the agent who was entitled to a commission of R1 000 000.00 payable to plaintiff by the seller. The next offer to purchase signed by the defendant on 21st October 2011 was submitted by *Zambli* to *Magnolia*. The terms thereof reflected that “*Kevin Roux / Smada Investments* was to be paid 3% plus VAT. However, the offer was not accepted by the defendant.

[9] The next option agreements (annexures “KRP2”) dated the 15th November 2010, annexure “KRP3” dated the 18th November 2010 and annexure “KRP4” signed by *Zambli* on 31st January 2011 and by *Magnolia* on the 1st February 2011 were concluded. All the annexures mentioned above contained clauses reflecting that *Roux* would be entitled to the payment of the commission by *Zambli* in the sum of R1 000 000.00 (one million rand) plus VAT.

[10] In November 2011 the sale of the property between *Magnolia* and *Zambli* was ultimately concluded with the purchase price reflected in clause 9 being a sum of R52 000 000.00, and the Deed of Sale agreement is referred to as annexure "KRP5". What must have surprised *Roux* is clause 9 of that agreement which reads:

> "The purchaser warrants that a commission is payable to an estate agent, including Kevin Roux Properties, in respect of the sale and transfer and indemnifies the seller against any claims for commission by any estate agent or trader. In the event of any claim being made upon the seller for commission, then the purchaser shall be obliged to settle or defend same and indemnify the seller against the claim and costs of defence as required by the seller from time to time."

B) REASONS FOR JUDGMENT

[11] In the main the defendant's denial of liability to the plaintiff is that there was no mandate entered into between itself and *Roux*. It has denied that *Roux* has introduced *Zambli* to the defendant and its property. Although it has admitted the sale of the property to the third party, (*Zambli*) it has vehemently denied that *Roux* was the effective cause of the sale of the property between *Magnolia* and *Zambli.*

[12] In ***National Employers' General Insurance v Jagers*** 1984 (4) SA 437 (ECD), Eksteen AJP remarked as follows at 440 D:

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the *onus* is obviously not as heavy as it is in a criminal case, but nevertheless where the *onus* rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he (**or she**) satisfies the Court on a preponderance of probabilities that his (**or her**) version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's

> allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his (**or her**) version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do to the defendant's, the plaintiff can only succeed if the Court nevertheless believes him (**or her**) and is satisfied that his (or her) evidence is true and that the defendant's version is false …it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities". (My emphasis)

[13] Therefore, the trial Court has to first consider whether on the probabilities of the case the plaintiff is telling the truth and therefore, his or her version is acceptable. If that is accomplished the trial Court need not have to make other considerations. The probabilities of the case are considered at the same time when the credibility of the witnesses are evaluated by the Court and that process does not constitute separate fields of enquiry as regards to the consideration of the truth by the plaintiff and the consideration of the probabilities.

[14] The two main issues in the present case are whether or not the plaintiff received a mandate from defendant to find a buyer for the latter's property. Secondly, and if so, whether or not the plaintiff was the effective cause of *Zambli'*s purchase of defendant's property. On the face of a denial by the defendant that it had instructed the plaintiff to act as its estate agent the Court has to rely on the evidence that was adduced before it, to establish whether or not the plaintiff has discharged its *onus*.

[15] In the first place, and given the nature of *Roux*'s profession who conducts himself as an estate agent and has been so for some time, there can be no denial that he was in fact conducting a profession of an estate agent at the time when *Roux* is alleged to have been engaged by *Magnolia* to pursue his profession. *Roux*'s name appears frequently as having been listed in numerous documents filed by *Roux* where he is referred to as the estate agent in the sale in issue. The amount which is referred to as his remuneration is reflected in such documents. In my view, it is unlikely that *Magnolia* would list the names and particulars of *Roux* if the latter was never engaged by *Magnolia* for that purpose. I refer to the documents such as annexure "A" and "B". In my view, it is highly unlikely for *Magnolia*'s attorneys to have drafted such contracts which nominate *Roux* as the estate agent in the document involving *Zambli* if *Magnolia* did not consent to such transactions.

[16] This is also the case with respect to exhibit "A112" which was signed *by Mr Bassingthwaighte* on behalf of *Magnolia*. In their clause 11.4.2 of that document *Roux* is to be paid a commission of a sum of R1 000 000.00 plus value added tax which amount is due by *Magnolia*. The same applies to annexure "A4" exhibit and "A2" which were produced by *Mr Owen Holland* of Business Partners which was both a shareholder of defendant and its Property Managing Agent. *Magnolia*'s witness *Bassingthwanghte* confirmed that he signed the agreement exhibit "A112" knowing that it was "reflecting a commission payable to *Kevin Roux* in the sum of R1 000 000.00 *because that was the commission agreed upon*". Secondly, that the document was signed on behalf of *Zambli* and that an agreement was concluded in its terms. Thirdly, that if the transaction was successful the commission reflected in the agreement in clause 9 was payable by *Zambli.* Fourthly, if the transaction went

through defendant would have paid to plaintiff R1 000 000.00 and *that he accepted that Roux introduced Zambli to the property*. Further, and in his evidence *Mr Bassingtwanghte* made the following admission which was damaging to the defendant's case:

> "Q: And you have heard all the evidence and you have seen all the documentation now that you say you are unaware of it at the time and you have seen his (Roux's) involvement and his contact and his introduction of the property and you have signed documentation that acknowledged that he was the effective cause of those earlier agreements?
>
> A: Yes.
>
> Q: But you say he is not the effective cause of the last agreement?
>
> A: Yes.
>
> Q: Why?
>
> A: Because he is not the effective cause.
>
> Q: Why?
>
> A: Because he had nothing to do with the last sale agreement."

[17] It follows from the above answer that it does not make sense and does not assist the defendant's case instead it strengthens the evidence of the plaintiff. I say so, because the evidence before this Court shows on a balance of probability that from the day when *Roux* introduced *Zambli* to the property in issue until it was sold to *Zambli* there was no estate agent involved other than the plaintiff. The parties remained the same and the purchase price was much the same although reduced at some stage and the terms of the agreement remained much the same. In my view, there was no other effective cause of the earlier agreements other than *Roux* and it follows that in the absence of any other intervening estate agent at any stage there could have been no other effective cause of the last agreement other than *Roux*. At least there is no evidence led to the contrary.

[18] There is no explanation from *Magnolia* or its witnesses why *Roux* was to be paid such amount if it had not carried out any mandate on behalf of *Magnolia*. It follows in my view, that the said amount must have been offered to *Roux* for a specific purpose and in remuneration for services done on behalf of *Magnolia* which is to introduce *Zambli* to *Magnolia*'s property under discussion herein.

[19] It also did not come as a coincidence to me that exhibit "A46" which was signed by *Mr Geyer* on the 19th August 2011 was not signed on behalf of *Zambli*. This is followed by a clause which provides for a no commission payable to any estate agent which specifically excludes *Kevin Roux Properties* from receiving any commission from the seller of the property. The question to be decided by this Court is whether *Magnolia* had any justification to refuse to pay *Roux* the commission which he had been entitled to as recorded in the specified agreements. The question that should be asked is, if *Magnolia* was not satisfied that *Roux* had introduced *Zambli* to *Magnolia*'s property, which was eventually sold with the help of *Roux*, why would its name be written in those Deeds of Sale, or offers to sale as the person to receive commission? There is no answer to this question.

[20] In the circumstances of this case, it does not make sense that *Magnolia* could justify its refusal to pay *Roux* of its money for commission in circumstances where there had been documents in the form of Deeds or offers of Sale after *Zambli* was introduced to *Magnolia*'s property by *Roux*. The facts presented by *Magnolia* do not support any other conclusion other than that *Roux* was unjustifiably deprived of its commission plus VAT thereof. There was even no other estate agent other than *Roux* that was involved in the sale of the property in issue. The only reason, in my

view, is that *Roux* had already introduced *Zambli* to this property and nothing more was necessary to be done other than to transfer the property. It is also the reason why a clause which excluded estate agents at that stage being that *Roux c*ompleted the task of introducing *Magnolia*'s property to *Zambli* and nothing more was to be done. On the evidence before me, I am satisfied that *Roux*'s introduction of the property in question to *Zambli* was the effective cause of the successful sale by defendant of the property to *Zambli.* That is why, and for no other reason, that the sale between *Magnolia* and *Zambli* was successful. There cannot be any other reason.

[21] *Mr Holland* having been directly involved in this case and with his knowledge of vital evidence *Magnolia* decided not to call *Mr Holland* as a witness, notwithstanding that *Mr Holland* was present in Court. This, in my view, as *Mr De La Harpe* has submitted, leads to an irresistible inference that the omission by *Magnolia* to call *Mr Holland* was a deliberate act on the part of *Magnolia* because *Mr Holland* may not have been supportive of the defendant's claim that he had no authority to represent *Magnolia* despite him being a representative of its appointed Managing Agent. *Mr Bassingthwaighte* confirmed that *Mr Holland* was authorised to extend the mandate to *Roux*. In fact, *Mr Victor* actually allowed *Roux* to show the property to *Zambli*.

[22] According to *Roux*, *Magnolia* should have discovered e-mail correspondence between *Mr Geyer* and *Mr Bassingthwaighte*. This information is relevant because *Mr Victor* admitted sending some e-mails to *Mr Holland* and those were exhibits "A1", "A2", "A3" and "A4 on the 2nd September 2009. In those e-mails *Mr Holland* revealed

that "Kevin has a buyer for Magnolia at R50m …" *Mr Holland*'s reply is "Kevin can use this as a base …" This correspondence was sent with a draft sale agreement which provided for the payment of a commission to *Roux* in the sum of one million rand plus VAT which was payable by *Magnolia*. As I have said *supra*, this evidence is indicative of the fact that *Roux* was specifically engaged by *Magnolia* to carry out the mandate and as a consequence of which *Magnolia* sold and transferred its property to *Zambli*. The sale was upon the terms acceptable to *Zambli* and *Magnolia* who received payment of the purchase price in consequence of which *Magnolia* is liable to *Roux* for the payment of the commission.

[23] It cannot be denied that *Roux* introduced *Zambli* to the property. Even *Mr Victor* confirmed that *Mr Roux* showed *Mr Watkinson* the property by arrangement and also introduced *Zambli* to the building. This conclusion is supported by the evidence of *Mr Bassingthwaighte*. Even *Mr Victor* himself conceded that *Roux* played an integral part which culminated in the signing of the various agreements with *Zambli*.

[24] It is inescapable that the defendant by its conduct decided to sideline *Roux* with a view to deprive it of its entitlement in the sum which it has claimed against *Magnolia* herein. Thereafter, *Roux* was excluded from receiving its commission and warranties even in circumstances where the commission was earned by *Roux*. *Magnolia* intended to deprive *Roux* of its commission which was due to it immediately after the money for the property was paid by *Zambli*.

[25] *Magnolia*'s allegation that *Roux* was not the effective cause of the last agreement to *Zambli* property has no substance at all. It does not make sense to me for the defendant to refer to the events as:

[25.1] the negotiation of the final agreement (exhibit "A170";

[25.2] the conclusion of the lease, exhibit "A172";

[25.3] the conclusion of the lease, exhibit "A139"; and

[25.4] the compliance with the conditions precedent in the agreement of sale.

[26] The evidence I have already alluded to shows clearly that there is no substance in *Magnolia*'s allegations against *Roux*. There can be no justification for such allegations because they have not been proved. It is clear from the probabilities of the case that the defendant deliberately excluded the plaintiff from any involvement in the conclusion of the final agreement of sale. This it did so purposefully and in circumstances which cannot be justified.

[27] On the probabilities alone the plaintiff's version is more probable than that of *Magnolia*. It is clear from the evidence supported by the probabilities already explained that *Magnolia* is not telling the truth. Its version cannot be believed.

[28] *Mr Cole* for the defendant sought to persuade this Court that the plaintiff had no mandate and that in the absence of special circumstances an agent must prove the following:

a) that which was to happen for commission to be payable had happened - ie that he or she has introduced to the seller a purchaser who is willing and financially able to buy the property;

b) secondly, that he was the effective cause of the sale.

[29] For the reasons I have stated in my judgment, there is no substance in the above submissions by *Mr Cole* and, therefore, they cannot succeed.

[30] It follows that if the agent is the effective cause of the sale, the estate agent is entitled to an agreed commission or, if no agreement has been reached as to the sum of that commission, to the customary commission (***Van Heerden v Retief*** 1981 (1) SA 945 (A). Moreover, an Estate Agent's contractual relationship with his or her principal is like any other contractual relationship and is not entitled to special rules. Whether the agent is entitled to the payment of commission will depend upon what was agreed between the parties. Where such a claim is made, as was pointed out by Jenkins LJ in ***Midgley's Ltd v Hand*** [1952] 2 QB 452 (CA) at 435:

> "One has to look out at the particular contract and see whether, according to its terms construed in accordance with the ordinary principles of construction, the event has happened on the occurance of which the commission is expressed to be payable."

[31] In order for an estate agent to be entitled to commission on the sale of the property, the agent plaintiff must show that but for his introduction of the third party the sale of the property to the third party would not have occurred and that it was his introduction which was the direct and effective cause of the sale and that the third party was induced to buy defendant's property as a result of that introduction (***Vanarthday (Edms) Bpk v Roos*** 1979 (4) SA 1 (A)). In the present case, *Roux* did just that.

[32] In ***Lieb and Another NNO v I Kuper & Co (Pty) Ltd*** 1982 (3) SA 708 (T) at 713 F-G it was held:

> "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."

[33] Before I conclude, I need to comment on the contentions by *Magnolia* that there were intervening events in the conclusion of the sale and lease agreements between *Roux* and *Magnolia*. Evidence before Court supports the view that such interventions, if any, occurred after *Roux* had performed and concluded his final and effective agreement. Therefore, their occurance, if any, could not be used to deprive *Roux* of its entitlement to the commission earned. I agree with *Mr De La Harpe* in his submission that all those occurances inclusive of all of them they do not apply in this case and for the above reasons they cannot be used to deprive *Roux* of its commission. In any event, they cannot amount to any intervening act so as to deprive *Roux* of its commission.

[34] I therefore make the following order.

[34.1] Judgment is hereby granted in favour of the plaintiff for the payment of:

[34.1.1] A sum of R1 000 000.00 (one million rand) plus Value Added Tax together with interest thereon calculated at the legal rate per annum from the 11th May 2012 (that being the date of transfer of defendant's property to Zambli and receipt by Zambli of the purchase price of R52 000 000.00) to date of payment.

[34.1.2] Defendant is ordered to pay plaintiff's costs of suit together with interest thereon calculated at the legal rate of interest per annum from allocatur to date of payment such costs to include the preparation of the heads of argument by plaintiff's counsel.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the plaintiff	:	Adv. D. De La Harpe
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