IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 05/11/2009
CASE NO: 8009/06

UNREPORTABLE

In the matter between:

ANTHONY GRAY DAUBERN t/a DAUBERN PROPERTIES Applicant

and

WILLEM DANIEL SWART Respondent

JUDGMENT

MURPHY J

1. The plaintiff, an estate agent, claims commission in the amount of R560 000, together with interest arising from the sale of a property previously owned by the defendant.

2. It is common cause that on 15 November 2004 the defendant gave the plaintiff a mandate to sell his property, being Portion 85 of the farm

Hartbeeshoek 303, Registration Division JR Gauteng. In terms of this written mandate the defendant granted the plaintiff a sole mandate which was valid and irrevocable until 30 April 2005. The plaintiff was required to market the property at a price of R6 million plus commission. The commission clause read:

> "Agente Kommissie sal bereken word teen 7% van die totale koopsom, of soos ooreengekom deur albei partye, en sal betaalbaar wees uit die eerste beskikbare fondse wat betaal sal word."

3. The particulars of claim disclose three possible causes of action. The first is that on 10 January 2005, CA Daubern (the wife of the plaintiff employed in his agency) introduced the property to Mr Johan Annandale who represented a company, Marble Gold (Pty) Ltd which eventually purchased the property on 9 August 2005, for R8 million and hence that she was entitled to the commission under the mandate of 15 November 2004. The second claim, pleaded in the alternative, in the event that it is found that no introduction occurred on 10 January 2005, is that the defendant granted the plaintiff an oral mandate on 17 May 2005 and that the plaintiff introduced Annandale to the property on 19 May 2005 when she physically took him to the property and that such was the direct cause of the sale. Thirdly, it is alleged in both instances that the plaintiff was the effective cause of the sale and entitled to commission on that basis.

4. With regard to the first mandate, the defendant admitted it had been concluded but pleaded that it was justifiably cancelled on 21 January 2005. The defendant denied that Annandale was introduced to the property by Daubern in January or May, but pleaded that he was introduced to the property on 1 April 2005 by Ms A Kruger and Mr J Horn. It was admitted however that Daubern handed over certain documents regarding the property to Trysa Annandale, the wife of Annandale. The defendant accordingly denied that the alleged oral mandate was given to the plaintiff in May 2005, that the plaintiff introduced the purchaser to the property and that the plaintiff was the effective cause of the sale.

5. The defendant raised a special plea that the plaintiff's claim had prescribed. This can be dealt with straightaway. Summons was initially issued against the defendant by Daubern. She was substituted as plaintiff by the present plaintiff pursuant to an order of court on 28 August 2008. In terms of clause 7.1 of the sale agreement between the defendant and Marble Gold, the latter was obliged to pay a deposit of R100 000 on 8 August 2005. The defendant contended that in terms of the commission clause of the written mandate of 15 November 2004, the commission "sal betaalbaar wees uit die eerste beskikbare fondse wat betaal sal word". It is common cause that the purchaser paid the deposit on 12 August 2005. The defendant accordingly submitted that the commission in terms of the written mandate became due and payable at least on 12 August 2005

being the date on which the first funds became available. He submitted that the date of substitution should be regarded as the date of interruption, being 28 August 2008 and hence the claim prescribed on 12 August 2008.

6. The special plea is not sustainable, in my opinion, because there is nothing in the sale agreement specifying the purposes for which the deposit could be applied. Clause 7.2 of that agreement expressly provides that the purchase price shall be payable upon registration of the property into the name of the purchaser. It is common cause that the purchase price was paid in two further additional payments, R3,9 million on 4 October 2005 and R4 million on 20 December 2005 and that R8 million was paid over to the defendant on the latter date. Accordingly, the first funds to pay the commission were available to the defendant on 20 December 2005. The deposit was held in the trust account not only for the benefit of the defendant but was refundable under certain circumstances. Moreover, as I have said, nothing in the agreement permitted payment of the deposit or any part of it to the estate agent. The commission in any event exceeded the amount of the deposit by R460 000. Payment to the seller (the defendant) was permissible only on registration, as in fact happened. There is accordingly no merit in the special plea in that prescription would have occurred on 20 December 2005 and was interrupted by the substitution order on 28 August 2005. The special plea is therefore dismissed.

7. The primary and determinative issue between the parties is whether the plaintiff was the effective cause of the sale. This involves a factual determination of whether the plaintiff introduced the purchaser to the property and whether or not the plaintiff was mandated at the relevant times. However, regarding the latter, it needs to be kept in mind at the outset that an unempowered agent may still be the effective cause of a sale and thus entitled to commission. The inquiry in such a case is normally whether despite the termination or non-existence of a prior mandate the work done by the unempowered agent was sufficiently significant to merit the award of commission even though not constituting the immediate or proximate cause of the ultimate transaction - *Le Grange v Metter* 1925 OPD 76 at 80; *Doyle v Gibbon* 1919 TPD 220; and *Basil Elk Estates (Pty) Ltd v Curzon* 1990 (2) SA 1 (T) at 3D-E, 6E-G. Showing the property to the prospective purchaser and introducing the purchaser to the seller may in the circumstances be causally significant and contribute sufficiently to the outcome in a way that despite the termination or absence of a valid mandate would still entitle the agent to commission.

8. Although having some overall relevance to the circumstances, the validity and existence of the first and alleged second mandates are facts of less relevance than the conduct of the plaintiff throughout the period of Daubern's involvement and the significance and sufficiency of that

conduct as causative factors contributing to the final result, the sale of the property.

9. As I have said, it is common cause that the written mandate was concluded on 15 November 2004. The parties are in dispute about whether it was lawfully cancelled on 21 January 2005. The plaintiff in any event contends that Daubern introduced Marble Gold to the property before the purported cancellation of the first mandate. Daubern testified that she met Trysa Annandale on 10 January 2005 while they were both standing in a queue at Acacia Town Council. They struck up a conversation during which Daubern informed Trysa that she was an estate agent. Trysa asked her if she knew of any land in the area that was available for development. Daubern told her that she was busy marketing three properties (one of which was the defendant's property) in Amandasig. Daubern and Trysa then agreed to meet at the home of Trysa's daughter, Ms A Kruger, later that day where Annandale would be present. Daubern went home, gathered together all the relevant documentation concerning the property and went to make photocopies of larger maps at the town council. Later that afternoon she went to the home of Ms Kruger where she met Trysa and Johan Annandale. There she handed the relevant documents to Annandale, who told her that he would review them properly later.

10. This evidence has not been contested or challenged in any meaningful way. Particularly noteworthy is the fact that neither Annandale nor his wife were called as witnesses by the defendant to counter the plaintiff's version. Nor was Ms Kruger (Annandale's daughter), called either, despite the averment in the plea that she had introduced Annandale to the defendant. The plaintiff's version of the introduction that occurred on 10 January 2005 is therefore undisputed. As the trial progressed, and particularly at the stage of argument, the defence narrowed to the pertinent question of whether Daubern's conduct over the entire period of her involvement made her the operative cause of the sale. Mention should be made of the fact that Daubern prior to the written mandate of 15 November 2004 had also marketed the property in terms of earlier mandates.

11. The only witness called on behalf of the defendant, Mrs Swart, did not dispute that the meetings of 10 January 2005 between Daubern and the Annandales actually took place. (The defendant has Alzheimer's disease and was unable to testify). Under cross-examination it was put to Mrs Swart that she had good reason to believe that Daubern was in fact involved in introducing Annandale and that Annandale only became aware of the property through the efforts of Daubern. To this Mrs Swart replied:

> "Ek glo hy het die grond bekom deur Nelie Eiendomme (Daubern), maar hulle het onderhandelinge gehad met my buurvrou, maar daar was nooit onderhandelings, laat Neli Daubern betrokke was by my grond om as 'n agent op te tree nie."

When then asked if she could dispute the fact that a meeting took place between Daubern and Annandale at his daughter's home on 10 January 2005 at which Daubern handed over relevant documentation, she replied:

> "Ek weet niks van hulle verhouding af nie."

12. Around about the same time that Daubern engaged with the Annandales she introduced other potential purchasers to the defendant. The first of importance was Tosha Trading CC ("Tosha"). There is a dispute of fact between the parties about when Daubern placed a written offer from Tosha before the defendant. Daubern's version is that she gave it to the defendant on 10 December 2004 but the defendant had reservations and that eventually a second written offer was made on 19 January 2005. This offer in the amount of R6,5 million was accepted by the defendant on 19 January 2005. The offer was conditional in that it would lapse on 9 February 2005 should Tosha not acquire the necessary funds to finance the purchase price. Despite the existence of this offer, Daubern and the defendant continued negotiations with another potential buyer, Mr Werner Havenga, to whom an option was ultimately granted to purchase the land for R6,8 million, which option had to be exercised by 12h00 on 31 January

2005. As will be seen presently, this option was extended by the defendant without any involvement of Daubern.

13. On 21 January 2005 the defendant purported to cancel the written mandate with the plaintiff. The letter of cancellation, Exhibit A5, is written by Mrs Swart in her handwriting. The grounds given for cancellation were that Daubern had allegedly made false promises about a buyer known as ‘Eddie”, that she had told “oneerlike leuens”; that she made defamatory remarks about the defendant; and that she engaged in unethical transactions. Daubern denied these allegations against her. During her testimony in chief Mrs Swart justified her actions on the ground that Daubern was playing potential buyers (Tosha and Havenga) off against each other, which resulted in their losing trust in her.

14. This latter reason strikes me as unconvincing. Havenga was obviously interested in the land of the defendant’s neighbour (de Lange) and that of the defendant. Daubern was marketing both. On 13 January 2005, Daubern granted Havenga an option in respect of the defendant’s land in the following terms:

> “Die plot van Mnr Willem Daniel Swart….van minstens 8.3 ha, Gedeelte 85 van plaas Hartebeeshoek 303jr word daar ‘n eerste opsie aan my WE Havenga …. gegee vir R6500 000 wat betaalbaar is deur 10% deposit ….. na aanvaarding en ondertekening, die verskil in sekuritiete binne 60 dae van ondertekening. Die enigste

opskortende voorwaarde is verkryging van finansiering binne 60 dae. Die opsie verstryk met ondertekening van koopkontrak voor 15:00 Donderdag 20 Januarie 2005. Die opsie moet asb. bevestig word deur ondertekening van hetsy die eienaars of die alleen mandaat agent van Daubern eiendomme as gevolmagtigde verteenwoordiger….”

The option was signed by Havenga and Daubern (ExhA 94)

15. Mrs Swart claimed that Daubern had no authority to grant the option. Yet, on 20 January 2005, the defendant signed a document (Exhibit A4) recording that the option had been accepted and arranging a meeting with Havenga to take place on 24 January 2005 at the office of the defendant’s attorney, Mr Johan Bornman. At that meeting a draft contract (Exh A66) was drawn up providing *inter alia* for 3,5% commission payable to the plaintiff (clause 5), as well as a further option (Exh A71) basically extending the option to 31 January 2005 signed by the defendant and witnessed by Mrs Swart. As it ultimately transpired, the sale with Havenga did not materialise. The offer in Exh A66 was more advantageous than the Tosha offer in that it was for R6,8 million. But what is most relevant is that the defendant and his wife were active in soliciting this offer despite the existence of the Tosha contract. Hence, the claim by Mrs Swart that Daubern was acting unethically by playing purchasers off against each other seems somewhat hollow. She made this complaint to the Estate Agents Board on 5 February 2005 after the Havenga deal fell through in a

letter (Exh A6-8) to the Board justifying the termination of Daubern's mandate. Considering that she and her husband were themselves actively engaged on 20 and 24 January 2005 in extending the option, despite having signed the Tosha offer on 19 January 2005, the claim of unethical dealing by Daubern is unconvincing and hardly stands as a basis for terminating the mandate. The Swarts themselves were quite evidently engaged in playing Havenga and Tosha off against each other.

16. Whatever the true reason for the purported termination of the mandate, and whether or not the conduct of Mrs Swart constituted a repudiation, loses relevance by virtue of the fact that the mandate would in any event have expired through the effluxion of time on 30 April 2005, and neither the Tosha nor the Havenga offers coming to fruition.

17. One fact is certain though, the relationship between Daubern and the Swarts had soured significantly and from that time, at least until mid May 2005, Daubern desisted in actively marketing the property. The defendant made something of this in cross-examination. Despite the sales with Havenga and Tosha having fallen through, and despite Annandale repeatedly contacting Daubern during January, it seems Daubern did little to bring a deal between Annandale and the defendant to fruition between late January and mid May 2005. The Tosha contract however only fell through at the end of March. Daubern testified that she phoned Bornman,

the lawyer of the defendant, after the Tosha deal failed but was not prepared to speak to Mrs Swart, presumably because of the bad blood between them. In April, Daubern went on leave with her husband and was ill. However, in April she began marketing the adjacent property, belonging to De Lange, with Annandale. During their discussions it became apparent that Annandale was interested in both properties.

18. On 19 May 2005, Daubern had an appointment with Annandale at the home of De Lange. While the three of them were in discussion, De Lange mentioned that Mrs Swart had mentioned to her that they were struggling to sell their land. Daubern decided then and there to phone Bornman and asked him to obtain permission from the defendant for her to show Annandale the land. She specifically requested Bornman to obtain permission for her to "market" the land. Bornman phoned her back within five minutes and stated that he had spoken to the defendant personally who had instructed him to grant permission to Daubern to sell the land, and had added that as far as he (the defendant) was concerned any agent could market the land so long as he got a favourable offer.

19. Immediately after the telephone conversation with Bornman, Daubern, Annandale, and his wife Trysa, got in Annandale's vehicle and drove to the defendant's land where Daubern pointed it out to him.

20. The plaintiff called Bornman as a witness to corroborate Daubern's version. He confirmed that Daubern phoned him on 19 May 2005 (which date he knew on account of correspondence at the time confirming it). He testified that Daubern informed him during the telephone conversation that she was in the company of a person interested in the land of both De Lange and the defendant. She explained that she and the Swarts were not on a good footing and requested his intervention to determine whether the defendant would allow her to introduce her client to the land. Bornman explained to Daubern that he no longer represented the defendant but that he was willing to do as she asked. Bornman then phoned the defendant and spoke to him personally. The defendant indicated that he had no problem, and as far as he was concerned anyone could market the property. This attitude is consistent with Daubern's version that the problem in the relationship was with Mrs Swart, not the defendant. Bornman raised the question of gaining access to the land and the defendant explained that there were tenants in the house on the property and the gate should be open. Bornman then conveyed this to Daubern.

21. The only challenge made to this testimony by the defendant was the assertion put in cross-examination to Bornman and repeated by Mrs Swart in her testimony that it was unlikely that the defendant would have answered the telephone personally on account of his being deaf. Were I to accept such assertion to be true, in the absence of any testimony from

the defendant himself or any corroborating medical evidence, I would in effect hold that Bornman, a practising attorney and officer of the court, had deliberately misled the court by blatantly lying to it. There is no basis whatsoever for such a finding. Besides the fact that Bornman has no interest in the matter, he was plainly a credible and impressive witness who was mindful of his duty to the court and his responsibilities. There is no reason at all to question his credibility or reliability and not a smidgeon of doubt about the truthfulness of his evidence.

22. After the events of 19 May 2005, Daubern did certain follow up work in regard to the property. In particular, she did an investigation and analysis of comparative prices for similar land in the area and conveyed that information to him in writing - Exhibit A9. Her undisputed evidence is that there was ongoing correspondence between them during June and July 2005 regarding both the land of De Lange and the defendant.

23. On 10 June 2005 the defendant granted an option in respect of the land to Citadin. The stipulated price was R7,5 million. On 29 July 2005 the defendant accepted an offer from Exact Time Developments (Pty) Ltd with a purchase price of R8,6 million. The agreement provided for commission payable to Seeff at 7,5% plus VAT, being R735 300. The defendant would thus receive R7 864 700. The next day on 30 July 2005 the defendant accepted an offer for R8 million from Marble Gold, the company

represented by Annandale. In terms of clause 15 of the final agreement signed on 9 August 2005 it was provided that there was no agent's commission payable by the seller. The defendant cancelled the agreement with Exact Time Developments (Pty) Ltd on 1 August 2005. Clause 13.5 of the agreement with Marble Gold reads:

> "The Purchaser further indemnifies the Seller against all and any commission and other claims payable to Seeff/any other party, specifically Exact Time Developments (Pty) Ltd/other Purchaser which indemnification will be effected on receipt of written advice from the transferring attorneys."

24. The handwritten letter by Mrs Swart cancelling the contract with Exact Time Developments (Exhibit F17) asserts a right to a cooling off period, which in law would not apply to a transaction of this order. The evidence of Mrs Swart that the contract was cancelled because "dinge skeef geloop het", is frankly unconvincing. I accept rather the plaintiff's submission that the contract was cancelled because she was snatching at the more advantageous bargain with Marble Gold which she believed attracted no liability for commission. As with the deals in January - February, Mrs Swart was positioning to avoid any commission payment.

25. It is necessary to examine the background leading up to the offer by Marble Gold in a little more detail. Annandale's interest in developing the properties had prior to the offer to the Swarts culminated in Marble Gold

offering to purchase De Lange's property as well as another adjacent property belonging to a certain Kriel. The development of this land depended on the defendant granting a right of way over his property. Daubern received commission in the amount of R200 000 in respect of the sale of De Lange's property.

26. At some stage during July 2005, Daubern sent an sms to the Swarts informing them that she had Annandale as an interested purchaser. She was rebuffed by Mrs Swart who did not want to work through her or to give her a mandate. On 14 July 2005 Annandale addressed a letter to Daubern which reads as follows:

> "Beste Nelie
>
> **HARTEBEESTHOEK 303 JR**
>
> Ek verwys na ons telefoniese gesprek Woensdagaand 13 Julie 2005, insake die SMS boodskap wat u op die betrokke dag aan die eienaar van gedeelte 85 Hartebeesthoek 303 JR gestuur het om navraag te doen of hulle sou belangstel om hulle eiendom te verkoop via (volgens u) "Mnr Johan Bornman) (Prokureur).
>
> Ter voorkoming van enige verwarring omtrent die voorname bestig ek hiermee dat ek of enige van die maatskappye waarvan ek aandele hou, nie belangstel om gemelde eiendom aan te koop nie, en ook nie in u as makelaar ten opsigte van die betrokke eiendom nie."

27. On the same day Annandale wrote a letter to the Swarts which read:

> "Geagte meneer en mevrou Swart
>
> Ek bevestig dat mev W de Lange se eiendom deur Marble Gold 199 (Pty) Ltd aangekoop is.
>
> Provinsie vereis die goedkeuring van die drie eienaars in die Amandasig uitbreiding 4 dorpsgebied sodat elke ontwikkelaar/eienaar die bestaande erfplanne op sy eiendom kan wysig.
>
> Dit affekteer geensins die individuele eienaar se kontraktuele verbintenis en/of verkope aan 'n ontwikkelaar nie.
>
> U gee alleenlik toestemming dat mev W de Lange se eiendom as 'n fase in die Amandasig 4 dorpsgebied ontwikkel kan word. U eiendom kan dan ook as sulks onafhanklik ontwikkel word en so ook mnr Kriel se eiendom.
>
> Die toegang van Britsweg bly nog steeds 'n voorvereiste van Provinsie.
>
> Bogemelde toestemming strek tot voordeel van al die eienaars/ontwikkelaars en u samewerking sal waardeer word.
>
> 'n Volmag aan ons om met die owerhede en betrokke persone te onderhandel word aangeheg. U word gevrywaar van enige kostes en/of kontraktuele verpligtinge waartoe u nie toegestem nie."

28. Daubern conceded that Annandale had told her that he did not have any interest in purchasing the land of the defendant. She was however also aware that it was a planning requirement that both De Lange and Kriel properties required an access route from Brits Road. This required a servitude to be registered over the defendant's property. She conceded also therefore that Annandale had an ongoing interest in gaining the defendant's consent to such a servitude.

29. Mrs Swart testified that initially she and the defendant did not want to co-operate with Marble Gold because of Daubern's involvement. But they also understood that Marble Gold needed their permission for the

development and later their agreement to a servitude. She maintained that they were reluctant to grant the servitude and this led to negotiations resulting in the sale because Marble Gold did not want to lose the deal with De Lange and Kriel. In other words, Mrs Swart took the position that the sale with the defendant was concluded because it was the only way Marble Gold could acquire access to the proposed development. The entire township development scheme depended on the right of access.

30. The difficulty in the way of accepting this version is that it conflicts with certain averments made by the defendant in the version he put forward under oath in his affidavit opposing summary judgment. In paragraph 72 of the affidavit, he stated as follows:

> "Ek kan net meld dat Meneer Annandale gedurende Julie 2005 begin onderhandel het met Mnre Citadin ontwikkelaars omtrent toegang oor my grond na Mevrou de Lange se grond. Mnre Citadin se opsie om die eiendom te koop het verval en Meneer Annandale het my toe genader namens Marble Gold om 'n toegang te beding oor my grond na Mevrou de Lange se grond. Mnre Marble Gold het Mevrou de Lange se grond gekoop met die doel om 'n dorp daarop te stig. Een van die voorwaardes vir dorpstigting was dat 'n servituut oor my grond geregistreer word ten gunste van die de Lange grond. *Ek het toestemming verleen vir die serwituut*. Tydens die onderhandelinge het Meneer Annandale my gevra of my grond in die mark is. Ek het bevestigend geantwoord en gemeld dat die prys agt miljoen is. Mnre Marble Gold het 'n aanbod gemaak van agt miljoen wat ek op 8 Augustus 2005 aanvaar het. Die aanbod is gemaak onderhewig aan kansellasie van bestaande opsie." (my emphasis)

31. The account in the summary judgment affidavit differs markedly from that proffered by Mrs Swart in her evidence. According to the defendant he was prepared to agree to the servitude. The sale was therefore not forced as a consequence of his refusal to grant the servitude and accordingly there was no impediment to the establishment of the township. The initiative to purchase the property came from Annandale and the incentive to accept his offer came from the fact that he was prepared to offer more. These averments stand in the way of an unqualified finding that the refusal of the servitude was the immediate and overriding cause of the sale. Under cross-examination Mrs Swart could offer no convincing explanation for this inconsistency other than to say the affidavit was wrong. The obvious way to clear up the ambiguity would have been to call the defendant and/or Annandale, and if need be to subpoena the latter if he proved reluctant. We were told that the defendant is bedridden. There is no medical evidence to support that. No acceptable reason has been advanced for not calling Annandale. I will return to the significance of this failure presently.

32. The question then is whether the plaintiff has established on the evidence that Daubern contributed to the conclusion of the sale between Marble Gold and the defendant to an extent sufficient to entitle him to claim commission. Is what Daubern did of sufficient magnitude to be regarded as the effective cause of the sale? This requires the consideration and

weighing of the various factors involved and the question will not necessarily be answered by seeking to determine if the agent's conduct was a *conditio sine qua non* or the factor of greatest magnitude. All the contributing factors have to be considered.

33. With regard to the question of whether Daubern was mandated when she introduced Annandale, it is common cause that she did indeed have a mandate on 10 January 2005 when she brought the property to Annandale's attention and furnished him with documents. As I have indicated I accept unreservedly that the meetings of 10 January 2005 occurred as testified by Daubern. The defendant's failure to call Annandale, his wife or daughter leads to the inference that the meetings did indeed occur and that Annandale was furnished with the relevant documentation by Daubern. In any event, by the time we reached argument, these matters were no longer contested. That the mandate subsequently terminated, be it by cancellation, repudiation or effluxion of time, is not a decisive factor. In *Le Grange v Metter* 1925 OPD 76 at 80 it was held that an agent often will be entitled to commission even though his or her mandate has terminated. De Villiers JP held that the agent may be entitled to commission:

> "notwithstanding that the sale may only go through long after his active efforts have ceased, and notwithstanding that the sale may eventually be concluded directly between the parties without his participation, and notwithstanding that the sale may

> go through on different terms and conditions from those on which the broker or agent was employed to sell."

34. Likewise, in the absence of any contrary evidence from the defendant and Annandale, and in the light of the cogent and credible evidence of Bornman, I am satisfied beyond a balance of probabilities that the defendant gave Daubern an open-ended mandate to market the property on 19 May 2005, in consequence of which she physically introduced Annandale to the land.

35. Counsel for the defendant has sought to make something of the fact that the property was only sold to Marble Gold three months after Daubern physically showed Annandale the property. The passage of time is not a decisive factor intervening to diminish the causative influence of an introduction. Normally an agent acting under a mandate would be expected to find a purchaser and negotiate a sale to conclusion. Where the mandate is terminated or lacking in specificity (as in this case) the introduction of an unacquainted purchaser to the land and the possibility of a sale may well suffice. Daubern's actions on 19 May 2005 involved showing Annandale the land and effectively bringing together two unacquainted parties, thereby constituting the possibility of a prospective sale. Her conduct was sufficient in the circumstances even though the sale was eventually concluded directly between the parties without her participation, and particularly seeing that her further participation was

impeded by the principal (or in this case his wife) - *Doyle v Gibbon* 1919 TPD 220; and *Van Heerden v Retief* 1981 (1) SA 945 (A).

36. For the reasons already set out, I am satisfied that Daubern introduced Annandale to the property in the sense of describing its situation and qualities and then showing him over the property in a way focusing his mind to the fact that the property was available on the market. Counsel for the defendant conceded as much during argument. The line of argument however shifted subtly from the sub-text of the plea to one asserting that the passage of time had resulted in more compelling causative factors effectuating the sale.

37. In *Aida Real Estate Ltd v Lipschitz* 1971 (3) SA 871 (W) at 873-874 Marais J enunciated the guiding principle:

> "A proviso has been added to the effect that the introduction of the able and willing buyer must have been the effective cause or the *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 inquiry - viz did the new factor outweigh the effect of the introduction by being more than or equally conducive to the bringing about of the sale or was the introduction still overridingly operative? Only in the latter instance is commission said to have been earned. This enquiry …. requires … a common sense approach …

38. In *Basil Elk Estates (Pty) Ltd v Curzon* 1990 (2) SA 1 (T) at 5 the principle was elaborated upon as follows:

> "Emphasis was, however, placed on the factor to which I shall now turn, viz that of the importance of the initial introduction, and whether it overshadowed other supervening events ……
>
> As pointed out above, the onus was on the appellant to satisfy the Court that on a balance of probabilities its activities predominated as a causative factor. From that it follows that where there are competitive causative factors the appellant must fail unless it can firmly be stated that is endeavours override other factors of importance."

39. The case for the plaintiff is that the introductions that took place on 10 January 2005 and 19 May 2005 overrode all other factors of importance with the result that they were the decisive factors which were overridingly operative when the sale was eventually concluded.

40. The defendant, as already pointed out, says other factors intervened breaking the causal chain, such as the passage of time, the falling through of three other prospective sales in which the plaintiff was not involved and the negotiations regarding the servitude. The passage of time, as I have said, is not of itself decisive. It is not unusual for purchasers not to act immediately on an introduction, or for competing negotiations to place the introduction in temporary abeyance. Such alone will not disqualify the introduction from being the effective cause - *Barnard and Parry Ltd v*

Strydom 1946 AD 931 at 936. Moreover, the prospective sales to Citadin and Exact Time Developments (Pty) Ltd fell through because Marble Gold came with a better offer.

41. Counsel's conjecture that the visit to the property on 19 May 2005 by Annandale was of little significance, is doubtful, if not speculative, in view of Annandale not testifying. The importance of the visit has to be understood in the context of Daubern having introduced the property to him by giving him the documents a few months earlier and her exercising the art of persuasion to further stimulate his interest. Her evidence was that he wanted to see it; so much so that he drove her to it in his own vehicle.

42. It is difficult to draw any conclusion from Annandale's letter of 14 July 2005 that he was not interested in purchasing the property without his having testified explaining his stance and why a few weeks later he changed his mind. Annandale was aware of the troubled and hostile relationship between Daubern and Mrs Swart, and he may have sought to put distance between himself and Daubern so as not to jeopardise the deal. Without his testimony we do not know if he actually would have preferred to have acquired a limited right of way as Mrs Swart testified, or that after further assessing the property during negotiations and seeing potential additional benefits opted to make an offer along the lines

described by the defendant in the summary judgment affidavit. In cross-examination Mrs Swart conceded that she was with her husband when he attested to the affidavit. She drove him to the police station to have it commissioned because he is unable to drive. Considering the active interest and the role she played, it is likely that she would have perused the affidavit before he signed it. Such casts considerable doubt upon her credibility and her uncorroborated assertion that the decisive causative factor in concluding the sale was the defendant's refusal to grant a servitude over the property. Added to that, it is permissible to draw an adverse inference from the defendant's failure to call Annandale to clarify the circumstances under which the offer was made.

43. For those reasons then, I am persuaded that the first introduction in January 2005 and the showing of the property to Annandale in May 2005 were together the decisive causative factors that remained operative until the conclusion of the sale. None of the intervening negotiations or other events operated to diminish its ultimate impact. While the service rendered by Daubern did not extend to her participation in directly concluding the contract, she introduced the purchaser to the land, did some follow up work and through her intervention brought the parties together. As such the service rendered ended up being less than that usually offered by a mandated agent. Nevertheless, the limited service

she did render remained causally significant entitling her to commission, in respect of which no other agent would have a competing claim.

44. The commission sought is R560 000 being the 7% stipulated in the original written mandate, which allowed for the amount to be reduced by mutual agreement. It is reasonable to imply a similar term in the renewed mandate conferred by the defendant orally on 19 May 2005. Such is also the customary industry norm. The fact that the plaintiff may have accepted 4% in other cases provides no justification for reducing the agreed rate in this instance. The contract provides for a reduction only by mutual agreement and there is no such agreement.

45. Costs normally should follow the result. The defendant sought a postponement on 9 February 2009 for the purpose of obtaining an expert report which in the end did not advance his case. He is thus also liable for the costs occasioned by that postponement.

46. In the result the following orders are issued:

1. The defendant is ordered to pay the plaintiff the sum of R560 000 together with interest at a rate of 15,5% *a tempore morae*.

2. The defendant is ordered to pay the costs of the action, including the costs occasioned by the postponement of the proceedings on 9 February 2009.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 03/12/08, 09/02/09-13/02/09, 25/03/09, 07/05/09
For the Applicant: Adv D Prinsloo, Pretoria
Instructed By:Borman & Mostert Inc. c/o Venter Dupper & Smalman, Pretoria
For the Respondent: Adv JAL Pretorius, Pretoria
Instructed By: Neels Engelbrecht & Partners c/o Du Plessis Mundt, Pretoria