IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS1042/14

In the matter between:

HENDRIK GIDEON VAN ZYL	**First Applicant**
PETRUS JACOBUS VILJOEN	**Second Applicant**
KAREN FRAUENDORF	**Third Applicant**

and

TERGRO GROUP OF COMPANIES (PTY) LTD t/a HARCOURTS TERGO GROUP	**Respondent**

Heard: **13 to 15 and 17 June 2016**

(Final Written arguments submitted on 8 July 2016)

Delivered: **19 December 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

[1] The respondent is a group name of franchises in the business of real estate. The individual applicants were employed by the respondent as Sales Agents

in its Kempton Park offices. They had had resigned and joined a competitor, Re-Max Kempton Park, which based about is 1 kilometre away from the respondent's premises. The individual applicants seek payment of commission in respect of certain properties which they contend they had facilitated the sale thereof as agents (whether as listing, selling and/or referring agents) whilst still in the respondent's employ.

[2] The respondent on the other hand has lodged counter claims against the individual applicants, seeking damages for breach of contract. The claims and counter claims arise from the various clauses of the *'Agreement of agent employment'* which was entered into between the parties. For ease of reference, the parties will be referred to as cited in the Statement of Claim.

[3] At the commencement of the proceedings, the parties had agreed that all of the claims of the first applicant are in dispute, with limited concessions being made in respect of some. The respondent had nonetheless conceded that the amounts claimed by second and third applicants were to a large extent correct, the only issue being whether they were payable in view of the counter-claim. The parties had further agreed that the amounts under the counter-claim against the individual applicants were also correct, with the sole issue being whether they should be payable, in view of the applicants' contention that there was a waiver.

[4] The primary role of the estate agents was to find houses to sell or buy, get mandates from potential sellers or buyers, advertise and show potential buyers the property, and assist with the necessary and any administration and registration of properties when deals are concluded. Estate Agents employed by the respondent fell into both 'Listing' and 'Selling' Agents. They secured mandates from potential sellers, advertised the properties, and concluded sales. Mandates could either be sole or Networking Data based. Once all administrative matters pertaining to the transfer and registration of properties were finalised, commission would be due to the estate agents in terms of whatever agreements or arrangements made with the employer.

[5] For the sake of convenience, the structure of this judgment will be such that I will first deal with the individual applicants' respective claims, the evidence and my conclusions in that regard, and thereafter will deal with the respondent's counter-claim.

Van Zyl's claim:

[6] Van Zyl was employed with effect from April 2009. He had entered into a contract of employment with the respondent on 2 September 2013 and had resigned with immediate effect on 4 April 2014. He had joined Re-Max on 7 April 2014. Van Zyl seeks payment of outstanding commission in the amount of R123 651.95 and interest on that amount at a rate of 15,1% *tempore morae*.

[7] The basis of Van Zyl's claim is that during his employ with the respondent, and prior to his resignation, he had introduced purchasers to sellers, and was the effective cause, directly or indirectly, of a contract of sale, and the registration of sales in respect of certain properties. The break-down of the commission claimed in respect of these properties as per the statement of claim is as follows;

Claim A:	28 Tinderwood, Serengeti Golf Estate:	R6 140.35.
Claim B:	16 Bergsering, Glen Marais:	R33 771.93
Claim C:	148 Monument Road, Aston Manor:	R67 543.86
Claim D:	26 PFM House, Longstreet:	R8 400.00
Claim E:	313 Victoria Street, Boksburg:	R1 950.00
Claim F:	42 De Villiers Street Boksburg:	R5 845.61

[8] The respondent disputed all the claims. It had nonetheless contended that to the extent that claim B was successful, Van Zyl was only entitled commission in the amount of R31 745.61. In respect of claim D, it was contended that if successful, it should be limited to R7 896.00. As the trial progressed, Van Zyl had to abandon his claims for commission in respect of properties under E

and F. This was as a result of cross-examination having revealed that the deals in respect of those properties were never concluded as they were not registered.

[9] It was common cause that as per the 'Annexure' to the Contract of Employment, Van Zyl was entitled to 70% commission on the properties he sold or the deals he had successfully concluded. He however contended that the respondent never paid his commission on time, and this was despite several discussions he had had with the respondent's General Manager, Fourie over time. Van Zyl lamented the late payment of commission due as being contrary to the provisions of clause 2.3 of the contract of employment, in terms of which such payments were to be made upon registration of a transaction. Thus, where the agent was the selling agent, he or she was to be paid on every Friday after the commission was received by the respondent. As a result of not getting paid timeously, he had consistently sent e-mails to Fourie, but nothing was done.

[10] In respect of his claim A, his contention was that the property belonged to his relative. He got a mandate to sell and had indeed sold it. He was paid his commission in that regard, but there was an outstanding amount of R10 000.00, which he was informed was in respect of legal and other costs. After protracted negotiations with Grobler, the respondent, Managing Director and Fourie, the matter was resolved when it was agreed that Van Zyl would be paid an amount of R5 800.00, which had however still not been paid.

[11] Under cross-examination, Van Zyl conceded that the commission claimed under A was subject to a variety of difficulties, including that the potential purchaser of that property ended up as deceased estate. He conceded that there were difficulties in closing the deal on the property, which had ended with Grobler and three sets of attorneys being involved. He further conceded that another agent also got involved in the sale of the property, as he had to liaise with the attorneys handling the deceased estate, and further that there was a delay in the release of the money.

[12] Even though he conceded that any deductions could be made in terms of clause 5.6.1 of the contract of employment, and further that there were attorneys involved in the deal, his main complaint was the respondent did not produce anything in writing to indicate how administration and legal fees were deducted from his commission.

[13] Mario Grobler, the respondent's Managing and sole Director denied that Van Zyl was entitled to any commission under his Claim A, in that legal and administration fees had to be deducted from that commission. He further testified that the sealing of the deal in respect of the property in question was at risk hence he got involved together with attorneys in order to assist Van Zyl.

[14] The respondent's contention in regard to Van Zyl's claim A was that there was a legitimate deduction of the R10 000.00 for legal and administrative costs in respect of the property, which was permissible in terms of clause 5.6.1[1] of the Agreement of employment. In the alternative, it was submitted that the claim fell foul of forfeiture restraint provisions under clause 7.4.6 of the agreement[2].

[15] For the present purposes, it would not be necessary to deal with the respondent's alternative contention as to the reason the commission in respect of the R10 000.00 was not paid. However, even though Grobler's contention was that the full amount of the commission was not due to Van Zyl as part of it went to administration and legal fees (total amount of R10 000.00), he had not provided a full breakdown of these fees as they had not been requested. To the extent that he had conceded that the fees in question were not substantiated, he conceded that Van Zyl was entitled to 70% of the commission in that regard. In my view, and further to the extent that Van Zyl had conceded that the deal in respect of the property had to have attorneys involved because of its complexities, I can see no reason based on Grobler's

[1] Which provides that;

> 'When an Agent requests HARCOURTS to intervene in a transaction where one of the parties in breach within the registration period the Agent agrees that HARCOURTS may deduct a reasonable administration and/or legal fee from the Company share of commission'

[2] Which provide that;

> 'Should an Agent break this restraint directly or indirectly he will be liable to HARDCOURTS for liquidated damages of an amount equal to 6 (six) months the Agents monthly commission income, and will forfeit all commission due and earned' (Sic)

concessions as to the reason Val Zyl should not be entitled to the 70% of the Commission in that regard, which translates into R6 580.00.

[16] In respect of claims B and D, Van Zyl's contention was that he was entitled to commission on the property as he had signed a mandate as a listing agent in that regard and further since the properties were registered.

[17] The respondent as already indicated had conceded that in respect of claim B, the amount of R31 745.61 was due, except to the extent that the counter-claim was to be successful. The same applies to Claim D, in respect of an amount of R7 986.00 if it were successful.

[18] In respect of claim C, Van Zyls' evidence was that Grobler had asked him to find a property as he sought to relocate offices. He was then contacted by another entity, Koopliede who had bought the property through the office of the Sheriff, and arrangements were made with Grobler to look at that property. Having looked at the property, Grobler had expressed an intention to buy it by paying a deposit towards it. Grobler had also signed the Offer to Purchase (OTP), which was then forwarded to Koopliede.

[19] Van Zyl's contention was that he was entitled to commission on the property on the grounds that he was the listing agent; had introduced the property to Grobler, and further since the property was ultimately registered.

[20] Under cross-examination, even though Van Zyl had insisted that he was the mandated agent, he could not provide documentary proof in that regard. His contention was that he had a verbal mandate from Van Heerden of Koopliede to sell the property on Koopliede's behalf, and was thus entitled to a share of R110 000.00 commission on the property.

[21] Van Zyl further conceded that Grobler had completed the documents in that regard, and further that it was common for the Sheriff to hold auctions in the Kempton Park area every third week, and that Grobler got a list of the properties on auction and noted that the property in question was for sale. He conceded that the documents presented had recorded him and Grobler as the

agents, yet insisted he was the only agent. He further conceded that there was no listing of the property in question

[22] Grobler's response to Van Zyl's claim in respect of the property in question was that he discovered the property after he saw a list of properties on auction. Having obtained the list, he had then mentioned the property to Van Zyl. He denied having known of the property through Van Zyl, and had only asked him to make arrangements for the viewing of the property as Kempton Park fell under him.

[23] According to Grobler, it was his wife that wanted the property from Koopliede. His wife was the sole member of a close corporation that bought the property from Koopliede. He had nonetheless completed the OTP, and the transfer of the property took place in June 2013 after finance was secured. He contended that Van Zyl was not entitled to any commission on the property as he was not the listing agent, and had no mandate handed to him to deal with the property.

[24] Under cross-examination, Grobler conceded that he could not dispute it if Van Heerden had confirmed that he had given Van Zyl the mandate to sell the property, even though he and his wife had signed the OTP. He contended that he had signed as the principal and completed the agreement. He conceded that Van Zyl had not lied when he testified that he was an agent in respect of the property in question, and thus entitled to commission. He could not dispute it when it was put to him that the notion of oral mandates was not foreign to him or the respondent. He further conceded that Van Zyl would have been entitled to 50% of the commission since they both acted as agents.

[25] Van Heerden, a trustee of Koopliede had also testified on behalf of the applicants. Koopliede is a group name for several entities that are in the business of property investment. They mainly buy, sell or rent out properties. He had project managed the property under Van Zyl's claim C, and testified that most of Koopliede's properties were sold through Van Zyl as an agent.

[26] Van Heerden testified that it was Van Zyl that had approached him about the property. He denied even having spoken to Grobler about that property at

least after the deal was concluded, and he had only heard through Van Zyl that Grobler was interested in buying the property. He further testified that it was Van Zyl that had negotiated the deal.

[27] Cross-examination of Van Heerden revealed that he was contacted by Van Zyl a day or so prior to his testimony, who had informed him to put it in writing that he was indeed the agent/listing agent that had negotiated the price on the property. He done so in letter dated 10 June 2016[3], and purely for the purposes of the trial.

[28] The concessions made by Van Heerden under cross-examination clearly reveal that the letter in question was generated for the purposes of this trial, and very little significance and weight will be attached to it. Ordinarily, it would have been apparent that Van Heerden's version was tailored to suit Van Zyl's claim, and should thus be treated with caution.

[29] The matter however does not end there in view of Grobler's own concessions as illustrated above in the summary of his evidence. Based on those concessions, it is not necessary to deal with other disputes pertaining to the commission in respect of the claim under C, as I am satisfied that Van Zyl was indeed also an agent in respect of the property, and further that he was involved to a large extent in the conclusion of the deal. To the extent that this is the case, he is accordingly entitled to 50% of the commission as conceded by Grobler.

The second and third applicants' claims:

[30] The second and third applicants worked as a team, and their claim is in respect of two properties they were involved as agents in their sale. In terms of the annexure to the contract of employment, the second applicant is entitled to 70% commission share, whilst the third applicant was entitled to a 60% commission share.

[3] Page 175 'A' of the Applicants' Bundle of Documents

[31] The respondent's basis for refuting their claim is that they had breached their contract of employment. Thus, whether the claims are successful is dependent on whether the counter-claim succeeds.

The Counter-Claim:

[32] The respondent's counter claims against the individual applicants is as follows;

a) R507 771.60 against Van Zyl, together with interest thereon at 9% per annum *a tempore mora*e and costs

b) R175 339.54 against the second applicant, Petrus Viljoen, together with interest thereon at 9% per annum *a tempore morae*, together with costs

c) R151 311.82 against the third respondent, Karen Frauendorf, together with interest thereon at 9% per annum *a tempore morae* and costs

[33] The counter-claim is grounded on the respondent's contention that the individual applicants breached the terms of their contract of employment, more specifically the restraint of trade and confidentiality provisions, by taking up employment with Re-Max, and using its confidential information for their benefit and that of Re-Max.

[34] As already indicated, Van Zyl resigned from the respondent on 4 April 2014 and joined Re-Max on 7 April 2014. Viljoen and Frauendorf had resigned from the respondent on 14 April 2014 and also joined Re-Max. They had all resigned with immediate effect without giving the required 60 days' written notice.

[35] It was further common cause that the individual applicants had signed the *'Agreement of Agent Commission'* as an annexure to the contracts of employment at varying times, which for all intents and purposes are binding upon them. The following clauses in the '*Agreement of agent employment'* are relied upon by the respondent;

'Clause 6.3 Bona Fide Notice termination:

'6.3.1 *Notwithstanding notices and terminations set out in 6.1 and 6.2 above, either Agent or HARCOURTS may without cause, terminate this agreement upon giving of 60 (Sixty) days written notice to the other party. In such event neither party shall have any claim against the other in relation to such terminations. The Agent shall continue to be entitled to any commissions, which were negotiated prior to this termination date, less a reasonable management and administration fee. This management and administration fee may not exceed 50% of the commission due and payable to the Agent and will be calculated in accordance with the time frame of registration'*

6.3.2 Such commission (after deductions) shall be paid to the Agent only upon registration of transfer of the relevant transaction and complete compliance by the Agent with all obligations under this agreement upon termination. Payment of commission to the Agent shall be subject to applicable provisions of this agreement.

6.3.3 This notice will only be applicable and acceptable if the Agent acts bona fide and in good faith and will only be accepted by HARCOURTS if the agent is in good standing with HARCOURTS. Notice given that will negatively impact HARCOURTS such as actions mentioned in clause 7 below will not be treated as bona fide and 6.3.1 will not apply.

[36] In respect of the counter-claim against the individual applicants, it was further common cause that they were bound by the restraint and confidentiality provisions contained in clause 7[4] of the '*Agreement of Agent Employment*', and further that should there be a breach of the terms of the restraint directly or indirectly, they would be liable to the respondent for liquidated damages in the amount equal to the amount they earned in commission during a 6-months' period.

[37] The respondent contended that the individual applicants had breached their agreements by commencing employment during the restraint period at Re-Max, a competitor in the same area as the respondent, and further by making use of its confidential information for their benefit and that of Re-Max.

[4] RESTRICTION ON SIMILAR AND/OR SUBSEQUENT BUSINESS ACTIVITY

[38] The individual applicants having resigned in April 2014 and only having claimed or demanded payment of their commissions on 23 June 2014, the respondent's contention was that they were aware of its attitude since at least 26 June 2014[5] that it had raised concerns surrounding the breach of agreements, more specifically pertaining to their failure to work out their notice periods, and the fact that they had taken up employment with Re-Max in breach of the restraint provisions. The respondent's view was that the commissions were effectively forfeited, as the individual applicants should have claimed earlier.

[39] The applicants refuted the respondent's counter claim on several grounds, principal of which was that the respondent, acting through its personnel had by implication, waived its rights to and in respect of their contractual obligations and restraint of trade provisions. In this regard, they argued that first, they were not required or expected to work any notice period; second, they had resigned because the respondent had made continued employment intolerable; third, the respondent was aware that they were going to work for Re-Max; and fourth, the respondent had not suffered any harm or any damages as a result of their resignation.

[40] The respondent's response to the applicants' assertions was that the agreement was the sole memorial of the terms governing their relationship with it, and there could be no variation except in writing signed by both parties. In this case, there was no such variation in writing for a conclusion to be made that the applicants were not required to work out their notice period.

[41] In respect of Van Zyl, it was contended that he had in any event, no intention of working out his period in view of his testimony that that he was interviewed for the position at Re-Max on 3 April 2014, resigned with effect from 4 April 2014, and had started working for that entity on 7 April 2014. It was contended that his resignation or termination was not *bona fide*.

[42] In regard to the allegations that Van Zyl's working environment was made intolerable, the respondent's contention was that if that was the case, he

[5] Respondent's correspondence of 26 June 2014

should have referred a constructive dismissal at the CCMA after his resignation and had not done so. In this regard also, it was argued that there was no merit to Van Zyl's contention that the intolerable conditions were caused by late payments of commissions, as any delays in that regard were small and could not credibly establish a significant complaint of intolerable working conditions such as to excuse him from complying with his obligations.

[43] The respondent further submitted that Van Zyl had failed to establish any question of waiver, more specifically since he only had his exit interview on 10 April 2014, after he had started his employment with Re-Max on 7 April 2014. It was further submitted that the fact that Grobler had asked Van Zyl about how things were going at Re-Max after he had started his employment and wished him luck in his new employment was insufficient to establish any waiver.

[44] In respect of Viljoen and Frauendorf, the respondent also denied that it had made continued employment intolerable for them as they had also failed to refer a case of constructive dismissal to the CCMA. To the extent that the two had resigned on 14 April 2014, it was also argued that the respondent was only made aware on that date that they were going to Re-Max, and that they too had not established a waiver.

Waiver:

[45] Waiver takes place where a right or remedy or privilege or power or an interest or benefit is not asserted[6]. In *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others*[7], it was held that

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[6] *Sali v National Commissioner of the South African Police Service and Others* [2014] 9 BLLR 827 (CC) para 53

[7] 2015 (2) BCLR 182 (CC) at paragraphs 60 – 61. See also *Hepner v Roodepord-Maraisburg Town Council* 1962 (4) SA 772(A) at 778 D-F where Steyn CJ held that:

> "There is authority for the view that in the case of waiver by conduct, the conduct must leave no reasonable doubt as to the intention for surrendering the right in issue (Smith v Momberg 1895}SC 295 at page 304; Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Ltd 1915 AD 1 at p 62) but in Martin v de Kock 1948 (2) SA 719 (AD) at p 733 this Court indicated that that view may possibly require reconsideration. It sets, I think, a higher standard than that adopted in Laws v Rutherfund 1924 AD 261 at p263, where Innes CJ says:
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> > 'The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.'

"…. Waiver is the legal act of abandoning a right on which one is otherwise entitled to rely. It is not easily inferred or established. The onus to prove it lies with the party asserting waiver. That party is required to establish that the right-holder, with full knowledge of the right, decided to abandon it.

And,

So, waiver depends on the intention of the right-holder. That can be proved either through express actions or by conduct plainly inconsistent with an intention to enforce the right. It may be inferred from the outward manifestations of the right-holder's intention:

"The outward manifestations can consist of words; of some other form of conduct from which the intention to waive is inferred; or even of inaction or silence where a duty to speak exists.'" (Authorities omitted)

[46] In *Road Accident Fund v Mothupi*[8] it was held that:

'Inferred waiver:

"Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it…"

[47] The test for determining a waiver is objective[9], and is adjudged by its outward manifestations by a reasonable person standing in the applicants' shoes. The outward manifestations may consist of words; some other form of unequivocal conduct from which the intention to waive is inferred; or even inaction or silence on a party where a duty to act or speak exists[10].

This accords with the test applied in City of Cape Town v Kenny 1934 AD 543 and was followed in Collen v Rietfontein Engineering Works 1948 (1) SA 413 (AD) at p 436 and Linton v Corser 1952 (3) SA 685 (AD)at p 695. Cf. Ellis and others v Laubcher 1956 (4) SA 692 (AD) at p 702). In my opinion the test is more correctly stated in these cases."

[8] *2000 (4) SA 38 (SCA)* at paras 15 – 19
[9] *Multilateral Motor Vehicle Accidents Fund v Meyerowitz 1995 (1) SA 23(C) at* 26H-27G
[10] See *Jethro N.O v Road Accident Fund (10534/2006) [2015] ZAWCHC 101 (29 July 2015)* at para 18. See also *Mothupi* at para 19, where it was held that;

"Because no one is presumed to waive his rights....one, the onus is one the party alleging it and two, clear proof is required of an intention to do so.... The conduct from which waiver is inferred, so it has been frequently stated, must be unequivocal, that is to say, consistent with no other hypothesis".

[48] In the light of the above principles, the question that arises is whether the applicants have discharged the onus of demonstrating that the respondent had waived its rights in respect of their contractual obligations pertaining to the restraint provisions and the notice period.

[49] It cannot be doubted in this case that the individual applicants clearly had no intention of serving their notice period. With Van Zyl, it was not in dispute that he was interviewed for the position at Re-Max on 3 April 2014, had resigned with immediate effect on 4 April 2014, and had started his employment with Re-Max on 7 April 2014. Viljoen and Frauendorf also resigned from the respondent on 14 April 2014, obtained their fidelity certificates on 15 April 2014, and immediately started their employment with Re-Max.

[50] Prior to dealing with whether there was a waiver, some of the ancillary issues to this main topic needs to be swiftly disposed of. First, the respondent's contention that the Agreements of Agent Employment were the sole memorials of the terms governing their relationships with the respondent and that there was no variation agreed to in writing is an argument that was raised belatedly, and was not pleaded nor canvassed in evidence. Even then, this question still boils down to whether in fact there was a waiver of any of the terms and obligations of the applicants in terms of the agreement.

[51] Second, the applicants' contention that they had left because of the respondent having made continued employment intolerable for them is mere red-herring. I accept that there were concerns, and complaints raised over time by the applicants about the payment of commissions. These however as ultimately conceded by Van Zyl merely related to amounts due rather than delays in payments. None of the applicants filed grievances and as Van Zyl conceded, any issues surrounding commission were ultimately resolved. Furthermore, if indeed these concerns were serious and had led to their resignations, nothing prevented them from resigning and then lodging a constructive dismissal claim. To this end, the applicants' contention that they left the respondent because their working conditions having been made intolerable is rejected. They had voluntarily left the respondent's employ and joined the competition.

[52] The central issue is whether there is cause to sustain the argument surrounding waiver. The respondent's General manager, Fourie was aware that the applicants, or at least Van Zyl, intended to resign and join Re-Max. Fourie was not called upon to testify to refute Van Zyl's allegations that despite being informed of the intended resignation and to join Re-Max, had had merely indicated to him that the restraint would not be enforced. Whether Fourie had the necessary authority to agree to the non-enforcement of the restraint provisions was not put to the applicants and was raised for the first time by Grobler in his cross-examination.

[53] Grobler's evidence is even more telling. He became aware of Van Zyl's resignation on 4 April 2014. As at 7 April 2014, it can be accepted that he was aware that Van Zyl had joined Re-Max, and the subsequent exit interview where Van Zyl had said that he was leaving as he had outgrown the respondent is of no consequence, as it was known at that time that he had already joined Re-Max. In his discussions with Van Zyl, at no stage did Grobler speak about the restraint provisions or the notice period. On his version, he did not want to cause a 'fuss' and wanted the separation to be amicable. The fact that the applicants knew of the agreements is in my view irrelevant, as Grobler, if he was really concerned about any breaches should have informed them at the time that they left.

[54] Grobler, despite having all the relevant knowledge and information about the applicants' intentions went further, and wished them all well in his e-mail to staff on 14 April 2014. Even if this e-mail was not directed at the applicants and was meant to calm the remaining staff in the light of the exodus, not once was it indicated that the respondent took umbrage to employees willy-nilly leaving. On the contrary, the e-mail specifically acknowledges that the applicants are going to Re-Max, that their departure is without hard feelings and grudges, and further assures them that they are always welcomed to come back.

[55] On Grobler's own version, clause 6.3 of the agreement only referred to notice period, and that it did not make provision forfeiture of commission if an employee did not serve notice. He conceded that he knew that as at

4 April 2014 that the applicants were going to Re-Max, and never spoke to them about serving notice. He conceded further that he was aware that Van Zyl went to the 'open day' between 4 and 10 April 2014 on behalf of Re-Max, and yet said nothing to him. He conceded that after they had left, he had not seen any purpose in pursuing the matter with them, and confirmed that it was only after receipt of the applicants' letter of demand that the issue of restraint was raised on 26 June 2014. He accordingly would not have raised a counter-claim but for the applicants' demand.

[56] The conduct of Grobler in the light of the above objective factors can only lead to the invariable conclusion that indeed the applicants were entitled to reasonably believe that the respondent had waived its rights in respect of the enforcement of notice period and the restraint provisions. Grobler, with the full knowledge of the terms of the applicants' agreement, and the applicants' intentions, failed to take any action, let alone indicate the respondent's intention to enforce the provisions of the contract of employment. There is no reason therefore to believe that such conduct is inconsistent with an unequivocal waiver of the respondent's rights. But for the fact that the applicants had demanded payment of their outstanding, the respondent was not in any manner, shape or form, interested in pursuing any claim matter against the applicants in respect of the patent breaches of their contracts of employment. Even if the applicants' resignation could not be construed as bona fide within the meaning of clause 6.3.3 of the agreement of employment, the respondent, at least through Grobler's conduct was prepared to the let them leave in circumstances where they had clearly breached and further intended to breach the terms of their contract.

[57] The non-payment of commission due to the applicants was not as a consequence of their failure to comply with the termination provisions under clause 6 of the contract of employment, or having acted in breach of the provisions of their contracts of employment. Had this been the intention, it would have been made plain to the applicants at the time that they left. To have simply raised this as a defence some two and half months later in

retaliation to the applicants' demand cannot in my view be justifiable or lead to a conclusion that the respondent had asserted its rights.

[58] In the light of the above conclusions, it follows that any harm or damage caused to the respondent because of the applicants having breached their contracts of employment is directly attributable to it having acquiesced in that conduct. To this end, it follows that the counter claim ought to be dismissed.

Costs:

[59] I have had regard to the requirements of law and fairness in relation to costs. The respondent's main contention throughout the proceedings was that the applicants were not paid their commissions as a result of their breach of the contracts of employment. The applicants' claim of a waiver having been successful in large, it is also taken into account that the respondent's counter-claim was for all intents and purposes, legitimate in the light of the applicants' breaches. In my view, the facts and circumstances of this case dictate that each party must be burdened with its own costs.

Order:

[60] Accordingly, the following order is made;

1. The first applicant's claims are successful as follows:

   a) Claim A: in the amount of R6 140.35.

   b) Claim B: in the amount of R31 745.61

   c) Claim C: the amount of R67 543.86

   d) Claim D: the amount of R7 986.00

   TOTAL: R113 415.82 (and applicable interest as at 25 May 2015)

2. The second applicant's claims are successful as follows;

   a) Claim G: in the amount of R7 278.95

b) Claim I: in the amount of R7 402.00

TOTAL: R14 680.00 (and applicable interest rate as at 25 May 2015)

3. The third applicant's claims are successful as follows;

a) Claim H: in the amount of R6 239.10

b) Claim J: in the amount of R6 345.00

TOTAL: R12 584.10 (and applicable interest rate as applicable as at 25 May 2015)

4. The respondent's counter-claim is dismissed

5. There is no order as to costs

E. Tlhotlhalemaje,

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants:	Adv C Goosen
Instructed by:	Horn Attorneys
On behalf of the Respondent:	Adv A Bishop
Instructed by:	Gittins, Youngman and Associates