NO. 1 ESTATES CC V JULIAN BAARD

CASE NO. (P) I 1206/2002

2002/09/03

Maritz, J.

LAW OF AGENCY
LAW OF EVIDENCE

Law of agency – estate agent – claim for commission – introduction of property to prospective purchaser – purchaser unimpressed – property later reintroduced to purchaser in the course of a new and unrelated chain of events – whether initial introduction had been the effective cause of the sale discussed

Law of evidence – claim for estate agent's commission – estate agent must prove both contractual and causal relationship on balance of probabilities – if introduction leads straight to sale, introduction as a *causa sine qua non* is also *prima facie* the *causa causans* of the sale – when there are competitive causal factors resulting in the sale, the agent must prove that his/her instrumentality has been in all phases from introduction to the sale a consistent, uninterrupted and major positive force – *onus* not discharged – claim dismissed.

CASE NO. (P) I 1206/2002

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NO. 1 ESTATES CC **Plaintiff**

versus

JULIAN BAARD **Defendant**

CORAM: MARITZ, J.

Heard on: 2000/09/12-14

Delivered on: 2002/09/03

JUDGMENT

MARITZ, J.: An estate agent claiming commission on the sale of an immovable property must prove both a contractual and causal relationship to succeed: a contractual relationship mandating the agent to find a willing and able purchaser for or seller of an immovable property and a causal relationship between the agent's mandated efforts and the property's sale or purchase, as the case may be (cf. *Schollum & Co v Lloyd*, 1916 TPD 291 at 293). In this action for the

payment of estate agent's commission, both those relationships are in issue – the principal one being whether the plaintiff was the effective cause of the sale of the defendant's residential property to one Gross or his nominee.

It is either common cause or not really in dispute that the defendant was the owner of that property known as No. 11A Promenaden Road, Windhoek. Although it was not "officially" up for sale, the defendant nevertheless agreed when approached by two estate agents employed by the Plaintiff that it could be offered to interested buyers. Concerned about the response of the "difficult tenant" with whom he had a lucrative lease agreement, he required that prior appointments be made to view the property. He mentioned the net selling price to at least one of the agents, Ms Daphnè Swanepoel.

It so happened that Gross had to vacate the house he was renting and was interested to buy or rent another house. He, but mostly his fiancée, went "house-hunting" in Windhoek. They contacted the plaintiff, amongst others, to assist them in finding a suitable one. Gross' fiancée spoke to Ms Loretta Basson, one of the estate agents employed by the plaintiff, to view the houses they had on their books within a specified price range. One of the houses Basson pointed out to

her during the beginning of October 1997 was that of the defendant in Promenaden Road. They did not enter the premises because Basson could not obtain the tenant's permission to view it. They made a tentative appointment to meet again the next day. Neither Basson nor Gross' fiancée could make the appointment and it so happened that Gross and another of the plaintiff's agents, Ms Venetia Venter, continued the search the next day.

After Venter had eventually obtained permission to access the Promenaden Road property, she showed it to Gross on 7 October 1997. Gross commented that the property had to be renovated and repaired and that the price was too high. Venter informed him that the price could be negotiated and invited him to make a written offer. Gross was non-committal and, as it were, did not make an offer. Instead, he made an offer the same day to purchase a house in Herbst Street and, on 16 October 1997, contracted to purchase the member's interest of one Aggenbach in the close corporation owning that property. The contract was subject to a suspensive condition that he would obtain a bank loan financing part of the purchase price. He could not raise the loan and, as a consequence, the sale fell through about a week later. Gross found himself back where he had started.

Precisely how it came about that Gross met up with the defendant is in dispute, but it is not in issue that they did. Unbeknown to the plaintiff, they entered into a suspensive sale agreement in respect of the Promenaden Road property on 24 November 1997. The agreement contemplated occupation on 1 January 1998 and transfer within the following 3 months. But again, Gross' application for a loan was unsuccessful and the suspensive condition remained unfulfilled. Gross had to vacate the house he was renting by 31 December 1998 and, still interested to purchase the property, entered into a lease agreement with the defendant on 1 January 1998 and incorporated amongst the terms thereof a right of first refusal in the event of the defendant finding another purchaser.

Over the next number of months, Goss' financial position improved considerably. He effected substantial improvements to the property and on 20 April 1998 entered into yet a further contract of purchase and sale with the defendant. In terms thereof he had to pay a deposit and furnish a warranty for the balance of the purchase price by 30 September 1998, failing which, he would forfeit the deposit. He could occupy the property in the mean time but had to pay occupational rent. Finally, on 30 October 1998, a third agreement of sale was concluded, this time with Gross or his nominee. Gross forfeited earlier

deposits and downpayments made as *rouwkoop* and the purchase price was renegotiated and fixed at N$760 000.00. Gross agreed to submit a guarantee for payment of the purchase price by no later than 30 November 1998, failing which, he would forfeit compensation for the improvements effected by him to the property – which by then, ran into several hundred thousand dollar. This time, Gross' nominee, Promenadenweg Investments CC, succeeded in obtaining financial assistance, provided the guarantee in time and obtained registration of transfer on 10 February 1999 against payment of the purchase price.

As fate would have it, about a month before registration of the transfer, Venter had a manicure appointment with the defendant's wife. Whilst making small talk, the defendant's wife informed her that the defendant had sold the Promenaden Road property to Gross. Recalling that she had introduced Gross to the property, Venter was indignant about the direct sale "behind her back" and left a message for the defendant to call her. A telephone call and a meeting later, the defendant offered N$15 000.00 to settle the dispute. Venter discussed the offer with Basson and Swanepoel and the upshot thereof was a written rejection of the offer by the plaintiff and a demand for payment of estate agent's commission. Maintaining that he had made the offer as a sign of goodwill and without admission of his liability to pay such

commission, the defendant withdrew the offer. That, in turn, resulted in the institution of this action.

Not much turns on the defendant's denial of the terms of the mandate given to the plaintiff. In his plea he already admitted the existence of an oral mandate, albeit of more limited scope than that alleged by the plaintiff. Under cross-examination by Mr. Coetzee (acting on behalf of the plaintiff), the defendant further admitted that he had mandated the plaintiff (represented by Swanepoel) to sell the property for an amount of N$800 000.00 net of estate agent's commission. When this admission is taken together with the other admissions recorded by Mr Dicks on behalf of the defendant at the pre-trial hearing (i.e. that it was an implied term of the mandate that, should the plaintiff duly perform thereunder, the defendant would pay it a commission equal to the generally accepted tariff for estate agents selling residential properties in the Windhoek area and that the applicable tariff was equivalent to 7% of the purchase price of the property), the terms of the mandate that are relevant to the plaintiff's cause of action have been established.

Those terms are also supported by the contemporaneous note of the defendant's asking price made by Swanepoel on the mandate form and

the manner in which she (albeit erroneously) calculated that the property should be offered at a price of N$856 000.00, i.e. the net asking price of N$800 000 plus 7% commission thereon (instead of N$860 215.05 less 7%). It is not in dispute that, when applied to the purchase price of the property eventually agreed on in the 3rd contract of sale, the commission amounts to N$53 200.00 – which is the amount claimed.

Turning to the causal connection between the purchaser's introduction to the property and the eventual sale thereof, it is well established in law that the plaintiff bears the burden to prove on a balance of probabilities that the introduction "operated up to the execution of the deed of sale and was, despite the intervention of (another cause) …, its effective cause" (*per* Schreiner JA in *Barnard & Parry, Ltd v Strydom*, 1946 AD 931 at 938). The mere introduction of the eventual purchaser to the property by a mandated agent may give rise to a *prima facie* inference that it was the effective cause of the sale in circumstances where no other obstacle had to be overcome to bring the sale about. As Van den Heever JA points out in *Webranchek v L K Jacobs & Co Ltd,* 1948 (4) SA 671 (A) at 679, where nothing intervenes to prevent the introduction from leading straight on to the sale, the introduction is not

only a *causa sine qua non* for, but in all likelihood also the *causa causans* of, the sale.

Whether such a *prima facie* inference of cause and effect may still be drawn once it is clear that in addition to the introduction there are a number of other competing causes for the eventual sale, must depend on the circumstances of each case and considerations such as the proximity in time between the introduction and the sale, the comparative and relative weight to be accorded to all the competing factors and influences that led to the final decision to buy the property on terms acceptable to the seller (cf. *Basil Elk Estates (Pty) Ltd v Curzon*, 1990 (2) SA 1 (T) at 3G–H) and the like. Whilst such an enquiry may be useful when absolution is sought or for a litigant to assess whether (s)he has a duty to lead evidence in rebuttal, the Court will, in the final analysis, decide the connection between cause and effect on a common sense approach to the evidence as a whole whilst bearing the overall *onus* borne by the plaintiff in mind.

It is with this approach in mind that I shall first consider the plaintiff’s efforts to cause the sale, then the nature of the intervening factors

and, finally, whether the plaintiff has proven that its labour was the *causa causans* thereof.

One may disregard the drive-by exercise with Gross' fiancée as a factor of any significance. She had no recollection that the property was amongst those shown to her on that day and, as she correctly pointed out, it is difficult to make an assessment from the street because the property was only accessible through a "panhandle" and was partly obscured by trees and other buildings. Basson, in effect, conceded that her efforts were not of importance in the causative chain. The relevance thereof was, in any event, superseded by the introduction of the property to Gross soon thereafter.

According to Venter, she first showed the property to Gross from the street on 7 October 1998 and, after permission had been obtained to enter the premises the next day, she showed him the entire property. Although Gross commented favourably on certain features of the property, he also mentioned that the garden was not well-kept and the house needed renovation. He was of the view that the price was too high and, according to Venter, he told her the next day that he was not

interested. By then, we now know, he had already made a written offer to purchase another house. Any part that the plaintiff played in the eventual sale terminated the day after Gross had viewed the property. Some time later that month, Venter mentioned to the defendant that she had shown the property to Gross.

The defendant, whilst not disputing many of the events testified to by Venter, nevertheless maintained that the sale resulted from his efforts and not from those of Venter. He testified that he was also the owner of a property in Anna Street. In the course of a casual conversation he had with Dieter Jentz at Joe's Beerhouse during the latter half of October 1997, Jentz asked him if his Anna Street property was still in the market and, upon a further enquiry, mentioned to him that Gross was looking for a house. Seeing an opportunity to sell that property, he immediately went to Gross (who was the owner of Joe's Beerhouse) and arranged to show him the Anna Street property the next day. When Gross saw the property, he said that it was too small for his purposes and that it had too many steps. It was then that he mentioned to Gross that he had another property to offer. He was at that stage not aware that Venter had already introduced the property to Gross and, after he

had made the necessary arrangements, he took Gross to the Promenaden Street property the next day.

As they drove up the panhandle, Gross said to him that he was certain that the property had been shown to him by an estate agent with reddish hair. The defendant inferred that it was Venter. Gross was initially not interested in the house. He was concerned about noise from the nearby and rather unsightly flats. He said that he needed space for a photo studio and complained that the entertainment area was not large enough, the garden was not properly tended, the carpets were dirty, the house needed renovation and the asking price was too high. Gross also mentioned to him that he had not seen certain areas of the house when it was shown to him by the agent, most notably the inside of the garages and the main bedroom.

The defendant arranged for a key and access to those areas. The garages, which appeared from the outside like a double garage, were actually spacious enough to accommodate 4 vehicles. The defendant suggested to Gross that he could convert part of that space into a photo studio. The defendant also offered to replace the tree in the

garden that had died, to replace the carpets, to have the house repainted, to reduce the selling price and, in general, offered suggestions on how some of Gross' concerns could be addressed. Being an employee of a local commercial bank, he also offered to "pull strings" to get Gross a loan. It was due to his efforts that the first agreement of sale was concluded, he testified.

His influence notwithstanding, the bank was not willing to advance Gross the loan he needed to purchase the property. He then accommodated Gross by allowing him to rent the property. Later, when the second agreement of sale was entered into and Gross could not furnish the required warranties, he entered into the third contract and assisted Gross in obtaining the N$700 000-loan for Promenadenweg Investments CC.

Jentz testified that the conversation he had with the defendant at Joe's Beerhouse towards the end of October 1997 followed on an earlier conversation he had with Gross. Gross told him that the Aggenbach deal had fallen through and that he was looking for a house. Knowing

both the defendant and Gross well, he said to Gross that he knew that the defendant had a house to sell.

Goss' evidence confirms in many respects that of Venter, Jentz and the defendant. He testified in detail about his first visit to the house with Venter. He recalled that they were only given limited access to the house because the children of the tenant were ill. He only saw the garages from the outside and did not see some of the bedrooms and bathrooms. Although he might have been of the opinion that the house had potential because of the outlook one had from there, the apparent lack of maintenance to the garden and buildings made a negative impression on him. He also considered the noise from nearby flats as a handicap. Given the costs of renovation and the high price at which it was offered to him, he was neither a willing nor an interested buyer when he left the premises. Although Venter had asked him to make an offer, he did not even bother to do so and, when Venter called on him again, told her that he was not interested in the property. Instead, he made an offer to purchase the Aggenbach property.

After the Aggenbach purchase had come to nothing, he enquired from friends and guests whether they did not know of anyone who might wish to sell a house in the range he was looking for. He also contacted estate agents. He confirmed the conversation he had with Jentz, the subsequent discussion with the defendant, the visit to the Anna Street property and how it came about that the defendant took him to the Promenaden Road property. When they arrived at the property he informed the defendant that an agent had shown him the property before. He was not really interested in it and mentioned the problems he had with it. He confirmed the defendant’s attempts to make the transaction more attractive to him and added that the defendant also suggested that they could remove the walls that limited the outside entertainment area, that boundary walls could be moved and extended to allow for more space, that the garages could be converted into a photo studio and the lawn area could be covered and used for parking. The defendant also informed Gross that the corporation owning the flats was in the process of selling them and that an application for business rights on the property was likely to succeed. What was of particular importance to Gross, was the defendant’s willingness to allow him to rent the property for a few months before taking transfer. Part of Gross’ business had burnt down on 1 October 1997 and, given the reduction in turnover and the costs of restoring the business

premises, his financial position was not as sound as it had been before. He made it clear that had the defendant not taken him to the Promenaden Road property to show him the parts he had not seen before, made suggestions to cater for his needs and, with an allowance for a period of rental, offered it to him at a reduced purchase price, he would not have purchased it.

When evaluating the veracity and reliability of the evidence, I shall bear in mind that the witnesses were called upon to testify about events that happened about 3 years before. The ever-present possibility of incomplete or incorrect perception aside, it is only natural that over such a long period of time events may be forgotten or, due to a natural inclination to be biased towards your own point of view or interests, subconsciously distorted or modified. If it happens, it does not make a dishonest witness but nevertheless affects the veracity or reliability of his or her evidence.

So, for example, is the evidence of Venter that she showed the whole house to Gross. When confronted with specific allegations under cross-examination, she was not so certain any more. She could not

remember whether she had shown him the garages from the inside, whether the servant declined to allow them to view the downstairs portion of the house, precisely which bedrooms were shown to him and certain other details of their visit to the house. These apparent contradictions are understandable, especially because she did not contemplate at the time that she would have to testify about the events in a court of law and need to imprint them on her mind or make a contemporaneous note thereof. It nevertheless alerts the Court to the possibility that she might have somewhat overstated her efforts in showing the house to Gross and what his impressions were.

Whilst I make the same allowance when assessing the evidence of the defendant, one particular feature concerns me and permeates the manner in which I shall consider his credibility: the ease with which he changed the tack of his evidence to sail, what he believed, the most favourable course to reach his objective in the litigation. So, for example, when confronted with the contractual clause dealing with the duty to pay estate agent's commission, he testified that it had been agreed upon that the purchaser should pay it if an issue in connection therewith would arise because "only he knew what had happened". When Mr Coetzee pointed out to him that the contract actually

stipulated that the seller had to pay the commission, the defendant without showing any sign of discomfort, changed his explanation: Yes, he testified, Gross told him “out of his heart” that Venter did not cause the sale and he therefore took the obligation upon him to ease Gross’ mind. The recalled that it was specifically discussed and Gross had told him that he did not feel that he should be liable for commission. He (the plaintiff) then took it upon him to deal with any claim by the plaintiff for commission. There are other examples that I do not propose to deal with for purposes of this judgment. Suffice it to say that whilst I do not reject his evidence out of hand for this reason, I shall be most careful before I rely thereon and will do so mainly when it is either common cause or corroborated by other credible evidence.

As regards the evidence of Gross, I shall bear in mind that he was not a disinterested witness. The defendant initially sought an indemnity from Gross in the event of the Court holding him liable to pay estate agent’s commission, and, for that purpose joined Gross as a third party to the proceedings. The claim for indemnity was withdrawn shortly before the trial and one of the conditions was that he would make himself available as a witness for the defendant.

If there was any suggestion that he would deliberately colour his evidence to support the defendant's cause, it was soon dispelled. Given the implication that the settlement agreement with the defendant might have caused him to give a different slant to his evidence, I observed him carefully and scrutinised his evidence for any sign of deliberate dishonesty or favouritism. He impressed me as a witness, both in demeanour and in the frank, detailed and balanced manner in which he testified. He had nothing to lose or gain by his testimony and it was not even suggested to him that, in order to settle the defendant's claim against him for an indemnity, he had agreed to be dishonest in the presentation of his evidence. He had no hesitation to comment adversely on the defendant's conduct (saying at one point in time that he felt that the defendant had betrayed his trust by the insertion of a certain clause in the third contract) and frankly conceded in favour of the plaintiff the possibility of events that he could no longer remember with certainty – and as one may expect, there were a number. He was steadfast in his evidence as regards the events he could remember and, notwithstanding extensive and able cross-examination, did not contradict himself in any material way. Whilst bearing in mind my earlier *caveat* as regards the recollection of the events over time, I must note that when it comes to the assessment of the veracity and reliability of the witnesses' testimonies, his evidence

is to be preferred. His evidence is also corroborated in material respects by that of Ms Gross.

The fact that the first contract of purchase and sale was concluded within two months after the plaintiff had introduced Gross to the property is, by itself a significant factor that weighs heavily with the Court when it assesses whether the plaintiff has discharged the burden to prove that its involvement was the predominant one in the causative chain of competing factors. That Venter's involvement ceased the day after the introduction does not necessarily dispose of the plaintiff's claim, as the defendant seems to think – judging by his evidence. Depending on the weight to be accorded to the competitive causative factors, the "introduction might still be the overriding factor inducing the sale" (*Aida Real Estate Ltd v Lipschitz*, 1971 (3) SA 871 (W) at 874H).

More often than not, a prospective purchaser's introduction to a property does not immediately result in a purchase. The conclusion of the contract is usually preceded by negotiations about the purchase price, the date of occupation, the amount of occupational rent to be

paid if occupation is taken before transfer, when warranties should be given, the amount of or need to give a deposit and, almost invariably, special conditions relating to the raising of loans to finance the whole or part of the purchase price. Theoretically, agreement on virtually each of the material clauses of the contract may be regarded as a *causa sine qua non* to the ultimate sale. So too, are the removal of financial obstacles. These are matters that the parties normally iron out between themselves and rarely involve the intervention of the estate agent – except, perhaps, in negotiating the price. These considerations notwithstanding, Marais J held in Aida Real Estate Ltd v Lipschitz, *supra* at 875F-H,

> “(i)t would … be a mistake to say that the occurrence of these financial obstacles and their removal without the assistance of the agent necessarily go to show that the agent's introduction was not effective in bringing about the ultimate sale. Obstacles in the way of the sale and the fact that one or other or both of the parties by independent effort overcame them, may indeed support the very opposite view. It may be the measure of the wisdom and business acumen of the agent in introducing to each other a seller who is so keen to sell and/or a purchaser who is so keen to buy that even formidable obstacles in the way of a sale were overcome; or, to put it more crudely, the willingness and ability of the purchaser introduced by the agent were so great

> that nothing could prevent the sale taking place. In such a case the agent would be entitled to remuneration, no matter whether he selected the potential purchaser by chance or by foresight. A commission agent is paid by results and not by good intentions or even hard work."

It is equally true that the accumulative weight to be afforded to the resolution of these obstacles cannot be disregarded in the assessment of the relative weight to be accorded to the agent's efforts in the scales of justice. Neither can the introduction of "new" factors into the chain of events be disregarded as Frank J remarked in *Key Properties and Another v Lamprecht*, 1996 NR 197 at 205C-F.

Assessing these competitive causative factors to determine the weight to be accorded to them cannot be done with mathematical accuracy or in accordance with any fixed formula. Van den Heever JA recognised this in *Webranchek*'s case *supra* at 679 when he said:

> "… 'effective cause' means something more than that which causes in a mechanical sense. If I may use a figure: counsel were at one that if plaintiff brought about a super-saturated solution and a stranger merely jarred it into crystallisation, defendant could not lawfully withhold plaintiff's commission. That admission immediately brings into play moral causes and moral effects, and

> it is difficult, if not impossible, to track and define causation in such a transcendental field. Accordingly a Judge who has to try the issue must needs decide the matter by applying the common sense standards and not according to the notions in regard to the operation of causation which "might satisfy the metaphysician" (*Yorkshire Dale Steamship Co Ltd v Minister of War Transport (The Coxwold*) [1942] 2 All ER 6 (HL) [1942] AC 691 (HL) at 706)."

Did the plaintiff prove on a balance of probabilities that "but for (its) introduction of the property to the purchaser the sale would not have gone through; that (its) introduction was the … efficient cause of the sale and that the purchaser was induced to buy as a result of the introduction" (*per* De Waal J in *Mackie v Whyte & Turpin,* 1923 TPD 347 at 348)?

Mr Dicks argues that it did not. He contends that this case falls to be distinguished from those where the prospective purchaser, mildly impressed with the property introduced to him, connives with the seller behind the back of the agent. The evidence is, he submits, that Gross was not impressed with the property and made an offer on another property. It was Jentz' intervention that brought Gross and the

defendant together and set off a new chain of events that led to the sale. In that chain of events the manner in which the defendant went about to induce Gross into buying the property, the lease he offered and the assistance he gave to Gross and his nominee to obtain financial assistance were the effective cause of the sale. Mr Coetzee, on the other hand, emphasised the importance of the initial introduction, the fact that his reservations notwithstanding, Gross was impressed with the property and that the initial sale took place within two months after the introduction. He commented adversely – and justifiably so – about the defendant’s failure to mention the transaction to Venter and his dishonest efforts to shift the obligation to pay commission in the event of a claim to Gross. He submits that the plaintiff discharged the burden of proof it carried.

There is much to be said for the arguments presented by both counsel. What I find of particular significance in assessing the relative weight to be accorded to the competing causative factors, is Gross’ conduct after it had become clear that the Aggenbach deal would not materialize. He did not, as one would have expected of a person favourably impressed with the earlier introduction of the Promenaden property, contact the plaintiff to enquire whether it was still in the market and, if so, revisited

the property or made an offer to purchase it. Instead, he approached his friends and clients – even other agents – to find another property. Not for a moment did he consider the Promenaden property which had been introduced to him about two weeks earlier. This conduct also corroborates his evidence that when he left the property the day Venter introduced it to him, he was not a willing and interested buyer.

His reintroduction to the property was the effect of a completely new and unrelated chain of events. It would have happened even if he had never been introduced to the property before. In that context, the plaintiff cannot even claim that the initial introduction was a *causa sine qua non* to the sale. As it were, the reservations he had when he saw the property for the first time worked against a possible sale when the defendant reintroduced the property to him. It was only when he saw the parts of the property that he had not seen before and when his objections and concerns were addressed by the salesmanship of the defendant that he began to show interest. On the next visit, he brought his fiancée along and with further concessions by the defendant accommodating their needs, he decided to buy the property.

In these circumstances it can hardly be said that the plaintiff's instrumentality has been "in all the phases from the introduction to the sale *consistent, uninterrupted and a major positive force* working towards the successful conclusion of the transaction" as Marais J required in the *Aida Real Estate* case, *supra,* at 874F. Arriving at his conclusion, I bear in mind Mr Coetzee's criticism of the defendant's questionable business ethics, his contractual assumption of the liability to pay agent's commission and the offer he made to Venter when she confronted him.

Criticism of the defendant's conduct, however justifiable it may be, is only marginally relevant to the main issue this Court is called upon to decide and it would be a gross injustice if the Court were to allow those considerations to unduly influence the result. As regards the defendant's contractual obligation to pay agent's commission, it must be noted that the obligation created in the contract of purchase and sale is one as between the defendant and Gross. Whether the defendant had such an obligation towards the plaintiff must be assessed within the context of the causative and contractual relationship between them. It is only when liability to pay commission arises that, as by agreement between Gross and the defendant, the

latter had to meet it. As to the offer made to Venter, whether as one in settlement or goodwill, it was not accepted and withdrawn shortly after it had been made. In making the offer, the plaintiff must have considered the unpalatable possibility of litigation and did not intend it to be an admission of liability. It was apparently also not so understood and, in any event, not so pleaded.

What remains, is to briefly deal with Mr Coetzee's contention that if the defendant relied on another factor as the effective cause of the sale, he had to specifically plead it. In support, he refers to the judgment of Gardiner J in *Somerset Strand Land Syndicate, Ltd v Raath*, 1920 CPD 407 where he said at 408, that a party seeking to allege "either that no sale was effected or that it was effected through the instrumentality of some other person than the defendant, then this should be specifically pleaded and if not specifically pleaded then the allegation in the claim … that the sale was effected through the instrumentality of the defendant must be taken to have been admitted".

Inasmuch as the defendant specifically denied that the plaintiff was the effective cause of the sale, this case falls to be distinguished from the

Raath-case where no such denial was made on the pleadings. The denial goes much further than a non-admission and carries with it the implied assertion that the plaintiff was not the effective cause of the sale. Given the overall *onus* the plaintiff had to discharge by proving the allegation in the face of the defendant's denial, the defendant's failure to specifically plead that another person had caused the sale did not preclude him from adducing evidence in rebuttal of the allegation. In any event, had that been the case, the plaintiff should have objected to such evidence when it was adduced instead of raising it for the first time at the very end of his closing argument in reply.

In the result, the plaintiff's claim is dismissed with costs.

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MARITZ, J