



'Not Reportable'

CASE NO.: I 634/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

STEFAN LOFTIE-EATON t/a SLE PROPERTIES
Plaintiff

and

ANDREW FORDRED N.O
Defendant

First

MASTER OF THE HIGH COURT OF NAMIBIA

Second Defendant

CORAM: PARKER J

Heard on: 2012 May 28 – 30

Delivered on: 2012 June 20

JUDGMENT

PARKER J: [1] This is a claim by the plaintiff, who carries on business as estate agent, for payment of commission alleged to be due and payable by the first defendant (hereinafter referred to simply as the 'defendant' because no relief is sought against the second defendant) by reason of the sale of immovable property at No. 29 Eadie Street, Windhoek ("the property") which forms a part of the deceased estate of the late Joan Agnes Fordred. Summons was issued against the defendant

in his capacity as the executor of the said deceased estate. Ms Schneider represents the plaintiff and the defendant appears in person.

[2] The plaintiff alleges that by an oral mandate the defendant in February 2010 gave authority to the plaintiff to find a buyer for the property. The oral mandate was given by the defendant in his capacity as executor of the deceased estate, as aforesaid, because the property was registered in the name of the deceased. It is indisputable that in the same February an estate agent working for the plaintiff, Simone Konings, acting as the duly authorized agent of the plaintiff, introduced one Jose de Azevedo Nogueira and his wife Tanya to the property. In this regard I find that Simone did introduce the property to Tanya first because Antonio, by the nature of the business he carried out (retail business), left such matters in the competent hands of his dear wife Tanya.

[3] Thus, what is important in this proceeding is that the defendant does not deny that it was Simone who introduced the eventual buyer of the property, Antonio, to the property; and, significantly, the defendant who appears *per se* in this matter calls it – unwittingly, perhaps – ‘initial introduction’ in his closing submission. I note, with respect, that the epithet ‘initial’ adds no weight in this proceeding as will become apparent shortly. What is weighty is that it is the selfsame Antonio who became the eventual buyer of the selfsame property; and this fact is critical and crucial in this proceeding. Be that as it may, according to the defendant, ‘the plaintiff lost the effect of his initial introduction’. And why does the defendant so contend? The defendant says that the plaintiff’s mandate was terminated for a reason and that is, the plaintiff and his agent or the plaintiff’s agent ‘were simply not performing, especially an agent of Konings’ (i.e. Simone’s) experience thus there was an

expectation that the customer receives reliable service who is the seller who in this case was the first defendant.’ (Quoted verbatim)

[4] As I have said previously, by his own admission, the defendant states that it was Simone who introduced the property to the eventual buyer. But, according to the defendant, as I have said previously, ‘the plaintiff lost the initial effect of his initial introduction’. I proceed to consider against the backdrop of the law this averment, certain indisputable facts and the common cause fact that the property was sold to the selfsame buyer Antonio by a second estate agent Senior.

[5] If an agent, e.g. an estate agent, in order to find a buyer introduces a party with whom the transaction desired by the principal goes through, it is a question of fact whether or not the introduction constituted the ‘efficient cause’ of the completion of the transaction. If it did, it makes no difference that the transaction was in fact completed direct between the principal and third party; or that it was completed after the agent’s employment or mandate had terminated. And, furthermore, the onus lies throughout on the agent to prove that he was the effective cause of the sale; and where another agent or more other agents have taken part in the negotiations, the onus is still on the plaintiff to prove that his or her efforts operated right up to the completion of the transaction and that those efforts were, despite the activities of the other agent or agents, its effective cause. (Silke, *The Law of Agency in South Africa*, 3rd edn: pp 395-6, and the cases there cited) And it has also been said also that at the very least, the word ‘introduce’ in this regard means ‘to direct the attention of a person who hitherto has not applied his or her mind in that direction to the fact that a property is for sale or to a material element of the sale not previously

appreciated by him or her. (*D.C. Wylde & Co v Sparg*. 1972 (2) SA 75) Thus, an estate agent who has introduced the ultimate purchaser of a house who claims commission must prove that the effects of his or her introduction continued right up to the moment of purchase and that they were the cause of the sale going through, keeping in mind that it really matters not if, as is in the present case, the transaction was completed after the estate agent's mandate had terminated. And it has been stated that once the estate agent has proved that the person with whom the principal (in the instate case, the defendant) has ultimately contracted was the person introduced by the agent the estate agent (in the instant case, Antonio), the estate agent has raised a prima facie case and it is for the principal (i.e. the defendant) to produce sufficient evidence to counter this. (Silke, *The Law of Agency in South Africa*, *ibid.*: p 397 and the cases there cited)

[6] As I have found previously, it is not disputed that it was Simone who introduced the ultimate purchaser to the property. She did not merely call Tanya to tell her that the property is for sale. I accept the evidence that Simone introduced Tanya to the property after arranging a viewing of the property with the defendant and that Tanya asked for a second viewing of the property to enable husband Antonio to also view the property; whereupon Simone arranged a second viewing of the property with Tanya and Antonio and a friend Ilona Erasmus. And during this second viewing Simone introduced them to the defendant. It was she Simone who took them through the property and showed them the physical details of the property. Thereafter, Simone arranged a third viewing of the property at which Tanya brought along her builder (referred to as 'engineer' by Simone, but Tanya testified that the person is her 'builder'). For all this it is absolutely of no moment whether the defendant called the plaintiff's offices and Simone showed up in response thereto

and the defendant gave Simone the mandate, as Simone testified, or Simone, upon her own volition, showed up at the property and the defendant gave her the mandate (as the defendant testified). It is also absolutely inconsequential as to the submission by the defendant and testimonies of Tanya and Antonio that Antonio and Tanya lived directly opposite the property, and that from their residence Antonio 'could look into the yard of number 29'. Tanya and Antonio 'lived directly opposite the property' and 'Antonio could look into the yard of number 29'; and yet the newspaper adverts by the defendant did not elicit any response from Tanya and Antonio; none at all, until Simone (the plaintiff) came on the scene and introduced Tanya and Antonio to the property. That being the case I find that it was Simone who introduced Tanya and Antonio to the property in the sense that it was Simone who directed the attention of Tanya and Antonio who hitherto had not applied their minds in that direction to the fact that a property is for sale and also details of the physical layout of the property not previously appreciated by Tanya and Antonio (See *D.C. Wylde & Co v Sparg*. 1972 (2) SA 75; and also *Wakefields Real Estate v Gavin Wayne Attree and Others* (666/10) [2011] ZASCA 160 (28 September 2011).) It follows that, in my view, the defendant's averment and submission that Tanya and Antonio 'lived directly opposite the property' and 'Antonio could look into the yard of number 29' tends to weaken, rather than advance, the case of the defendant.

[7] It is not in dispute that there was a cancellation of the contract of sale by Antonio because the asking price for the property communicated to her by Simone was higher than what his bankers were prepared to lend to him via a bond. Thereafter, the defendant and the second estate agent Senior completed the transaction in the absence and without the knowledge of Simone who originally introduced Antonio and Tanya, as I have already found. Accordingly, I find that

Simone was the effective cause of the transaction and in so finding I have taken into account this important factor, namely, the degree of effort made by Simone which I have set out previously, to which must be added Simone's preparing the contracts, the last of which was concluded between Antonio and the defendant but which was cancelled. What is significant is that after Simone had found a buyer in the person of Antonio, a deed of sale (the Senior contract) was eventually entered into. As I have reasoned previously, it matters not if the eventual completion of the sale took place after Simone's mandate had terminated. It must be remembered Antonio testified that he never met Senior throughout the transaction. I am satisfied that the plaintiff has proved that Antonio with whom the defendant ultimately contracted was the person introduced by Simone and so the plaintiff raised more than a prima facie case; she raised an incontrovertible and strong case, upon the authorities, and the defendant failed to produce sufficient evidence to counter this.

[8] Furthermore, initially Antonio could not, on the amount of money his bankers were then prepared to lend him, buy the property and so he cancelled on the basis that he had to raise the difference from another source. For this reason, in his submission, the defendant asks rhetorically, 'Does the plaintiff honestly want this court to believe that every time a purchaser merely phones up and say the bank evaluation is lower than the asking price they (i.e. the plaintiff) accept it on such face value and allow the purchaser to walk away from the agreement?' The defendant asks rhetorically further, 'Does the plaintiff merely rest back in these situations and does nothing to facilitate alternative financing or pricing for purchasers?' These questions add no weight. In considering them, I cannot do any better than to adopt that which Marais J said in *Aida Real Estate Ltd v Lipschitz* 1971 (3) SA 871 (W) at 875E-H in such insightful words:

'As regards the financial difficulties, it must be pointed out that almost every transaction brought about by an estate agent is preceded by protracted negotiations of a financial nature - namely, as regards the amount of the price as well as to the method and time of payment. Often success is only achieved through the intervention of third parties, and quite often the agent himself is not a participant in these negotiations. *It would, however, be a mistake to say 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 overcome 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.'

[9] For all the foregoing reasoning and conclusions I have no difficulty in holding that the plaintiff's introduction of Antonio and Tanya was the effective cause of the sale which subsequently took place and so the plaintiff is entitled to its commission (*Key Properties (Pty) Ltd v Lamprecht and Another* 1996 NR 197 (HC)). Thus, there was indubitably established a causal relationship between the introduction of the purchaser and the ultimate transaction of the sale, and that is sufficient to found the

plaintiff's legal claim for commission. (See *Toulmin v Miller*, 58 L.T.R. 96.) And it behoves me to add that the second estate agent Senior did enter the transaction; it matters not how Senior entered the transaction (as Tanya testified as to how Senior did). What is significant, in my view, is that Senior did come into the scene after Simone had done all the donkey work, to use a pedestrian language, just to pick up the fruits that have dropped on the ground, through Simone's effective work; that is to say, Simone had already done the most effective part of the work, which I have described previously (see *Burchell v Gowrie & Blockhouse Collieries Ltd* (1910, A.C. 614 at 625, cited with approval in *Webranchek v L K Jacobs & Co Ltd* (1948) (4) SA 671 (AD)). I conclude, therefore, that Simone's efforts override by a very large margin Senior's efforts.

[10] In my view it is clear from the evidence that Simone (for the plaintiff) did all that according to the authorities justifies the plaintiff's claim for the commission set out in the pleadings. Besides, for the reasoning and conclusions I have set out previously, I accept Ms Schneider's submission that the defendant did not discharge the burden of proving his unliquidated counterclaim for damages and so his claim in reconvention fails.

[11] It follows that the plaintiff's claim succeeds and it must have its costs, and the defendant's counterclaim fails. In the result, I make the following orders:

- (1) Judgement for the plaintiff in the amount of N\$120,000.00, plus interest thereon at the rate of 20% per annum calculated from 6 February 2010 to date of payment.

- (2) The first defendant must pay the plaintiff its costs on the scale as between party and party, and such costs shall include costs occasioned by the employment of one instructing counsel and one instructed counsel.

- (3) The first defendant's counterclaim is dismissed, and there is no order as to costs in that behalf.

PARKER J

COUNSEL ON BEHALF OF THE APPLICANT: Adv H Schneider

Instructed by: Francois Erasmus & Partners

ON BEHALF OF THE FIRST RESPONDENT: Mr A Fordred
In person