IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO. EL 632/2009

ECD 2432/09

In the matter between

ANNE ROSEMARIE CHAMBERS Plaintiff

and

THEODORE ERVINE BURGER Defendant

JUDGMENT

HARTLE, J

1. The plaintiff claims payment of estate agent's commission in the sum of R542 640.00, based on an oral mandate given to her by the defendant to find a purchaser for his immovable property being farms 312 and 313 – generically referred to as "*Weltreveden*" – in the district of Queenstown.

2. It was conceded upon trial that the plaintiff is an estate agent who at all relevant times was the holder of a valid fidelity fund certificate issued pursuant to the provisions of section 26(a) of the Estate Agency Affairs Act, No. 112 of 1976. It was also accepted during the trial that the amount claimed in prayer (i) represents the commission that she would have been entitled to earn assuming she proved that she duly performed in terms of the mandate in question.

3. The plaintiff pleaded that "(i)*n or about July 2008, (*she*) introduced one AGGREY MAHANJANA to the said immovable property and as a direct result of this introduction, the National Government of the Republic of South Africa purchased and took transfer on 19 May 2009 of the aforesaid immovable property at a purchase price of R6 800 000.00 ... VAT exclusive*". Thus she performed in terms of her mandate, was the effective cause of the sale, and is entitled to payment of the agreed commission. Reference was made to the deed of sale - attached to her particulars of claim marked Annexure "A" - which was the precursor to the transfer.[1] In terms of paragraph 21 thereof, the seller was to be liable for the payment of any agent's commission in respect of the sale.

4. The defendant admits that *Mahanjana* was introduced to the property, but denies that as a direct result of this introduction – or indeed at all - the deed of sale (Annexure "A") was entered into; that the plaintiff was the effective

1 Annexure "A" is a memorandum of agreement of purchase and sale entered into between the defendant and the national government, represented by Dr *Daliwonga Armstrong Matta*, in his capacity as chief director: East Cape Land Reform Office. The last date of signature of the agreement - which according to Clause 12 thereof is the effective date of sale - is 24 February 2009. It is evident from correspondence included in the plaintiff's bundle (Exhibit 17 – 18 and 19) that the sale is a land reform transaction and that transfer was registered on the basis that approval for the acquisition was obtained pursuant to the provisions of section 10(1)(b)(i) of the Land Reform : Provision of Land and Assistance Act, No. 126 of 1993.

cause of that sale, or that she performed her obligations in terms of the mandate. That Annexure "A" co-incidentally referred to estate agent's commission did not, so it was pleaded, establish her entitlement to payment in the absence of any causal connection between the introduction and conclusion of the sale ultimately to the government.

5. The defendant adverted to a prior agreement (which I will refer to as the "*Anne Chamber's agreement to purchase*") which was entered into on 14 July 2008 between the defendant and the National Emergent Red Meat Producers Organisation, Eastern Cape ("NERPO EP"), which he conceded on the pleadings had indeed been concluded in furtherance of the agreed mandate. In terms of this agreement he purported to sell his property for an amount of R9.5 million, which purchase consideration included value for farming equipment and assets in an amount of R2 million. The sale was subject to a suspensive condition concerning the approval by the Department of Rural Development and Land Reform ("the department")[2] and the furnishing of guarantees by 30 November 2008. In the absence of the guarantees having been supplied by the agreed upon date, however, the agreement fell away, and the introduction of *Mahanjana* was accordingly to no effect.

6. The plaintiff testified that in 2007 she was asked by the department to find farms for "*their beneficiaries*".[3] She did so on a full time basis from 2007 in conjunction with a separate agency, *Jorita Properties,* of which *Gerald Tessendorf* - a relative of hers - was the principal agent. The nature of the formal arrangement between her agency and his concerning these deals was

2 Previously the Department of Land Affairs

3 It is common cause that these persons are emerging black farmers whom the department seeks to benefit for land reform purposes.

one of co-operative agreement.[4]

7. One such beneficiary for whom the plaintiff sought to find a farm was *Mahanjana* associated with the national office of NERPO. He was looking for a cattle or vegetable farm.

8. She had learnt from a friend that the defendant's farm was for sale and approached him with a view to discussing his requirements. After giving her a guided tour he indicated that his price was R9.5 million, inclusive of implements and equipment. He confirmed that she could bring a buyer, which culminated in the formal mandate to her. It also emerged that there was some urgency for him to dispose of the property Not only had the mortgagor, Standard Bank, threatened to repossess the land, but he was in the throes of a divorce action and the purchase by the Defendant's wife of an unrelated property was dependent on the proceeds of the transfer of *Weltrevreden*.

9. An earlier prospective purchaser fell by the way side, but in July 2008 she made arrangements with the defendant to bring *Mahanjana* to view the farm. The latter flew down from Pretoria and the plaintiff drove him to Queenstown where he was shown it in the presence of the defendant and his wife.

10. *Mahanjana* liked the property and indicated that he would like to purchase it. She later took *Reverend Mxekezo*, the local NERPO representative, to the

4 It was not in dispute that *Tessendorf* is similarly the holder of the necessary fidelity fund certificate.

farm. This culminated in the offer to purchase on her agency's template dated 14 July 2008 (the Anne Chamber's agreement), which was signed by *Mxekezo* on behalf of NERPO EP and by the defendant on the same date. Her limited understanding of the conditional clause in the agreement was that NERPO would buy this farm "*through*" the department, i.e. they would fund the purchase.

11. A week later she forwarded the offer by facsimile to the defendant's conveyancing attorneys, *De Waal-Baxter.* In the covering letter she confirmed that she had "*already handed same to the Department of Land Affairs, Queenstown"* and that she would keep the attorneys updated. The agreement was given to one Mr. *Boltina* of the Queenstown district land reform office. He was the project leader concerned with the sale of the farm to *Mahanjana*. She anticipated that what would unfold thereafter was "*the rest of the procedure of the sale of the property*".

12. On 28 July 2008 *De Waal-Baxter* acknowledged receipt of the agreement and requested to be informed as soon as the plaintiff heard from the department.

13. Thereafter she claims that she and *Tessendorf* maintained regular telephonic contact with the Queenstown office to track the progress; with the defendant to keep him updated (because she was particularly concerned for his plight); and with *Althea Petzer*, a conveyancing secretary in the employ of *De Waal-Baxter*. On one occasion she and *Tessendorf* personally attended at the Queenstown office in order to introduce themselves and to enquire as to the progress of the acquisition. She also claimed both to have informed the

department of the defendant's dire financial circumstances, and to have initiated the procurement from it of a "*to whom it may concern*" letter to assuage Standard Bank to hold legal proceedings in abeyance when it was pressing to dispose of the property by sale in execution.[5]

14. With reference to a letter in the plaintiff's bundle[6] addressed by the department to the defendant dated 5 November 2008, she acknowledged being informed that it had subsequently valued the defendant's property at R6.8 million and that *De Waal-Baxter* had replied to them indicating their client's acceptance of the offer and acknowledging that the price excluded any implements, and vat such as was applicable.[7] Concerning the attorneys' request to let them have details of the purchaser to draft a formal deed of sale, the plaintiff remarked that this was "*normal*" procedure. What she meant thereby, she explained, is that once the valuation was accepted and the seller was happy with everything, a new deed would be prepared which would ultimately be signed by Mr. *Dali Matta,* the Chief Director of the Eastern Cape Land Reform Office.

15. She pointed to a further letter in the bundle dated 22 January 2009[8] addressed by *De Waal-Baxter* to the department requesting information to draft the deed in which reference is made to an earlier fax addressed by them to the "*Estate Agents*" confirming that it had approved the sale of the farm.

5 This is a letter dated 18 December 2008 addressed by the district director of the Queenstown office, Ms *Malerato Molokoane*, to Standard Bank requesting them to hold back the sale in execution because of the successful approval of the sale. Different copies of the letter were included in the plaintiff's bundle marked A 12, A 49 and Exhibits "C" and "D". The copies differ with reference to handwritten annotations and fax transmission reports on each of them.

6. This is a letter addressed by the department directly to the defendant informing him of the outcome of the valuation and requesting him to confirm that the price is acceptable in order to submit the project to the district screening committee which was to meet on 11 November 2008 (Exhibit A 10).

7 Exhibit A11.

8 Exhibit A13.

She claimed this as proof of her involvement at the time since there were there were no competing agents who had an interest in the transaction; and a later letter addressed by the department to the conveyancing attorneys[9] as evidencing the department's acknowledgement of her interest in the transaction beyond 30 November 2008. This is because a fax report at the head of the letter confirms that the letter was copied to her by the department on 2 February 2009.

16. She agreed that she had no role to play in the drafting of the new deed of sale (Annexure "A"), but was confident that all the information concerning the transaction was in the original Anne Chamber's agreement. She added that, since she and *Tessendorf* were in constant contact with the department, they would not have hesitated to give them anything they were looking for. Since they had sold a number of farms like this, she knew that the deed would be drawn up between the seller, the government and the beneficiary - with Mr. *Matta* as signatory on behalf of the latter.

17. Her expectation that commission was to be paid in respect of the transaction was dashed on the date of registration of transfer. She adverted to a fax letter addressed to her by *De Waal-Baxter* dated 19 May 2009,[10] sent on the morning of registration of transfer, in which the defendant's liability for commission was disavowed for the first time. The contents of this communication are to the following effect:

> "**SALE: BURGER TE / NATIONAL MERCHANT RED MEAT PRODUCERS ORGANISATION**

9 Exhibit A15.
10 Exhibit A20.

> We advise that the aforementioned sale to the National Merchant Red Meat Producers Organisation was subject specifically thereto that the sale be approved by the Department of Land Affairs and guarantees issued by 30 November 2008.
>
> The sale was in fact not approved, nor was the guarantees received and the sale therefore fell away.
>
> A new Deed of Sale was negotiated, without your intervention and without any input from your agency, in which a new buyer was determined, a new purchase was negotiated and the subject matter of the sale was also different.
>
> In the light of the circumstances we have received instructions from Mr. Burger to repudiate your claim for agent's commission on the basis that you were not the effective cause of the sale and as such not entitled to agent's commission."

18. Her surprised reaction to this disavowal is set out in the transcript of evidence at page 68 as follows:

> "… we signed the Deed of Sale with Mr. Burger. We did everything we had to do. We explained to him how the procedure worked. As far as the new Deed of Sale was concerned, it's normal procedure that we're not involved there. We've done our work. That date had expired. We did ask Mr. Burger to extend it. There was a land claim on the property. And he said no, please don't. We don't want to delay matters any further. We want to continue with the same Offer to Purchase. He didn't want us to draw up a new Offer to Purchase because he was scared it was going to delay the matter further. He didn't want any more delays."

19. On pages 69 and 72 respectively she also highlighted her confusion around the defendant's repudiation of her claim for commission as follows:

> "I can't understand where he's coming from …. We did the sale, we took Mr. Burger – we made appointments with him, we took the client to the farm, he purchased the farm through us. And the date did expire – we wanted to draw up a new Offer to Purchase and he didn't want to. He said we must use the existing one; he doesn't want to delay the matter any further. So I don't know – I can't understand where they're coming from. I was the effective cause of sale; I did introduce my buyer to the property."
>
> "Can you tell Her Ladyship whether or not on any previous occasion Mr. Burger had given

any indication of repudiating liability for commission? --- Nothing whatsoever, Your Honour, I was totally shocked. I just couldn't believe it."

20. Under cross examination the plaintiff persisted that a deed of sale in the form of Annexure "A" was the norm and that the government was the purchaser notwithstanding what the Anne Chamber's agreement indicated. She explained that this was just an offer and that a formal deed was expected to follow once a valuation was effected. She appeared unable to understand the defendant's submission that the offer became the enabling deed of sale once it was accepted by him. She also appeared unable to understand the effect in law of the suspensive condition in her agreement, but added that the defendant had in any event specifically mandated her not to "*renew*" the offer after 30 November 2008. She took this to be the "*go-ahead*" to continue on the basis of the original agreement until registration of transfer. She agreed that a new offer to purchase would indeed have been necessary post valuation and acceptance by the defendant to reflect the reduced purchase price, but insisted that this need was countermanded by his specific request to keep matters as they were.

21. She was unable to verify with regard to telephone or files notes the occasions on which either she or *Tessendorf* phoned or with whom they spoke, but her common refrain was that they had been in "c*onstant contact*" with the defendant, the department and *Althea Petzer*. She remained convinced that she was responsible for the "*to whom it may concern letter*" dated 18 December 2008. She must have requested it, so she suggested, otherwise the reference in *De Waal-Baxter's* letter dated 22 January 2009 concerning the department's earlier fax to the "*Estate Agents*" could not have arisen. She

could only imagine that it must have been faxed to her contemporaneously.[11]

22. She rejected the assertion that that district director, *Molokoane,* could not have known of her involvement in the matter, insisting that she and *Tessendorf* had gone to her office to introduce themselves to her. She could not be specific, however, as to the date when this took place.

23. The plaintiff appeared unversed with the workings or the effect of the two applicable financing models in place at the time by the department to assist emerging farmers in the acquisition of farming property for land reform purposes or of the internal processes which had unfolded concerning *Mahanjana's* dealings with the department after the initial offer was submitted.[12] In this regard, whilst conceding on the one hand that NERPO wanted to acquire *Weltevreden* for its own purposes and to have title over it rather than to simply become a beneficiary, she was otherwise confident that *Mahanjana* had always said that the government would own the property.

24. Despite her obvious lack of knowledge concerning the financing models or internal procedures of the department she insisted, however, that she and *Tessendorf* had explained these "*very clearly to* (the defendant)". When asked to explain it in her own way, she stated as follows:

> "I was asked to find them farms, to find client a farm. I found him the farm, took him to the farm, he signed for it through his representative, because I went more than once to the farm. Mr. Burger accepted it. We then handed it in to the Department of Land Affairs and as well

11 That it was faxed is evident from both Exhibits A12 and "D", since the plaintiff's fax numbers appear at the top of these. The only clear fax report, however, is 7 July 2010 on A12.

12 These programs, outlined later in the plaintiff's case, per Messrs *Tessendorf*, *Mahanjana* and *Matta*, are referred to below.

> gave it to Baxter-de Waal. And the procedure after that is a project leader was appointed to go and look at the farm, then the valuation gets done, which was done. We told Mr. Burger what the valuation was when it came back. He accepted the valuation."

25. She was not clear when or where they had informed him, but the plaintiff was insistent she and *Tessendorf* had informed the defendant of the department's valuation. Her recall was that the department had phoned them since it was the agency's obligation to "*get back to the seller*". She was not put off by the fact that the letter advising of the valuation was personally addressed to the plaintiff. She dismissed this as "*standard procedure*".

26. She denied that her contact with the defendant concerning the transaction ended "*more or less around the beginning of November 2008*" or that her contact with *Althea Petzer* was limited on the basis put to her by Mr. Kincaid who appeared for the defendant.[13]

27. She conceded that she only met Ms *Molokoane* after May 2009, but could not remember the date. She rejected any criticism of her handling of the matter as an agent by *Molokoane's* exacting standards, stressing that they had done the "*normal*" thing expected of them, viz to keep in contact with the department and transferring attorneys.

28. Finally, once she was able to understand this, the plaintiff conceded that the introduction of *Mahanjana* to the farm (in relation to Annexure "A") was not

13 These assertions put to the plaintiff were never confirmed in subsequent testimony. Neither the defendant nor *Althea Petzer* was called as witness. Significantly, however, it was put to the plaintiff that she had (contemporaneously) faxed to *Petzer* a copy of *Molokoane's "to whom it may concern letter"* which the plaintiff had apparently sourced from Dawn Kemp Estates, the other agents interested in the defendant's wife's property transfer.

direct, but rather an indirect one. Still she maintained that this entitled her to payment of the commission pursuant to the ultimate sale of the farm to the national government.

29. *Mahanjana*, the national chief executive officer of NERPO, testified on behalf of the plaintiff. He is also a trustee of the NERPO Farming Enterprises and Development Trust, the entity which currently leases *Weltreveden* from the government through the department. The trust is an independent entity, albeit a section 21 subsidiary of NERPO which acts in the latter's interests in the acquisition of land used to train emerging farmers. The organisation relies for the realisation of its projects on government financing these purchases or bestowing the land upon it for "*free*" in the form of a free-lease agreement.

30. He acknowledged the plaintiff as an estate agent who had acted in NERPO'S interests before in introducing farming property in the Chris Hani/Matola district and who had shown "*Weltreveden*" to him.

31. He identified the Anne Chamber's sale agreement as the one signed by the chairperson of the provincial branch which had been entered into with the defendant. He agreed that it had never been envisaged that NERPO would be funding the purchase by way of a mortgage bond, given the special suspensive condition contained in the agreement. The manner in which this provision was framed he attributed to the plaintiff's role in looking for property on behalf of government, the acquisition of which they would look at financing.

32. He explained the two land redistribution models employed by the department for land reform purposes which were in place at the time pursuant to which they might "*take over*" properties identified by the plaintiff which piqued their interest. The first program – Land Redistribution for Agricultural Development (LRAD) - operated on the basis that government would award a grant to a maximum of R400 000.00 per qualifying beneficiary to purchase the land.[14] In practice, since farm values invariably exceed the maximum grant and in order to gain advantage of this program for its acquisitions, NERPO would combine members to make up a sufficient number to meet the purchase price. The beneficiaries would own the land with government exercising no control post registration.

33. The second program - which came after LRAD to address the difficulties occasioned by the large numbers of beneficiaries involved in a single purchase[15] - is called Proactive Land Acquisition Strategy (PLAS). According to this model, a beneficiary identifies a property in which he is interested. Government purchases it on the latter's behalf but leases it to the beneficiary who enjoys first option to purchase once government thinks he is ready and productive on the farm.

34. He agreed that it was the "*duty*" of the plaintiff, after conclusion of the sale secured by her, to "*facilitate*" the process with the department in accordance with their finance models. He was aware - and indeed it is common cause - that financial approval was not furnished by 30 November 2008. He learned

14 *Molokoane* testified that this grant was R434 000.00 per beneficiary, but nothing turns on this.
15 A further difficulty, it later emerged during the hearing, was that owners who had acquired property courtesy of the LRAD strategy were on-selling these to white farmers, thus defeating the department's objective to acquire 30% of the country's arable market by 2014.

as much from the project leader, Mr *Boltina*, of the Queenstown district office, with whom he was in telephonic contact almost on a daily basis concerning the transaction. To his knowledge the application failed on the LRAD system but, subsequent to 30 November 2008, was approved under PLAS. He remembered that such approval coincided with his year end holiday. He was further made aware, both by the defendant and *Boltina* that the monies for the purchase would only become available in the next financial year, commencing on 1 April 2009.

35. He identified Annexure "A" as the effective agreement employing the PLAS system and acknowledged the absence of NERPO EP being described as the purchaser in it. He also identified the lease agreement entered into between the government and NERPO Farming Enterprise Development Trust, signed by him in his official capacity, as being the vehicle through which NERPO's interest in the land for its purposes was ultimately realised (Exhibit "B").[16]

36. He testified finally that, between the signing of the initial agreement (including the period after 30 November 2008) and the culmination of his organisation as lessee in respect of the property, the defendant contacted him on a regular and frequent basis enquiring about the progress of the matter.

37. Gerald *Tessendorf*, an estate agent, confirmed his relationship and association with the plaintiff for purposes of selling farming property. He knew of the defendant's mandate to the plaintiff because he was present in her office at the time she first made an appointment with him to view

16 It seems that contrary to *Mahanjana's* expectation that the Development Trust would have an option to purchase the farm - the title of the document foreshadows such an option and paragraph 6 also makes reference thereto - such a provision was ultimately not provided for in the lease agreement.

Weltreveden.

38. He accompanied her to the farm when the defendant showed them around, discussed the purchase price he wanted and conveyed the urgency of the situation given that Standard Bank was intending to repossess his farm. He also learned of the defendant's matrimonial problems, this information having been volunteered to them by Mrs *Burger*.

39. He and the plaintiff called *Mahanjana* in Pretoria when they were back in East London. They knew that the defendant's farm was just what he was looking for. Arrangements were made for him to view it and both of them accompanied him back to the farm to show him the property. On the last occasion only the defendant's spouse was present.

40. *Mahanjana* expressed an interest in the property. He informed them that he would discuss the matter with the department and revert to the defendant in this regard.

41. He was not present when the Anne Chamber's agreement was negotiated, but was aware of the offer and its transmission by facsimile to *De Waal-Baxter* attorneys. Thereafter he was "*involved*" in the unfolding of the deal. He knew of every fax that was sent and the plaintiff notified him of all correspondence received.

42. He personally kept contact with the defendant after to keep him in the loop because the latter was "*in dire straits*". He was aware that the defendant

often phoned the plaintiff as well to find out what was happening. On occasions the defendant also came into the office and at one stage was in a particularly bad state emotionally.

43. He personally made a call to *Molokoane* to track the progress of the transaction. Similarly he spoke to *Boltina*. He recalls further that some time in October 2008 both he and the plaintiff went to Queenstown to introduce themselves to *Molokoane* and *Boltina*. He found *Molokoane* to be very accommodating. They informed her of the defendant's problem, of which she appeared to be already aware. She undertook to try to help and to speed things up as much as she could.

44. Conscious of the advance of 30 November 2008, he personally called the defendant at the beginning of that month to warn him that the offer was due to expire and that he needed to "*renew*" it. The latter asked what the implications were and he mentioned that there was a land dispute which was why the matter was dragging (He had heard about this dispute from *Boltina*). The very specific instruction from the defendant in this regard was that in no way should they stop the sale. They were to simply "*carry on*" with matters as they stood. He feared any delays because the bank was standing poised to repossess the property.

45. Adverting to the two schemes available to the department as mechanisms for facilitating the acquisition of land (his knowledge of these accorded with *Mahanjana*, *Matta* and *Molokoane's* understanding of how they operated); he was firm that they never got involved in the LRAD scheme, only PLAS.

46. He added that he dealt exclusively in farms and that he had successfully sold seven farms previously. Thirty or forty similar applications for acquisitions had been turned down by the department because of valuations not being accepted by the sellers. This was, however, the first land reform sale involving the plaintiff. His understanding of the process involved in these matters, in his role as agent - was that the offer to purchase was "*just to get the ball rolling*" and to serve as a basis for the valuation. Thereafter different procedures ensued: committee meetings were held and business plans drawn up etc. Finally the department drafted the ultimate deed of sale in which the government was reflected as purchaser.

47. He identified the deed of sale (Annexure "A") as being in accordance with what he understood to be the "*standard*" in respect of the processes involved.

48. He described his contact with the defendant concerning the transaction both before and after 30 November 2008 as being regular and - because of the delays and pressure the defendant was being placed under by the bank - very frustrating.

49. With regard the "*to whom it may concern*" letter[17], he acknowledged that he was aware of contact between the plaintiff and *Dawn* of *Kemp Estates* because of their interest in the conveyancing transaction concerning the defendant's spouse. This would account for the annotation in the plaintiff's hand of *Dawn's* name on it.

17 Exhibit A49 in this instance.

50. Exhibits "C" and "D", were to the best of his knowledge sourced from the original "*to whom it may concern*" letter which was faxed to the plaintiff's facsimile address. He could not decipher from the fax header, when this was, but thought that it could have been in December 2008 - making it contemporaneous with the time of *Molokoane* writing it.

51. Under cross examination he acknowledged that the Anne Chamber's agreement appeared on the face of it to be in accordance with the LRAD strategy, given that NERPO was indicated as purchaser. He added, however, that it still remained for the matter to be negotiated between *Mahanjana* and the department as to what "*route*" they were going to take. He clarified that he and the plaintiff did not get involved in "*that side of it*" and indeed that they had never before been involved with an LRAD application. Despite this – or personal knowledge that *Mahanjana* contemplated buying under this model, he could not dispute that *Mahanjana's* preference had been for NERPO to own the property in its own name. He added however that the purchase was envisaged "*through the department*" and that he expected that it would be funded under the PLAS system. Seemingly he and the plaintiff were not interested in how NERPO was going to achieve its objective to obtain the property. Neither did he consider that it was up to the agents to determine what system was effectuated. Similarly they were not involved in the "*internal processes*" concerning the meetings of the district screening committee etc. Their only obligation was to follow up with regard to process made.

52. He agreed with hindsight that the Anne Chamber's agreement should perhaps have stipulated the department as purchaser, with NERPO as beneficiary. However, because it was the plaintiff's first deal this is

unfortunately how the matter evolved. He further conceded that her agreement was in law a nullity for want of timeous compliance with the suspensive condition, but repeated his view that the purpose served thereby – as with all such offers - was merely to "*get the ball rolling*" so as to originate the going out for tender for the valuator and thereafter to generate all the further processes – environmental impact assessment, business plan and valuation, culminating in the ultimate sale as reflected in Annexure "A". Without it nothing could happen.

53. He disagreed under cross examination that he had only met *Molokoane* closer to the date of registration of transfer. He could say so because at the time of their meeting she had asked if he would in future contact *Boltina* in respect of the transaction, who was the project leader. He agreed however that the meeting was merely fortuitous because they were co-incidentally *en route* to Elliot at the time to look at a farm.

54. He conceded that - like the plaintiff - his record keeping was unhelpful as he made no diary entries of his visits or minutes of his calls.

55. As far as he was concerned, he was the person who phoned the defendant to inform him of the valuation. He explains that he did not wish to go on hearsay from *Boltina* and requested something in writing, which confirmation was provided to him. He conveyed the department's stance to the defendant, who undertook to revert to him once he had discussed the matter, with whom he did not know. He later called and learnt that he had already accepted the offer. They then left it to the department to negotiate the deed of sale with the conveyancing attorneys, as is the norm. This final

deed would not have eventuated, however, absent their role in the introduction and production of the earlier offer.

56. He could not comment on the plaintiff's evidence being inconsistent with his – or what the defendant would allegedly say – concerning where or how the valuation was conveyed to him.[18]

57. He was unaware that the district screening committee had turned *Mahanjana's* application down the first time because the valuation was too high; that the application had also failed on LRAD, or that *Molokoane* had approached the *Lukhanji Red Meat Producers* as a possible alternative beneficiary. There was, however, nothing unusual about this since the agents did not involve themselves in these processes.

58. Finally the plaintiff called *Daliwonga Armstrong Matta* who, until April 2009, was in the employ of the provincial land reform office as chief director.

59. He similarly testified as to the workings and import of the two land acquisition programmes, LRAD and PLAS, in place at the time of the transaction. He added, however, that by the beginning of 2006 the PLAS model had become the preferable option *inter alia* because of the limitation in the amount of the grants under LRAD and the large numbers required to make up the purchase price.

18 As indicated above, the promise of what the defendant would come and say never materialised as he failed to testify.

60. With regard to the Anne Chamber's agreement and the exchange of correspondence concerning the valuation and subsequent request by *De Waal-Baxter* attorneys to furnish the details of the purchaser of the property to draft the deed of sale, he saw nothing unusual. He explained that it was normally the appointed conveyancer who drafted the agreement. He added that the favourable consideration by the department under the PLAS programme was the reason why the purchaser ultimately reflected in Annexure "A" was the national government and that this was a natural progression.

61. Concerning clause 21 of Annexure "A" dealing with the payment of estate agent's commission, he clarified that, where agents were involved, this clause would be standard.

62. He testified that the complete process flow in respect of land reform transactions was as follows:

> "On receipt of an application or an offer the initial documentation gets submitted at our regional offices, like Queenstown, Umtata, East London, Port Elizabeth offices. We had four regional offices at the time. Now the initial screening of that application or offer is done at that level and any packaging or design of that project is done at that level, then the project officer is appointed who will deal specifically with that particular project, who would do the packaging and the design, conduct valuations and do all sorts of activities related to that and that application then gets submitted to a district screening committee meeting, then that district committee meeting would satisfy itself that the project is in order and that committee will then recommend to a provincial committee and once it gets to the provincial committee it is then that at the level of the Chief Director would start in the acting with that particular project, because the Chief Director would then chair the committee at the provincial level. It is then on that basis, on the basis of that interaction and scrutiny of the documentation and related activities that the project either gets approved or not approved and once it is approved it is then sent back to the district officer where it originated for the district office to take it

> further in terms of the conveyancing, the registration of transfer and all related activities, that's it in a nutshell.[19]

63. Because of the department's preference for the PLAS model he explained that the tendency in 2008/9 was for them to redesign projects away from LRAD through PLAS. This was part of the function of field workers in the registration office to advise on the best route that the progress could take, looking at the possibility of success and approval. In such event, however, as far as he was concerned, the project retained its "*original identity*".

64. He confirmed that Exhibit "B" reflected the NERPO development trust's interest in the project as beneficiary. There was nothing odd about this evolvement. In his view it always remained the same project.

65. Finally, with regard to earlier correspondence exchanged between *De Waal-Baxter* attorneys and the Commission of Restitution of Land Rights concerning the defendant's desire to dispose of erf 201[20] as well as the balance of the property, he recorded his view that the Commission is a separate entity from the department albeit the director-general of the department had a role to play in the Commission and its proceedings. This notwithstanding, he could not dispute that the Queenstown office might have acquired knowledge - in the course of their dealing with the land claim - that the defendant wished to dispose of *Weltevreden* as well.

66. Under cross examination he could not agree with Mr *Kincaid's* submission

19 At page 246 of the transcribed record.

20 This erf is adjacent to *Weltevreden* and was the subject of a land claim which, it transpired from *Molokoane's* evidence, has presently been de-gazetted.

that, because of the distinct concepts of ownership and lease under LRAD and PLAS respectively - and the progression ultimately in respect of NERPO's case toward the PLAS scheme - the department was no longer dealing with the "*same project*". Neither could he agree that once the district screening committee refused the application under LRAD that that signalled "*the end of the matter*". The single project was "*resuscitated*" under PLAS because exactly the same information was on the file, the same beneficiary, price and seller etc. This did not amount to starting afresh and opening a new file. Whilst there might have been a change in the "*mechanical process of the acquisition of the farm*" – and the need to provide a business plan as a supplementary requirement under the PLAS scheme - all other things in his view remained the same. It was always the same project.

67. Neither could he agree that the project had different purposes under each of the models. This is because the strategic objective of the department is the promotion of *access* to land - as opposed to ownership.

68. Under examination by the court he confirmed that the format of the application to partake in either programme was not prescribed. It was possible to initiate the process even by way of a letter asking the department to assist a beneficiary in acquiring an identified farm. Thus he explained in his evidence :

> "There is no particular format and upon receipt of that letter the Department has got a form whereupon it captures that information, particulars, property description and things like that, but the initiation is just about a letter of application or an offer to sell from a seller who simply brings in an offer to say: "I am selling my farm", then that initiates the process."

69. That concluded the case for the plaintiff.

70. The defendant called only a single witness, *Molerato Elizabeth Molokoane,* who is employed by the department as its deputy director in the Queenstown district office.

71. She premised her testimony with an explanation that the Commission for Land Reform is not an independent body apart from the department, even though it is a section 8 institution under the Constitution. This is because it is headed by the director-general of the department. In this vein she refuted that the department would not have known of the defendant's intention to sell *Weltreveden* before *Mahanjana's* introduction to the property by the plaintiff.

72. She too confirmed the intricate workings of the two land redistribution models, LRAD and PLAS, which she was called upon in her capacity as deputy director to implement. She is the chair of the district screening committee, whereas *Matta* chaired the provincial committee.

73. She acknowledged that she got to know of the Anne Chamber's agreement when she took the file over from *Boltina* in 2008. She explained that he was junior in her office, slow and unfamiliar with the process. The defendant had been coming to the office almost on a daily basis "*trying to get his property bought*" and wanting to know whether the story had changed from the day before. He was in a particularly emotional and labile state. He would sometimes be at her office at quarter to seven already when she

arrived in the morning. Given the annoyance – and the defendant's desperation – she herself had taken over the file from *Boltina* to deal with it.

74. The description in the offer of NERPO as the purchaser led her to conclude that it was envisaged thereby that the LRAD progamme was to be employed. She noticed from the project file that the original offer to purchase was for R9.5 million. Upon its first presentation to the district screening committee it was declined on the basis that the price was too high and because the price included movables - which it is not the department's policy to acquire. But even absent the movables, the net price of R7.5 million was too high; hence a decision was taken to appoint an independent valuator to determine market value.

75. Once the price was determined the offer was made per letter of *Boltina* addressed to the defendant dated 5 November 2008. She was away at the time but requested him to draft something because she anticipated that the defendant, who was in the know abut the meetings of the district screening committee, would want an update. She understood that the letter was personally handed to the defendant who took it next door to the offices of *De Waal-Baxter* attorneys. Their office got a response accepting it the very same day, in fact within minutes after the counter-offer was tabled.

76. According to her there was no evidence on the file that the plaintiff or *Tessendorf* had anything to do with the acceptance of the reduced offer.

77. Again on 11 November 2008 she was part of the committee that deliberated

on the project. The application before the district screening committee was in terms of LRAD, but was declined because of the large number of individual beneficiaries who would be required to make up the purchase price (66). The committee considered that this would not create a viable agricultural enterprise and would be inimical to the department's land reform objectives. They informed the beneficiary that the application was unsuccessful and that they were closing their file. *Mahanjana*, who she also knew personally, advised her that he would pursue other options, perhaps even approach a bank for finance.

78. But the defendant would not give up. He continued to make a nuisance of himself, asking her if she couldn't get someone else to purchase it. She then decided to approach *Mahanjana* again who it seems was also aware of the defendant's desperation since the latter had been calling him as well. She offered that the department could buy it, but only if she had someone who was prepared to lease it under the PLAS scheme. *Mahanjana* agreed, albeit quite reluctantly and after much persuasion by her - because it was really his intention to own the property - that he would explore this route, hence he submitted a business plan, a necessary requirement under PLAS.

79. When the process ran its course again before the district screening committee under the PLAS model it went quickly and the application was successful. However, budgetary constraints prevented the department from implementing the approval until the next budget term, which was due to commence on 1 April 2009.

80. The application thereafter served before the provincial screening committee

and was finally approved.

81. She could not agree with Mr. *Matta's* assessment of *Mahanjana's* two applications under LRAD and PLAS constituting a single project. She explained it thus in her testimony:

> "They are totally different. As a project officer, as much as you could use your discretion the beneficiary would have to agree for you to alter it from LRAD to PLAS because the difference is that in LRAD we give you a grant you do not pay back, it is yours and that's the end. With PLAS you take commitment to pay a lease annually and there are clauses in the lease agreement that says if you do not pay you are then taken out, so it has no security in a way, that's the difference of the two programmes.
>
> Yes and once the grant is given and the land is acquired that's the end of it, the grant doesn't come back? Yes."

82. Regarding the "*to whom it may concern letter*" of 18 December 2008, she confirmed that this originated from her. Although the project had been approved, Standard Bank was still intent upon executing. The defendant had pleaded with her to do something to get them to hold off on the imminent execution. A call to the bank established that something in writing was required which resulted in the letter. She personally gave this to the defendant to take to the manager of Standard Bank in Queenstown.

83. As for plaintiff and *Tessendorf*, the witness refuted any knowledge of their involvement in the transaction although she knew of their existence by virtue of the Anne Chamber's agreement. She, personally, dealt only with the defendant and *De Waal-Baxter* attorneys. If the plaintiff was involved, in her opinion, there would have been direct dealings with her on all salient

processes including the steering of the application through the district screening committee. Asked what an estate agent should do to fulfill a mandate she testified as follows:

> "We expect of an estate agent to make sure that the sale goes through. Basically you would receive an offer as attached here. After assessing or registering it, giving it a project file, you would then link with the project – with the estate agent to get your title deeds, whatever documents you need. We also expect them, after we have appointed valuers, where an agent is actually involved we do not put in terms of reference the seller, we include the agent's name. They are expected to take the valuer to the farm to show them whatever is on the farm. In this case where we needed a business plan we expect them to facilitate the business plan also. We only come to discuss the matter with the seller when we however cannot agree with the agent on the price, that's when we insist on seeing the owner of the farm, that's the only time we come to meet them and then also when we send the Deed of Sale.
>
> So you don't have dealings with the seller? --- No.
>
> You deal at most material times with the agent? --- With the agent, yes."

84. She conceded however that, notwithstanding her own expectations of what was required from estate agents in respect of these transactions, these might not necessarily co-incide with what the terms of the mandate were. Her only knowledge of the plaintiff's alleged entitlement to commission was when *Tessendorf* called to ask when the department was paying. This led to her sending to him a copy of the letter which she had written to *De Waal-Baxter* on 26 January 2009 formalising the offer.[21] This would have been on 2 February 2009 as is indicated on a fax report at the head of this letter. Later, she met him in her office one day as she was on her way out. He said he had come to introduce himself.

85. Under cross examination she agreed - as Mr. *Matta* had testified - that the

21 Exhibit A15.

offer to purchase was sufficient to iniate the application to the department on behalf of a beneficiary. Further, no new documentation was necessary in respect of NERPO's PLAS application save a business plan, which was a subsidiary requirement. Everything else that was on the file was used including the Anne Chamber's agreement. She added that there was a form used by the Queenstown office which they required from a beneficiary to be attached, but did not elaborate further in this regard.

86. Under examination by the court, *Molokoane* conceded that in terms of PLAS as currently implemented it is not envisaged that there will be even a gradual acquisition of land by beneficiaries. She explained that in the first year of PLAS's implementation, the intention was indeed that the beneficiary would lease for a period of between 3 and 5 years with an option to buy, but that in 2010 the Minister had issued a directive that no such land would be transferred. Even old state land currently owed cannot be transferred to any beneficiary. She agreed that this is not consistent with the department's stated objective to acquire 30% of the arable South African market by 2014, and might invite a constitutional challenge.

87. Notwithstanding this, she conceded that in terms of the department's reform objectives, land is not simply acquired for the sake of it. There would always have to be a beneficiary in that process.

88. That concluded the case for the defendant.

89. In determining claims for payment of estate agents' commission, the

question whether an agent is entitled to such payment depends on what was agreed between the parties and not upon any special rules of law.[22] The proper approach is to look at the contract and to see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened on the occurrence of which the commission is expressed to be payable. *In casu* neither the mandate nor its terms are in issue. The plaintiff was simply to find the defendant a purchaser for his farm. The common cause evidence is that the defendant was by force of circumstances desperate to dispose of his property, and appeared not to mind terribly who bought it.

90. In ***Aida Real Estate Limited v Lipschitz***[23] **Marais J** outlined the duty of the estate agent if he is to earn remuneration by way of commission for selling a property as follows:

> "The law with regard to a matter of this kind is usually stated in the following form: the duty of the estate agent, if he is to earn remuneration by way of commission for selling property, is to introduce to his principal (the seller) a purchaser who is willing and financially able to buy the property, and he earns the commission if the sale is concluded with that purchaser at the stipulated price or a price ultimately proved to have been acceptable to the seller."[24]

91. In this instance the fact of the introduction of *Mahanjana* to the defendant's property is not in issue although its direct connection to the ultimate sale concluded between the defendant and the government is in contention.

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22 ***Nach Investments (Pty) Ltd v Knight Frank SA (Pty) Ltd*** [2001] 3 ALL SA 25 (A).
23 1971 (3) SA 871 (WLD).
24 At 873 H.

92. In this regard Mr *Kincaid*, on behalf of the defendant, relied on several factors in support of the submission that the introduction of *Mahanjana* was not the effective cause of the concluding sale, the most obvious of these being that the Anne Chamber's agreement is fundamentally different from Annexure "A" in respect of both price and subject matter. So too her agreement contains the suspensive condition which made it subject to the approval by the department and the furnishing of guarantees by 30 November 2009, absent the fulfilment of which it lapsed after this date.

93. Further and in any event, so it was submitted, the department was already aware of the existence of the defendant's farm and his desire to sell it - courtesy of communication between the Commission and *De Waal- Baxter* with regard to the earlier land claim concerning erf 201 adjacent to *Weltevreden.* It could not be said, therefore, that but for the introduction of *Mahanjana* the department would not have acquired it, either through the process of land restitution (in the event of the land claim succeeding), or land redistribution, as he submitted happened in due course.

94. Mr *Kincaid* also relied on several intervening factors as distilling or overwhelming the plaintiff's introduction of *Mahanjana* to the property, namely the failure of NERPO's application for financial assistance utilising the LRAD model – which negative decision was accepted by *Mahanjana*; *Molokoane's* empathy for the defendant and her independent attempts to persuade *Mahanjana* to rather submit a business proposal under the PLAS scheme and its ultimate success on this basis culminating in the sale agreement (Annexure "A"); and the NERPO development trust taking over the property per lease (Exhibit "B").

95. Mr *Brooks* on behalf of the plaintiff submitted, however, that the plaintiff's introduction of *Mahanjana* - and the commencement of the department's internal processes initiated by the submission of the plaintiff's offer -culminated in the eventual sale a single line of cause and effect (a seamless unbroken chain of events) being in evidence throughout.

96. **Marais J** continued in ***Aida Real Estate v Lipschitz (supra)*** - concerning the dictum referred to in paragraph 90 above - to expound upon the principles to be applied in determining causality as follows:

> "A proviso has been added to the effect that the introduction of the able and willing buyer must have been the effective cause or *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 enquiry – *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, as the introduction was, or was the introduction still overridingly operative? Only in the latter instance is commission said to have been earned. This enquiry is not a metaphysical speculation in the result of cause and effect. It requires, as is said in *Webranchek v L. K. Jacobs and Co Ltd., 1948 (4) SA 671 AD*, a commonsense approach to the question of what really caused the sale to be concluded or, to put it differently, as it is said in a restatement of the law in America, whether it is "just" that the agent should receive credit and compensation for the work he has done for the seller. In regard to this latter version, it may be said in passing that this question has nothing to do with the amount of work the agent puts into it. The mere furnishing to this prospective buyer of the principal's address or the location of the property offered may be sufficient to entitle him to claim commission from the seller provided a line of cause and effect can reasonably be traced from the introduction to the conclusion of the sale……Something more than a nude *causa sine qua non* is contemplated by this type of contract of agency. The agent's instrumentality must have 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. The test is an objective one …"[25]

25 At 873 H – 874 F.

97. Before turning to the causality enquiry, I need say a word about the quality of the plaintiff's evidence. She struck me as being an unsophisticated business person who did not understand the niceties of the law. Her simple understanding of what was required from an agent was to introduce a purchaser, get a signed offer and follow-up. No more, no less. She had little appreciation of any distinction between concepts such as ownership and lease, or the import of suspensive conditions. Neither did she set her mind to the formal nature of an acquisition under the Land Reform: Provision of Land and Assistance Act No. 126 of 1993, or the internal processes of the department by which these ends stood to be achieved. Similarly she did not appreciate the value in her business of keeping formal notes or records. This notwithstanding, my contemporaneous reflections of her demeanour when she testified was that she was neither cavalier nor dishonest.

98. She readily made concessions where she understood the complex scenarios put to her, but was otherwise overwhelmed by the cross-examination and entirely out of her depth. She appeared to be genuinely perplexed and aghast at the thought that the defendant could disavow liability to pay commission to her, this premised on her simple understanding that she had introduced her buyer, had done what was normally expected of an agent, and was therefore entitled to payment. This was consistent with her response - in relation to the criticism against her failure to keep proper records - that she could never anticipate that "*we are going to have a court case one day on this*", and that this was the first time something like this had happened to her in her 18 years' experience as an agent. Once *Tessendorf* had revealed that this was her first land reform transaction, her inexperience and nescience of the department's internal processes was given context. Coupled with her poor

memory of salient events and an absence of record keeping, the plaintiff was a particularly unhelpful witness, but her evidence was to a large extent supplemented by the rest of the evidence which was either common cause or unchallenged.

99. In considering the various factors having a bearing on causality, I deal firstly with the suggestion that the introduction of *Mahanjana* was a neutral factor in the conclusion of annexure "A" because the Queenstown office was alleged to be aware of the existence of *Weltevreden* and of the defendant's desire to sell it independently of the plaintiff's introduction.

100. *Molokoane* conceded in this regard that the value of *Weltevreden* indicated in the correspondence exchanged between the Commission and *De Waal-Baxter* in 2007 concerning the land claim played no role in the assessment of the project, whether in respect of *Mahanjana's* application under LRAD or in terms of PLAS. She explained that the validity of valuations extended for a period of six months to a year so that in this instance the historical valuation obtained for the defendant's property was stale by the time the matter first came before the district committee.[26] Although she was at pains to suggest that they might have used this as "*an offer*", there was no evidence led by the defendant that anything in relation to the prior process concerning the land claim conduced ultimately to the sale concluded. The Commission had advised *De Waal-Baxter* some ten months before the introduction that they were "*excited and accept the offer to sell farm No. 201 to (*it)"[27], but nothing seems to have come of this. In the absence of the defendant having testified,

26 The valuation was never discovered, neither introduced into evidence.

27 Exhibits E and F refer. The Commission's letter incidentally does not state pertinently that it was interested in buying *Weltevreden*. It is further common cause that despite the passage of time erf 201 still belongs to the defendant and that the land claim pertaining thereto was recently de-gazetted.

the correspondence exchanged between those parties in my view has neither significance nor bearing.

101. In any event *Molokoane* conceded that it was in fact the submission of the Anne Chamber's agreement which served as the basis to initiate the department's internal processes in terms of LRAD, commencing with its consideration of the LRAD application.

102. Further the plaintiff's introduction of *Mahanjana* was not denied on the pleadings, neither was it suggested that the defendant would rely on his prior dealings with the Commission as dispelling the initiating cause relied upon by her. On the contrary, the correspondence between *De Waal-Baxter* and the Commission in this connection was introduced into evidence only after the plaintiff testified, almost as an afterthought.

103. Finally, in *Molokoane's* own assessment of the plaintiff's efforts as estate agent she considered that there was no doubt that if NERPO's application under LRAD had succeeded - at the reduced purchase price of R6 800 00,00 - she would be entitled to her commission. Therefore in my view any debate about the government purchasing *qua* the land claim falls away. Although Mr. *Kincaid* suggested that I should have no regard to *Molokoane's* opinion in this regard elicited under cross-examination, it is significant that she was prepared to accept the introduction of *Mahanjana* as the initiating cause in one instance, but not in the other.

104. Self-evidently the government is a different purchaser than the one

envisaged by the Anne Chamber's agreement, but that does not mean that the plaintiff is not entitled to payment of her commission for that reason alone. Mr. *Kincaid* correctly conceded as much. See in this regard ***Joubert and Others v Costner***[28] in which a young woman was introduced to certain property in respect of which she hoped to establish a commune. There were some complications with regard to the financing, whereupon her father stepped in to assist and bought the property for her. A submission that the introduction wasn't to the actual purchaser was rejected and in the result the agent was awarded his commission. The court held that the central enquiry is one of causality. If the original introduction led to the sale, then it does not matter that there is a difference of party.[29]

105. In ***Edwards v Wynberg Club***[30] there was an exchange of properties and a number of parties involved in making this happen. The agent introduced a certain Mr. *Engelbrecht* to the property, but he did not become the purchaser, another entity did. There was an intervention by a consortium ultimately which it was contended made it possible for the respondent to exchange its property for the property in question. It appeared that the appellant (agent) did not introduce the consortium to *Engelbrecht* or to the club's property. Furthermore, the appellant was not involved in the negotiations between the consortium and *Engelbrecht* which led to the agreement whereby the consortium purchased the shares in Fitzroy Bay (Pty) Ltd nor, for that matter, was the appellant involved in the negotiations between the consortium and the respondent which culminated in the purchase by the consortium of the club's property. The prospective "*purchaser*" of the club's property that was introduced to the respondent by

28 1982 (4) SA 540 (C).
29 See also paragraph 111 below in respect of ***Aida Real Estate (supra).*** Despite the later purchase by a company, the husband and wife who controlled the company were identified as one with the company.
30 1990 (2) SA 429 (C).

the appellant was the respondent. However neither *Engelbrecht* nor his company, *Engelmove (Pty) Ltd* purchased that property. The actual "*purchaser*" was the party introduced to the club's property by one *Janice Orpen*, she being the agent of *Engelbrecht* and not the sub-agent of the appellant. Despite the complex exchange, the introduction by the agent to *Engelbrecht* to Johnstone was held to be the effective cause of it. This conclusion was motivated thus by the court:

> "Whether in a particular case the agent's introduction can properly be said to be the effective cause of the sale must depend on the particular facts and circumstances of the case. In a case where the eventual purchase is not the person introduced by the agent, but a third party brought into the picture by the person whom the agent has introduced, the agent's entitlement to commission cannot, to my mind, depend solely on whether the relation between the eventual purchaser and the person introduced is such that the sale can be regarded as virtually one to the person whom the agent has introduced. That this cannot be the decisive factor is evident from the decision of the Appellate Division in *Nelson v Hirschhorn (supra)*. In that case the agent's claim for commission was upheld even though the eventual purchase was not the person whom the agent had introduced, but a party who became involved as a result of the efforts of that person. There was no suggestion, nor could there have been on the facts of the case, that the sale to the eventual purchaser could be regarded as being in substance a sale to the person whom the agent had introduced.
>
> In the present case there is in my view also no room for a finding that the relation between the consortium and Engelbrecht was such that a 'sale' of the Club's property to the consortium can be said to be virtually a sale to Engelbrecht. Nevertheless, it was the appellant's introduction of Engelbrecht to Johnstone that was the cause of the respondent becoming interested in the Chelsea Arms property. Those in control of the respondent obviously regarded the Chelsea Arms property as a desirable substitute for the Club's property. It was this factor - the respondent's desire to acquire the Chelsea Arms property, itself a consequence of the Appellant's introduction - that in my view remained operative throughout the negotiations which resulted in the eventual exchange of the two properties. Furthermore, although Engelbrecht was not the eventual purchaser of the respondent's property, it was due to Engelbrecht that the respondent disposed of its property and acquired in its place the Chelsea Arms property of which Engelbrecht was previously the effective owner. Although Engelbrecht decided that he no longer wanted the Club's property he clearly remained intent on disposing of the Chelsea Arms property. In order to achieve this he shrewdly exploited the

> respondent's interest in the Chelsea Arms property – an interest which, as I have said was engendered by the appellant's introduction – and appointed agents to find someone who was willing to acquire the respondent's property by means of the shares in the company owning the Chelsea Arms property. In my opinion the appellant's introduction of Engelbrecht to Johnstone was, as the appellant alleged, the effective cause of the exchange …"[31]

106. In this instance, one cannot overlook the particular context in which *Mahanjana* was approached for his interest in the defendant's property as a "*beneficiary,*"[32] neither the limited mechanisms in place by the department at the time by which access to redistributed land could be realised. Regardless of how the plaintiff understood the matter, *Mahanjana* confirmed that the offer was intended to be a land reform transaction and there can be no doubt that acquisitions pursuant to the Land Reform: Provision of Land Assistance Act present a different category of transfers with unique features. Even if *Mahanjana* wished for NERPO to acquire the land in its own right – as was indicated by the offer – it was going to be through the assistance of the department, and no other financial institution.[33] The promise of a sale being concluded lay in what the department could do by way of its powers. Although *Molokoane* suggested that he might approach a private financier, this was only after the first LRAD application failed. Moreover, there is no evidence that he in fact did so.

107. The ultimate manner in which the defendant's property was made accessible to NERPO's development trust is not mere co-incidence albeit *Mahanjana* testified that he was unwittingly misled into believing that the lease held the promise of the trust exercising an option to purchase in due

31 At 439 B.

32 In finding beneficiaries for the department the plaintiff and *Tessendorf* were focused on presenting only candidates who might benefit from the department's land reform objectives

33 This accorded with the plaintiff's simple understanding that, in presenting the offer, *Mahanjana* was going to buy "*through*" the department.

course. *Matta* and *Molokoane* explained that the stated objective of the department was to acquire 30% of arable land by 2014 per the mechanisms in place at the time. It is common cause that the LRAD model became problematic and that these applications were re-designed under PLAS. For various reasons government has presently resolved to acquire land in its own name rather than to award grants under the LRAD program. *Molokoane* explained how this might attract a constitutional challenge since it defeats the aim of redistributing farming property to black persons pursuant to government's Constitutional mandate, but *Matta* clarified that the focus is on access to such land, not necessarily ownership thereof.

108. In the scheme of things, therefore, and given the way *Mahanjana's* application mutated, there is in my view no disconnect between *Mahanjana* (representing NERPO) as potential purchaser and government as actual purchaser instituting the trust as lessee when these peculiarities are borne in mind. The trust's interest being limited to that of lessee - unfortunately for it without any option to purchase - does not break the causal chain. It succeeded in gaining access to the property by the only remaining land reform mechanism possible at the time.

109. To return to the central enquiry, the approach to be adopted by the court in determining effective cause of sale has been illustrated in a number of judgments which serve as a useful guide.

110. In ***Aida Real Estate (supra)*** the property was introduced by the agent to a husband and wife whereafter the wife advised that they were no longer interested in purchasing. This was not on account of the fact that she and

her husband had lost interest in the house as such, but because he got the impression that the agent was not doing his work properly in trying to sell the house. The husband later negotiated with the seller on his own. A sale was concluded after the seller's spouse granted a company controlled by the husband and his spouse a second bond, thus removing an obstacle in the way of concluding the purchase. Despite a break in negotiations, and the fact that the agent had dropped out of the negotiations, the court held that it was the agent's introduction and efforts which were the effective cause of the sale going through.

111. In ***Webranchek v L.K. Jacobs & Co Ltd***[34] there was an introduction; some quibbling over price and then a rival firm of estate agents became involved who resolved an issue around price. Only then did the eventual sale take place. Despite this intervention by the rival agent, the court held that the first agent was entitled to his commission because it was his introduction that "*aroused*" the interest of the purchaser. The sale had clearly been attributable to the efforts of the first agent that had constituted the "*dominant or effective cause of the sale*".[35]

112. In ***Nach Investments (Pty) Ltd v Knight Frank South Africa (Pty) Ltd***[36], despite the sale of the property to a tenant with a right of pre-emption who the agent had clearly not introduced - but in circumstances in which an exclusive mandate was given to sell it - the court found that it was the effect of an offer presented by the agent from an alternative source that effectively caused the tenant to exercise his option to purchase.

34 1948 (4) SA 671 (AD).
35 At 685.
36 [2001] 3 All SA 295 (SCA).

113. A different approach was adopted in the matter of ***Wynland Properties CC v Potgieter and Another***[37]. In this instance the purchaser had initially looked at a property at the introduction of the agent but lost interest in it because it had certain structural defects. Some time thereafter she had been persuaded by her sister- in- law to have another look at it and to talk to the sellers to see if she could find out about these structural defects. She inspected the property and elicited the assistance of an engineer who gave her a report that they could be dealt with. She then concluded a sale directly with the sellers. The court held that it was the subsequent intervention of the sister-in-law and the report of the engineer which was the effective cause of the sale and the agent was held not to have qualified for commission[38].

114. Also against the plaintiff, but distinguishable, is the matter of ***Basil Elk Estates (Pty) Ltd v Curzon***[39]. In this regard a couple looking for accommodation were attracted to a particular property. They were interested but the subsequent miscarriage of the wife caused them to walk away from the deal. The seller herself fell pregnant and elected not to proceed with a sale. She took the property off the market. Subsequently the erstwhile potential purchaser had a change of financial circumstances when he won on the races and was introduced to the same property by a different agent through whom the sale was concluded. The court held in the circumstances that the first introduction was not the effective cause, most notably because there was a change of agent and a lapse of approximately 9 months since the purchaser initially walked away from the deal.

37 [1999] 3 All SA 576 (C).
38 There is not much in the summary of facts from which to critically analyse the causality finding, but a significant determination was that the purchasers would have made contact through the intervention of the sister-in-law even if the agent had not introduced the property to the purchasers.
39 1990 (2) SA 1 (TPD).

115. In ***Et Mano Limited v Nationwide Airlines (Pty) Ltd***[40] the court held that the direct sale of an aircraft to a purchaser to whom the seller was previously introduced by an agent - without the latter's intervention - was necessitated by unforeseen circumstances and was moreover separated from the agents' prior failed endeavours to sell by a lapse of several months. Hence it was held that the agent was not the effective cause of the sale nor entitled to commission. The court referred to the appropriate test as follows :

> "The only event that would be regarded as breaking the chain of causation between the agent's endeavours and the eventual transaction is a sufficiently weighty intervening cause. What such an intervening cause might be and when it will be weighty enough, depends on the facts of each case. In general the question revolves itself into the question whether, on balance, it was the agent's exertions that caused the purchaser to buy or whether the sale was rather due to the impact of the intervening cause."

116. In assessing the agent's expected involvement and the measure of his exertions as a "*major positive force*" in the chain of causation, it is to be noted that he is under no obligation in the ordinary course to conduct the actual negotiations or to see to the completion of the ultimate contract.[41] He is remunerated for bringing about a specified event which he is incidentally under no obligation whatsoever to bring about, rather than for discharging certain specified duties or obligations.[42] He is paid "*by results and not by good intentions or even hard work.*[43] As was highlighted in ***Aida Real Estate (supra)***, the question whether an agent should receive compensation for the introduction has nothing to do with the amount of work put into it at all. This might well evoke some reticence on the part of the seller to pay on

40 2007 (2) SA 512 SCA at 519 C - D.
41 Van Zyl & Seuns (Edms) Bpk v Nel 1975 (3) SA 983 (N).
42 John H Pritchard & Associates (Pty) Ltd v Thorny Park Estates (Pty) Ltd 1967 (2) SA 511 (D) 577
43 Aida Real Estate Limited, (*supra),* at 875 H.

registration of transfer what must seem like an inordinate sum of money for seemingly little effort put in by the agent, but that is the nature of this type of contract of agency.[44]

117. In this instance much criticism was made of the plaintiff and *Tessendorf's* seemingly limited role in facilitating the process from introduction through to the successful application in terms of PLAS resulting in the formal conclusion of Annexure "A", but the defendant himself never testified to refute that anything more was expected from the plaintiff concerning the performance of her mandate beyond what she said was necessary for her to do in the circumstances. In ***Barnard Parry Ltd v Strydom***[45] it was said that the "*state of mind*" of the purchaser leading up to the sale – not intending to be analogous with the defendant's desperate emotional state *in casu* – is very material and his own evidence thereon may be of great importance. There seems to be no reason why the defendant did not testify, neither was it suggested that he was unavailable. On the contrary, several references were made to the promise of what he would come say in his testimony. In this regard the dictum in ***Elgin Fireclays Ltd v Webb***[46] is apposite:

> "… it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. (See Wigmore, secs, 285 and 286). But the inference is only a proper one if the evidence is available and it would elucidate

44 See ***Doyle v Gibbon*** 1919 TPD 220 at 223 where the agent handed the prospective purchaser a card to view the property. The purchaser bought directly from the owner despite leaving the parties to get on with their own business, but the simple leaving of a card by the agent was held to be the *causa causans* of the sale. See also **Machonochie's Executrix v Bidewell-Edwards** (1982) 9 SC 204 in which the court endorsed the principle that the sale effected through an agency entitled an agent to his commission "*however small his trouble in effecting the sale may have been*". In this instance an advertisement placed in a newspaper published by the seller and seen by the purchaser was held to be the effective cause of the sale notwithstanding that the agent had previously introduced the purchaser to the property. But these negotiations were broken off and communications had ceased entirely.

45 1946 AD 931.

46 1947 (4) SA 744 at 749.

the facts."

118. *Molokoane's* suggestion that the plaintiff had not performed by her standards of what was expected of an agent involved in land reform transactions can hardly supplement the defendant's case in this regard. The plaintiff, although she had been asked by the department to look for beneficiaries was not in this instance acting as the department's agent, but the defendant's - and her mandate was simply to find a purchaser for his farm. It matters not in my view, therefore, whether the plaintiff or *Tessendorf* personally conveyed the valuation to the defendant or whether one or either of them were involved in the redesign of *Mahanjana's* original application for finance under the PLAS model. Similarly it is insignificant that the relevant documentation required by the Queenstown office in the process was procured from the defendant or *De Waal- Baxter* attorneys. For the plaintiff it was enough to simply wait for the process culminating in registration of transfer to unfold. In the absence of any evidence by the defendant to the contrary, what in fact evolved from date of submission of her offer to registration of transfer required neither her assistance nor knowledge.

119. I mention, however, that it was not unexpected that the plaintiff's role would recede into the background once the defendant began to personally present himself at the Queenstown office and plead his case. On everyone's account *Molokoane* was sympathetic to his plight and quite taken with him. Indeed how could she ignore him when he was there from early morning entreating her to come to his assistance? The evidence also revealed that *De-Waal Baxter's* offices were next door to the Queenstown district office, so it is not improbable that this facilitated the exchange of documents and

communication between the department and the attorneys, leaving the plaintiff ostensibly out of the loop.[47]

120. I turn now to deal with the submission that the Anne Chamber's agreement was by 30 November 2008 a "*nullity*" for want of compliance with the suspensive condition. The defendant offered no countervailing evidence to the plaintiff's in this regard that his specific instruction was not to revise the offer. Already by the date *Mahanjana's* LRAD application served before the district screening committee for the second time, the offer did not fairly reflect the events which had by then unfolded in respect of valuation and counter-offer in respect of price; or that the subject matter of the purchase had changed. This notwithstanding, it sufficed for the committee's purposes. Even later when the PLAS application served before it, these changes (and the further obvious difference that the government represented through the department would be the purchaser if the application was approved under that model), plus the fact that the agreement had by then lapsed – with reference to the date by when the department was to approve the financing of the purchase price, did not offer an obstacle to the way forward. Its legal efficacy, or lack of it, seemed to make not a jot of difference to the district screening committee. This it is entirely consistent with the plaintiff and *Tessendorf's* evidence that the offer served merely to get the ball rolling and that a formal deed would be concluded later. It also fits in comfortably with the evidence of *Matta* and *Molokoane* that the initiating application required

47 This explains why, except for the initial letter submitting the offer and contentious letter in which *De-Waal Baxter* refers to a communication addressed by the department to the estate agents, none of the correspondence in the bundle directly evidences the plaintiff's involvement. Contrariwise this may be an indication of the plaintiff's relaxed business practices.

no particular formality. Indeed the offer at that stage, regardless of whether the defendant had "*renewed*" it, or extended the period for the financial processes to run their course, could hardly present as a perfect deed of sale with all the information ultimately contained in Annexure "A" as the drafting thereof had to await the project instruction letter. This only followed much later, toward the end of January 2009. *Matta* confirmed too that it was standard procedure for the conveyancers to draft a deed of sale, so nothing turns on this (or the legal reality that the offer had in law lapsed) as constituting a weighty intervening cause breaking the chain of causation.

121. *Molokoane's* initiative, driven by her concern and empathy for the defendant's situation, in persuading *Mahanjana* - apparently against his better judgment - to resubmit under the PLAS model after he had accepted the declension under LRAD and "*walked away from the deal*" is indeed a critical factor in the causal chain. Her efforts in this regard were quite commendable and saved the day as it were, but it was her duty - as testified to by *Matta* - to assist in this manner by encouraging the redesign of projects under the PLAS model.

122. Further, despite giving the impression that her intervention on this basis was a separate act divorced from anything which had gone before, she was obliged to concede that her efforts in resuscitating the project were for nought unless *Mahanjana* came on board. There had to be a lessee for the land to be purchased at all, and NERPO was it. She made a fuss of insisting that, despite the existing project file being placed before the district screening committee, this was a different and new project, but this cannot be true if *Mahanjana* was critical to its success. Had he declined *Molokoane's*

invitation at this point to resubmit a business proposal under the PLAS program, the line of cause and effect would indisputably have grown cold, but it was his revived interest in acquiring the defendant's property that clinched the final sale. The plaintiff's introduction of him to the property once again became relevant.

123. Inasmuch as the passing of time is a critical factor impacting causation, it is to be noted that the period between the failure of *Mahanjana's* application under LRAD (11 November 2008), and the ultimate success under PLAS (10 December 2008), was of very short duration. It may fairly be concluded that if the application had succeeded under LRAD, the payment of the plaintiff's commission would hardly have been contentious. But it was not. Even if the resubmission of the application under the PLAS model was underway without the plaintiff's knowledge at this time, in her mind she still had until 30 November 2008 for finance to be approved and, even thereafter, she had the blessing of the defendant to go ahead on the basis of the initial offer presented. This waiting ended early December 2009 by when *Molokoane* had informed the defendant – and the plaintiff claims to have known of this by virtue of her exchange with *Dawn* of *Dawn Kemp Estates* who was also waiting for this outcome – that the department had approved the sale. The deed of sale itself was only dated in February 2009, but this was because it was necessary for project letters to first be obtained before *De-Waal Baxter* could be instructed to draft the deed of sale. The further delay in registration of transfer was attributable to the fact that the department was obliged to wait in the new financial year in order to have funds to pay the purchase consideration. These are accordingly neutral factors.

124. Following on the approval of the sale, it was never suggested to the plaintiff that she would not be paid the commission due to her on date of registration of transfer. The formal deed of sale providing for payment of commission[48] – according to *Molokoane* included to indemnify the department in respect of such claims, coincidentally supports such anticipation on her part. If the defendant and his advisers thought that it followed logically that there was no connection between the original introduction and the eventual sale, or that the interest of the plaintiff had naturally passed with the failure of *Mahanjana's* application under LRAD, it is improbable that a commission clause would be included in the formal deed unless the plaintiff had a legitimate expectation to be paid her commission. It appears rather jarringly therefore that on the morning of registration of transfer, and seemingly unsolicited - because there is no correspondence indicating that the plaintiff demanded payment of her commission until after the defendant's disavowal of her entitlement thereto - *De Waal-Baxter* for the first time suggested that she was not entitled to be paid. The very act of doing so is consistent in my view with the plaintiff's submission that her agency was still very much involved and the defendant knew it - even if this meant only that she was awaiting registration of transfer in order to be paid her commission. The reason for the defendant's disavowal and the timing of it is instructive. It is based entirely on a legal argument that the offer to purchase had lapsed some 6 months earlier, in direct contradiction to the defendant's specific mandate not to rock the boat as it were by formally amending the offer or extending the period by when financing for the transaction had to be approved. If it were true that no expectation on the part of the plaintiff to be paid abided naturally after this date, it would surely have been unnecessary to warn the plaintiff that this was the defendant's thinking at all. I am accordingly constrained to find that this was nothing more than an opportunistic attempt

48 Clause 21 of Annexure "A"

on the part of the defendant to avoid his contractual obligation to the plaintiff when the promise of payment to him - and the end of a harrowing and stressful process - had at last become a reality.

125. In the premises I am satisfied that the plaintiff has established on a balance of probabilities that her introduction of *Mahanjana* and activities predominated as a causative factor in the conclusion of the sale and that she is entitled to payment of the commission. Since it was conceded by the defendant that if the plaintiff proved that she performed in terms of the mandate commission was payable by no later than the date of registration of transfer, I am further satisfied that interest on the commission should accrue from this date.

126. In the result I make the following order:

1. The defendant is to pay commission to the plaintiff in the sum of 542 640.00 (inclusive of vat), together with interest thereon at the legal rate calculated from 19 May 2009 to date of payment;
2. The defendant is to pay the plaintiff's costs of the action; and
3. Mr. *Daliwonga Matta* is declared a necessary witness

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B C HARTLE

JUDGE OF THE HIGH COURT

Date judgment delivered	:	9 March 2012
Appearance for the Plaintiff	:	Adv R Brooks
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