



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

CASE NO: 49507/12

14/4/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

14/04/2014

DATE

SIGNATURE

In the matter between:

SAMTOY CC

Plaintiff

and

HAFFENDEN GROVES (PTY) LTD

Defendant

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] This is an action for payment of estate agent commission in an amount of R660 000,00 with interest. The main issue for decision is whether plaintiff was the effective cause of sale of a certain portion of land between defendant and an entity known as Inkuba Estates (Pty) Ltd under circumstances where ; (a) the property was already known to the purchaser when plaintiff introduced it to the purchaser ; and (b) the sale was concluded directly between the purchaser and the defendant after the introduction without the involvement of plaintiff.

[2] The relevant allegations in the particulars of claim¹ read as follows:

4.

“ On or about 3 June 2011 and at Nelspruit, the Defendant represented by MR BREBNER orally gave the Plaintiff, represented by MR VAN EYSEN, a mandate to find a purchaser for the Defendant's property being Portions 8 and 9 of the Farm Rietfontein 274 J.T., also known as Portion 51, Remaining Extent of the Farm Rietfontein 274, at a selling price to be negotiated between the Defendant and a purchaser and to be accepted by the Defendant.

5.

The Plaintiff accepted the mandate.

¹ Paragraph 10 amended by notice dated 29 January 2014. Defendant's notice for consequential amendment is dated 04 February 2014 and both were granted during trial.

7.

On or about 3 July 2011 the Defendant, represented as aforesaid, instructed the Plaintiff, represented as aforesaid, to concentrate on the selling of the West Farm and the Plaintiff accepted the said instruction and concentrated on the selling of the West Farm.

8.

On or about 25 August 2011 the Defendant, represented as aforesaid, instructed the Plaintiff, represented as aforesaid, that the Defendant required the West Farm to be marketed at a selling price of R7 650 000 and the Plaintiff accepted this instruction.

9.

On or about 20 October 2011 the Plaintiff introduced MR P VAN ROOYEN to the fact that the Defendant's aforementioned West Farm was in the market at a sale price of R7 600 000.

10.

On or about 27 October 2011 and at the residence of the said MR BREBNER, the defendant, represented as aforesaid, requested the Plaintiff, represented as aforesaid, to pursue the said P VAN ROOYEN as a purchaser notwithstanding that the said MR VAN ROOYEN and Mr Kennett had, as a proposed joint venture, been interested in purchasing the Defendant's farm approximately a year earlier as a consequence of which the said Mr Kennett had viewed the Defendant's farm but that the aforementioned persons had indicated that they were not interested in buying same.

11.

The Plaintiff accepted the aforementioned instruction.

12.

On or about the 17th of April 2012 the Defendant sold the aforementioned property to INKUBA ESTATES (PTY) LTD (Registration Number 2012/035919/07) of

which said MR P VAN ROOYEN's son, Roelof Andries van Rooyen, is the only director and of which the shareholder are entities controlled by the said Mr. P van Rooyen, for an amount of R8, 800, 000.00.

14.

Plaintiff was the effective cause of the sale and, in the premises, Plaintiff duly performed the Plaintiff's obligations in terms of the mandate given to the Plaintiff.

15.

It was an express term of the mandate that, should the Plaintiff duly perform thereon, the Plaintiff would be paid a commission equal to 7,5% of the purchase price.

16.

Alternatively it was a tacit, alternatively implied term of the mandate that, in such event, the Plaintiff would be paid the commission equal to the generally accepted tariff for estate agents selling the type of property concerned in the Nelspruit area. The generally accepted tariff payable to estate agents in the Nelspruit area for transactions of this nature is 7,5% of purchase price"

[3.] I proceed to summarize the defendant's plea² only with regard to disputed issues that have a bearing on the ultimate question to be decided; namely (a) whether plaintiff's oral mandate was replace by subsequent written mandates in terms of which plaintiff was authorized to sell the West Portion of the farm ; and (b) whether plaintiff was the effective cause of the sale of the land in question:

² Some issues that were placed in issue were either admitted before the trial commenced and or became common cause during witnessess' evidence or cross examination.

[3.1] The defendant applied for and was granted permission to subdivide its farm into two portions, namely the portion lying to the West and the portion lying to the East . They are known as portions 8 and 9 respectively.

[3.2] Mr Van Eyssen was instructed to concentrate on finding a willing buyer to the West portion.

[3.3] Mr Van Eyssen represented to Mr Brebner that he had a willing buyer for the West portion for R7 650 000,00 (Seven million six hundred and fifty thousand rand). He demanded an exclusive mandate for a sufficient period to finalize the sale.

[3.4] Mr Brebner gave Mr Van Eyssen an exclusive mandate for a period sufficient³ to finalize the sale of the West portion at a price of R7 650 000,00 (Seven million six hundred and fifty thousand rand). A contract of mandate ⁴**was concluded** (my emphasis) on 09 September 2011.

³ The mandate expired on 23 September 2011.

⁴ Annexure A to defendant's plea. Exhibit ..

[3.5] Mr Van Eyssen failed to deliver on the exclusive mandate, and after its expiry, the parties concluded a further agreement of mandate to market the same west portion of the farm for the same amount. It was an express, alternatively implied, further alternatively tacit term that the exclusive mandate would be replaced with this new non exclusive mandate⁵ dated 27 October 2011. It would have expired on 30 April 2012.

[3.6] Mr Roelof Van Rooyen was employed by Cosmos Macadamias during October 2010. He and Mr Brebner met there, and the former was introduced to the fact that defendant's farm was for sale.

[3.7] Mr Phillip Van Rooyen and one Mr Tony Kennett made a proposal to buy defendant's farm through a joint venture. This did not materialize.

[3.8] The trigger event for the sale of the farm was when Mr Roelof van Rooyen completed his studies at the University of Stellenbosch.

⁵ Annexure B to defendant's plea (exhibit)

[3.9] Brebner also forwarded the details of the sale of the farm to Phillip Van Rooyen by email during June 2011. Mr Van Rooyen, after having been approached directly by Brebner, "warranted that he was not introduced to the property through any estate agent and more particularly not by AJ Estate Agents"⁶

[3.10] "Neither Van Eyssen nor EJ Estate Agents were the effective cause of the sale of the farm Rietfontein".

ISSUES THAT ARE COMMON CAUSE

[4] The following issues were admitted before evidence was led.

[4.1] That Plaintiff is a Close Corporation.

[4.2] That there would be no bar for plaintiff to claim commission merely on the basis of non-compliance with section 26 of the Estate Agency Affairs Act, Act 112 of 1976, as amended that requires that valid fidelity fund certificate should be issued to the plaintiff and every member or employee.

[4.3] That an oral mandate was granted to plaintiff.⁷

⁶ paragraph 7.4 of defendant's plea.

⁷ Defendant's version seeks to qualify the oral mandate by the two written mandates that authorized plaintiff to market the West Farm. Plaintiff maintains that the original mandate

PLAINTIFF'S EVIDENCE

[6] The first witness for the plaintiff was Mr. Felix Van Eyssen ("Felix"). His evidence is in the main based on email and other written communication⁸ between him and Mr Brebner ("Brebner") as well as documents he addressed to other parties he marketed defendant's property to, thus rendering his efforts the effective cause of the sale.

In-between summarizing his evidence, I will also summarize the correspondence, in chronological sequence:

The oral mandate

[6.1] Felix made contact with Brebner for the first time during 2010 when he was canvassing farms to sell on behalf of Embest Agricultural Corporation. Nothing came of it as Brebner told him he recently leased a farm and it was not for sale.

[6.2] He contacted him again on 19 May 2011 because he had a client. They agreed to meet at Brebner's residence on 24 May 2011.

remained valid throughout and was reaffirmed on 27 October when Brebner authorized its representative, Felix, to pursue Phillip.

⁸ Exhibit "A"

During the meeting, Brebner knew he was an estate agent because he introduced himself as such and it also appears from the document he provided him with (comparative sales).

Brebner took him around and asked what his client wanted to do with the farm. He informed him that he wanted to plant macademia nuts. Brebner advised him that he should not limit himself to one client. Felix told Brebner that he had a database with about 200 (two hundred) commercial farms. Brebner asked him to include his farm in this database. Brebner told him that his first priority was to sell both portions but if only one attracts attention, he would consider entering into a joint venture with the purchaser. He showed him the "pakhuis"/ pack house (storage for farm produce). He told him that the real value of the farm was in this pakhuis. Felix did not agree with this and told him by email later in the day. There was no doubt that Brebner wanted him to sell the farm. They discussed the mandate briefly and he told him that commission would be payable. The mandate included the whole farm as a going concern.

[6.3] During this meeting, Brebner gave him a listing of his property⁹ . It shows that the property is subdivided into two, West and East Portions.

⁹ page 38-40, Exhibit A.

The price Brebner anticipated for each portions was R9,25 m and R3.5m respectively.

[6.4] After their meeting, Felix sent Brebner a letter and attached what he referred to as "*Comparative Farm Sales of farms that has sold since 2006*". He prepared this document after their telephone contact on 19 May 2011. His experience as an estate agent is that sellers start off with higher prices. The purpose of providing them with comparative sales is to assist them to come to a realistic price. He specifically directed Brebner to look at Portion 3 of the farm Maritzdrift¹⁰ and Portion 5 of the farm Hermansburg¹¹. He believed that these farms were comparable to defendant's farm.

[6.5] Felix sent an email ¹²to Brebner on 25 May 2011 and advised him, amongst other things that he has compiled a document with the information provided and that this document would be provided to potential buyers. He also raised his concern about the challenges that may arise due to a land claim against the property.

¹⁰ page 49, Exhibit A

¹¹ page 62, Exhibit A

¹² p.71-72, Exhibit A

He also informed him that he had a potential buyer who is in the market to buy a farm with water rights to plant macademia nuts and that he wanted to take him to view the farm. He also informed him that in their next meeting they would discuss things like " *actual subdivisions, subdiviion of the pack house, irrigation and pumps..... marketing mandate and sales commission. It is important that a solid foundation is laid regarding the mandate*".

[6.6] On 25 May 2011, Felix and his colleague, Barry Libenberg made an offer of defendant's farm to a Mr. George Muller¹³. In the offer, they mentioned that the seller would like to sell the entire farm, alternatively one portion or enter into a joint venture.

[6.7] On 03 June 2011, Brebner signed a mandate¹⁴ to enable felix to obtain a legal opinion on the pending land claim. It is common cause that Felix did make enquiries at the Department of Rural Development and Land Reform , Mpumalanga. ¹⁵

He testified that he would not have gone into this trouble if he did not have a mandate to sell the farm.

¹³ p.98-101, Exhibit A

¹⁴ p.104, Exhibit A

¹⁵ letter dated 19 July 2011 addressed to Mr. EH Mawela, p. 118, Exhibit A

[6.8] On 03 July 2011, Brebner sent an email to Felix and advised him, after explaining certain values based on what he referred to as "Binno Steyns evaluation 2009", that:

" I want you to push the sale of the west portion. At this price and position, packhouse adjustment, you should be well placed to find buyers.

Later (my emphasis) we can then offer the east portion as more of a lifestyle estate....."

[6.9] Further emails were exchanged on 04 July 2011 in terms of which Brebner attached the evaluation report and the Binno Styles values he referred to in the email above. The valuation was done by Tetragon Valuers (pty) Ltd¹⁶ in 2009. The land and improvements were valued at R8 000 000,00 (Eight Million Rand)

Circumstances under which the exclusive mandate was granted and terminated

[6.10] Felix testified that early in September 2011, he received a call from one Jappie Terblanche about another farm that was next to defendant's. He told Terblanche that he had two farms next to each

¹⁶ p.4-25, Exhibit A.

other, referring to defendant's property. On 08 September 2011 he sought permission from Brebner to take Terblanche to view defendant's farm. Brebner enquired about the price he had given Terblanche, and Felix told him that it was R7 650 000,00 for Portion 8 (West farm)

Terblanche inspected the farms and decided that the defendant's was a better option. He requested an exclusive mandate for two weeks to enable him to look at the water rights.

[6.11] Felix contacted¹⁷ Brebner about an exclusive mandate as requested by Terblanche. Brebner agreed and signed the exclusive mandate in respect of Portion 8 (West farm) on 09 September 2011.¹⁸ The mandate expired on 23 September 2011. Terblanche did not buy the farm.

Introduction of Phillip Van Rooyen to defendant's property

[6.12] Felix testified further that on 17 October 2011, whilst out looking for farms to market, he stopped at a smallholding outside White River. He had a conversation with Mike Kleynhans ("Mike") who introduced himself as the manager of that farm and that he was employed by

¹⁷ letter dated 09 September 2011, p.120, Exhibit A

¹⁸ Annexure A to defendant's plea and page 119, Exhibit A.

Phillip Van Rooyen ("Phillip") of Cosmos Macademia. Mike informed Van Eyssen that the farm they were in at that time was not for sale, but he would know in a day or two if there were any farms available for sale.

[6.13] Felix told Mike about Brebner's farm. Mike informed him that he should bring more details because his employer was looking for a farm to plant his young macademia trees.

[6.14] He called Mike two days later for information about farms that are on sale. Mike gave him two telephone numbers of Odendaals family. He called them but the farms were not available for sale. On the same conversation, Mike told him that Phillip needed the details he had promised to bring.

[6.15] He delivered the details¹⁹ of defendant's farm to Mike to hand over to Phillip on 20 October 2011. Kleinhans acknowledged receipt of the full listing by appending his signature.²⁰

¹⁹ p 122-125.

The first page is marked "CONFIDENTIAL"

[6.16] Felix went on to testify that on 24 October 2011, he wrote a letter to Brebner and gave him feedback about Phillip's interest in the farm and that he has delivered the listing as stated above.²¹

In the same letter, he advised Brebner that (a) He was contacted by another farmer from Delmas, Peter Kleu who expressed his interest in the East portion ; and (b) that as their mandate had expired, he needed Brebner to sign another **non-exclusive** mandate.

[6.17] He met with Brebner at his residence on 27 October 2011. He took along the non-exclusive mandate document he had prepared for Brebner to sign.

During their discussions, Brebner mentioned that he had had previous dealings with Phillip about the farm, but that they could not agree on the asking price.

ATT: PHILLIP VAN ROOYEN, MIKE KLEINHAND, KOSMOS MACADAMIAS. At the bottom of the page it is written: "AJ ESTATE AGENTS.... ". Contact details of Felix and Barry were also provided.

The property is described in page 2 as "...situated in Alkmaar / Schagen area. The original farm which was Portion 51 (Remaining Extent) of the farm Rietfontein has been subdivided into two portions which subdivisions have been approved by the surveyor general. Only the West portion (as indicated on the map) is for sale."

The price of " R7, 600,000.00 (Seven Million Six Hundred Thousand Rand) Exclusive of VAT is mentioned in the last page under paragraph INVESTMENT"

²⁰ P. 121, Exhibit A

²¹ P.126, Exhibit A

[6.18] He testified further that Brebner neverthelss signed the non-exclusive mandate²². No restrictions were mentioned . Brebner confirmed that Phillip and Tony Kennett had been to view the farm. He asked if he should pursue Phillip and Brebner answered in the affirmative. The reason he asked the question is that if he did not get a specific mandate not to pursue him, he is entitled to claim commission.

[6.19] He contacted Mike on 31 October 2011 and was advised that the documents were indeed given to Phillip, but he had indicated that he was not interested in the farm.

[6.20] On 31 October 2011, he sent an email²³ to Brebner and attached a draft joint venture proposal. He also attached information that he intended to send to Peter Kleu. Felix testified that after 31 October 2011, Felix was no longer interested in the joint venture.

²² p. 127, Exhibit A

²³ p.128-130, Exhibit A

[6.21] He tried to contact Brebner on 29 November 2011, but he did not pick up his phone. His wife picked up the phone after several unpicked calls. She told him that Brebner was in a meeting with Phillip²⁴.

[6.22] Felix testified further that he requested Brebner to meet with him and Peter Kleu. The meeting took place on 01 December 2011. He prepared a minute ²⁵ of the issues discussed.

[6.23] Felix went on to testify that at this point he gained the impression that that they (his agency) were being misled by Kleinhans and Brebner.

His impression stems from two incidents that he mentions in his letter to Brebner dated 10 December 2011. The first is about a potential client, Mark Frazee who contacted him on 20 October 2011 with interest on the defendant's farm. He was eager to meet, but kept quiet until Felix called him on 08 December 2011. Mark told Felix that he had already

²⁴ Defendant's counsel objected on the basis that this is hearsay. However, a concession was made during cross examination that indeed the wife has confirmed this.

²⁵ P.131, Exhibit A, signed by Brebner on 10 December 2011.

Some of the recordings are that : Kleu was interested in the West Portion , but the price was high for him. Brebner was not willing to sell the East Portion, until the West was sold.

"8. After the meeting, "Mr Brebner informed Felix that he had reconsidered the price of the West Portion and after much consideration had reduced it to a net price of R6, 200, 000.00 Exclusive of Vat and Agents commission"

met with Brebner and he had shown him information about the subdivisions.

The other incident concerns a conversation he had with Mike on 9 December 2011 where he told Felix that Phillip had purchased another farm and would not be interested on the offer to purchase.

In this letter, Felix warned Brebner that he should “ *Be aware as the farm is being marketed by numerous agents that you could end up having to pay commission to more than one agent. The answer is to establish the source of information from the prospective purchaser and then inform the agent to verify the information*”

[6.24] Felix and Brebner held a meeting on 10 December 2011 where the latter admitted that indeed he did have contact with Mark Fratzen. They discussed other potential purchasers.

Peter Kleu joined in the meeting and put in an offer of R7 000 000,00.

[6.25] Felix testified further that up to this stage Brebner did not tell him that he was negotiating with Phillip or that he should not pursue him.

[6.25] Felix went on to state that he had a feeling that information was being withheld from him.

He wrote a letter²⁶ to Brebner on 05 January 2012 and explained to him that if Phillip has made an offer and same is accepted, he (Felix) would lodge a commission claim against the defendant. He detailed the basis of his claim, starting from how he approached Mike up to the meeting Phillip had with Brebner on 29 November 2011 and the reduced price in-between.

[6.26] It is imperative to reproduce Brebner's response²⁷ to this letter in full.

" Just got your letter, and refer to "Marketing of Portion 8 and 9 Rietfontein / Phillip van Rooyen"

Please note the following:

1. *Phillip van Rooyen has not yet made an offer to purchase.*
2. *A few months prior to 20/10/11 (date noted by you as having handed Mr Kleynhans all the info);*

Tony Kennett was introduced to me by Guido (his farm manager here at Schagen). I know Guido personally and had mentioned that we were considering selling. He informed Tony. Tony had met with me, on more than one occasion, on behalf of himself and PHILLIP VAN ROOYEN in consideration of a partnership to purchase the farm (in

²⁶ p. 137, Exhibit A

²⁷ email from Brebner to Felix dated 05 January 2012, p.139, Exhibit A

total). ALL INFORMATION WAS HANDED TO TONY BY HAMISH BREBNER, on which he and p. van Rooyen would base an offer.

So the info that you handed to Kleynhans (whom I have never met or had dealings with), was in fact "second hand".

I can go further back to two years ago, when I heard from Phillip's son Roelof, that they were looking for a farm. I suggested then that Phillip should contact me. At that point, Phillip informed me that the farm was too small. So he has been well aware of the possibilities here for a long time, and has shrewdly been watching and waiting.

Based on the above, I fail to see that you have a commission claim.

Regards

Hamish Brebner

..... "

[6.27] Felix responded to this email on 06 January 2012. It appears from his response that he maintained a humble attitude by for instance not disputing that the information handed to Mike could have been second hand and also requesting that Peter Kleu be given an opportunity because he wanted to improve his offer.

[6.28] On 20 January 2012 after learning that the farm had been sold, Felix confronted Brebner about it. The latter's response was that "*win some, lose some*"

[6.29] In terms of the deed of sale ²⁸dated 20 January 2012, the farm was purchased by Inkuba Trust, represented by Phillip.

[6.30] The deed of sale was changed²⁹ and the parties to the agreement are now Inkuba Estates Property Limited represented by Roelof Andries Van Rooyen.

[6.31] The defendant's attorneys reacted to the letter of demand by stating that defendant had been in negotiation with Phillip since Felix got his mandate. Felix denied being told this.

[7] **Under cross examination**, Felix admitted that various other estate agents were marketing the property and that they could have taken prospective buyers to view the property. He also admitted that Brebner was

²⁸ p. 154, Exhibit A

²⁹ This is irrelevant now because Phillip admitted during cross examination that ..

Therefore, for all intents and purposes the

only obliged to report only on those prospective purchasers that were introduced by him.

[8] He explained that the issue of commission would have been discussed on the meeting of 03 June 2011. He denied that the exclusive mandate affected or altered his oral mandate. He re-iterated that the purpose for the exclusive mandate was to afford Terblanche an opportunity to look into the issue of water rights.

[9] Felix maintained that the non-exclusive mandate was for the entire farm and that he made an error by not stating this and also not adjusting the price accordingly. I will revert to this later.

[10] It was put to Felix during cross examination that Brebner would testify that:

[a] He gave him an oral mandate to sell the entire farm, but this was changed by the exclusive mandate in terms of which he was authorised to sell the West farm only.

[b] The non-exclusive mandate was for the West farm only as recorded and there was no error with regard to the description or the price thereof.

[c] He negotiated a higher price than what Felix was offering the prospective buyers.

[d] He has known Phillip for more than ten years.

[e] He sold the farm to Phillip because he wanted to buy the entire farm, not just the West Portion.

[f] He gave Felix mandate to pursue Phillip because he already knew him.

[10.1] It was also put to him that Phillip would testify that:

[a] He (Phillip) never met him and was not introduced to the property by him.

[b] He already knew about the property by 26 June 2011. Brebner wanted R12m .

[c] He only glanced / looked at the document that Kleinhans gave him, moved it aside because he already knew the property. He did not check where it came from or the price.

[d] He visited the property in November after his son had made it clear that he wanted to join the family business. The property was in a poor state.

[e] Brebner did not mention Felix .

[f] He exchanged emails with his son on 07 October 2011 about buying defendant's farm.

[11] I have no issues with the evidence of Felix when assessed in its totality, particularly in sequence of events as outlined above. The only illogical part is his assertion that the scope of the non-exclusive mandate covered the entire farm.

[11.1] In the letter dated 24 October 2011, Felix asked Brebner that as their mandate had expired, he needed him to sign another **non-exclusive** mandate. Therefore, its extension, or new mandate based on its expiry cannot be for the entire farm.

[11.2] It would make sense if he were to say that the non-exclusive mandate was intended to formalize the oral mandate to concentrate on the West farm.

[11.3] Felix had an oral mandate to sell the entire property and an oral mandate to concentrate on the West farm and then the East after the West has been sold.

I do not accept that the non-exclusive mandate was meant to cover the whole farm, particularly in view of the price.

[11.4] **I do accept though** and make a finding that the oral mandate to sell the entire farm was not affected by the two written mandates. These were meant to pursue the agenda to

sell the West farm first.³⁰, but evidence shows that he was marketing the East Portion too.

[12] Felix, in my view was an honest witness and he gave his evidence in a straightforward manner. The only confusion related to the effect and status of the written mandates. I cannot fault him. The letter of demand relies on the two written mandates as his cause of action. However, the cause of action in the particulars of claim is the oral agreement to sell the entire farm. This was repeated on 27 October 2011 when Brebner told Felix to pursue Phillip despite the fact that he and Tony failed to secure a sale earlier. This was after receiving feedback that the listing document was given to Mike to hand to Phillip.

[12.1] The documents referred to above, as well as the time line outlined make sense and justify a finding that the initial oral mandate was not changed. Felix met Kleinhans on 21 October and gave feedback to Brebner by letter dated 24th October. They met on 27 October 2011. This was clearly in terms of the initial oral mandate because as stated above, the exclusive mandate expired on 23 September 2011. The issues that gave rise to the claim for commission happened in-between the two written mandates.

The non-exclusive mandate was only signed on 27 October.

³⁰ See paragraph 6.8 above. The oral mandate to sell the farm was not revoked.

[13] Felix was not able to answer questions relating to emails exchanged between Phillip and his son. This in my view does not mean that he was not honest. He simply had no knowledge and the emails were only revealed in court, hence they are marked with an 'A'.

[14] **MIKE KLEINHANS** was the second and last witness for the plaintiff. Until his resignation in 2013, he was employed by Phillip to manage his farm known as Ideaal³¹.

[15]- His evidence and that of Felix on the circumstances under which they met, their discussion on the day and subsequent days corroborate each other on material respects.

[16] He testified that Phillip had informed him on an earlier date that he should keep his ear on the ground for information about sale of farms as he wanted one for his macadmia tress.

³¹ he is a qualified tool, jig, dye and pattern maker. he is also a qualified quality engineer, qualified processing engineer, qualified audit engineer and he had a lot of businesses. his last employment before joining phillip's company was as a security guard for a company that was fighting rhino poaching.

i have noted that counsel for the defendant in his written submissions has indicated that he worked as a rhino poacher. this is not correct.

[17] On 20 October 2011³², Felix arrived, as arranged, and gave him a blue folder to hand to Phillip. He signed acknowledgement of receipt, page 21 of Exhibit A. The folder was transparent, as such, he could see the writing inside, but he did not read the contents. He gave the document to Phillip on a date he could not exactly recall. Phillip took a quick look and said that he was not interested because he already knew the farm. He later informed Felix what Phillip told him.

[18] Mike was taken through the events relating to his meeting with Viljoen, Phillip's attorney where he was asked some questions about his meeting with Felix and later on asked to sign an affidavit about it. The gist of his evidence or complaint in this regard is that the affidavit was commissioned in his absence. This was denied by Viljoen and his secretary who testified for the defendant. This is really not relevant, as such I will not go into further details about it.

[19] His cross examination was to put it mildly, in my view meant to belittle him in that: (a) It was impressed upon him that he is not Phillip's spokesperson, (b) Phillip would never lie, (c) Phillip never asked him to keep his ear on the ground for information on farm sales, (d) he

³² Felix testified that this was on 21 October 2011. Mike struggled with dates. This in my view is of no consequence.

was instructed not to give out information, however, he gave Felix Phillip's telephone number, (e) insinuations were made that he probably get incentives for sourcing information about farms, (f) he is just a manager of a small vegetable farm, (g) Phillip was not at the farm on the day he alleges he gave him the folder from Felix, (h) he admitted in his affidavit that Phillip would not discuss his business with him, (i) Phillip did not see the price in the document he gave him.

[20] Throughout the cross examination, Mike remained calm and humble inspite of all the questions that sought to put him in his lowly place. He struggled with dates, but I found him to be honest because he did not for instance dispute the contents of his affidavit. He said it is what he signed, but the commissioning happened in his absence. He was simply worried that there were annexures, but he does not see them in the documents before court.

[21] The relevant part of his evidence is that he gave Phillip a folder, not just one page (acknowledgment of receipt) as it was put to Felix by counsel for the defendant.

[22] My first impressions was that he was struggling with dates because of advanced age³³, but upon my enquiry, he confirmed that he was in his fifties. His answers were coherent and he was consistent though.

DEFENDANT' EVIDENCE

[23] The first witness for the defendant was **DANIEL ROUX VILJOEN**. He is an attorney , having been admitted in 1979. His evidence in chief centred around his encounter with Mike . The purpose , according to him was to gather the version of events and his relationship with Felix. The meeting took place on 12 July 2013 . It was arranged by Phillip and was prompted by a subpoena Mike received to testify in this trial. The gist of Viljoen's evidence in chief was about how he interviewed Mike, made notes and then drafted an affidavit ³⁴which he sent to Phillip's office for him to read and get commissioned.

[24] Other than the ethical concerns around the manner in which the meeting and interview was arranged ; **the cross examination** yielded the following facts that are relevant in this dispute:

³³ I thought he was in his seventies because of his haggard look, and slow, calculated but firm responses. Phillip testified about his alcoholism before he employed him.

³⁴ P. 300, Exhibit A

[24.1] When he consulted with Mike, he already knew (because Phillip informed him,) that Phillip received documents from an estate agent. It was a full listing of the farm.

[24.2] He was involved in correspondence with Phillip whilst acting as attorney for the defendant in this matter and he did consult with Phillip after receipt of summons. He knew Phillip's version. He thought Phillip and defendant were in consensus that there was no agent involved in the sale. He was not involved in drafting the indemnity clause in the deed of sale.

[24.3] He knows Roelof had an interest in the farm . The first discussion he had with Phillip about the farm was in November 2011. He cannot recall earlier discussions. He knows that Phillip's son wanted to farm, but cannot recall if this was discussed earlier than November 2011.

[24.4] He confirmed email communication between him and Phillip on 14 December 2011³⁵. They had a consultation earlier about Haffenden farm and he wanted to know if he should close the file. He

³⁵ p.314, Exhibit A

had earlier sent Phillip an account³⁶ on the consultation they had about possible purchase of Haffenden farm.

[24.5] He confirmed that he received an email³⁷ from Phillip on 06 January 2012. In this email, Phillip explains, amongst other things that that *"Roelof stel nou positief belang in die totale Haffenden Groves (East and West) en hy en Hamish gesels wat seker sal speed optel volgende week"*

Phillip, in this email also requested Viljoen to attend to certain things that he numbered 1-12, amongst which is the value to be attached to the pack house, registration of a company with Inkuba Trust as shareholder that would buy the farm as a going concern. Phillip concluded the email by telling Viljoen that this is a great opportunity and responsibility for Roelof and that he was going to help with limited finance *"maar hy gaan groot skuld maak om daar sy toekoms te bou"*

[24.6] Viljoen went on to confirm that in the first transaction, Roelof did not feature because the sale was between the Trust and the defendant. However, this was changed because they could not

³⁶ p.315, Exhibit A

³⁷ p.141, Exhibit A, addreesed to Nadine Viljoen (Viljoen's daughter and partner in the law firm)

comply with the timelines set by the defendant. He does not know why time was of the essence to Brebner.

[24.7] In October 2011 Viljoen assisted Amanda De Lange of Kellerprince estate agency with conveyancing work in respect of the sale of the Western portion of defendant's farm to a company known as Xpectrade. On 11 January 2012, he wrote an email³⁸ to Amanda and attached a deed of sale. He also advised her that *"the seller is currently in negotiation with a third party as regards the possible sale of the totality of the farm and that final decision in this regard will only be made by 20 January 2012..."*

[24.8] Viljoen confirmed that he knew that there was a mandate to sell the Western Portion of the farm. When he consulted with Phillip on 30 November 2011, he was already assisting De Lange. During January 2012, Brebner told him that he was in negotiations with a third party to buy/sell the farm.

[24.9] He conceded that the real value of the farm as far as he knows is in the Western Portion.

³⁸ p.143, Exhibit A

[24.10] He was referred to the deed of sale he prepared in the transaction between Xpectrade and defendant³⁹. He admitted that he used the information in this document in the subsequent agreement between Inkuba Trust and defendant.

[24.11] He was asked about the indemnity clause in the deed of trust between Inkuba and defendant and the reason thereof. Viljoen explained that it was a standard clause⁴⁰. When asked whether at the time the issue of commission was not discussed between the parties, he explained that he knew there was correspondence about it, but could not remember whether it was before or after the agreement was signed.

He was referred to the deed of sale between Xpectrade and defendant where it is specifically recorded that commission is payable and asked why it was necessary to put an indemnity clause in the Inkuba Trust agreement when the parties are certain that no agent was involved.

His answer was that he knows that the issue of agent came up , but that both parties were adamant that no agent was involved.

³⁹ p.144, Exhibit A

⁴⁰ Clause 18 reads "COMMISSION: The PURCHASER acknowledges and warrants that no estate agent introduced the PURCHASER to the PROPERTY or the SELLER or did anything directly or indirectly to bring about this sale and indemnifies the SELLER against any commission claim"

[24.12] When asked whether he knew of the correspondence⁴¹ between Felix and Brebner about possible claim for commission, Viljoen's answer was that "*it is not impossible*". When pressed by the court for an answer, he maintained that he could not say it was possible or impossible.

[24.13] Viljoen was asked, in his capacity as trustee of Inkuba Trust what the issues were with regard to the commission claim by Felix. He explained that as far as he knows, the parties said that Felix did not qualify for commission because he did not contribute anything and that they were at all times in negotiations. They never discussed whether he would at least be entitled to commission for the West Portion. He only heard that Felix had a mandate when they started litigation.

[24.14] It was further established during cross examination that Inkuba Trust was subsequently substituted by a company⁴² in the deed of sale.

⁴¹ P. 137-139, Exhibit A

⁴² email dated 15 February 2012, p. 178, Exhibit A

[24.15] It was also established that when the commission claim came up Viljoen was appointed to represent defendant and that he sought Phillip's input to answer to the allegations in this regard. Emails⁴³ were exchanged between Phillip and Viljoen wherein the former was asked to explain whether Mike had spoken to him about the sale of the farm. Phillip's response was that Mike has placed a 2 page document on his desk. He was already aware of the farm. Phillip was also asked to comment on the response to the commission claim.

[24.16] It was also established that he already knew about Mike at this time (April 2012), but only took his statement (affidavit) in 2013. His explanation is that he did not want to take a statement then because he did not want to cause trouble between Mike and his employer. He only took an affidavit after his resignation because it would have been difficult to get hold of him and there was no longer any employment relations to protect. When asked if he believed Mike did something wrong, Viljoen answered that Phillip does not believe that what he did was right. According to Viljoen, Phillip does not take advice from managers and he did not ask Mike to procure property for him.

⁴³ p. 217-219 dated between 18 and 20 April 2012, Exhibit A.

[24.17] It was also established that Viljoen has always known that Phillip received documents from Mike, even before he sent the emails referred to above.

[24.18] Viljoen conceded that the affidavit he drafted for Mike to sign is not entirely correct because it gives an incorrect impression that Phillip received one page from Mike. The page contains Mike's acknowledgement of receipt of documents. He admitted that he has seen the documents, and it is more than 2 pages.

[24.19] In re-examination, it was reiterated that defendant in this action is Haffenden, not Phillip, hence the response in the reply for further particulars that defendant did not receive the documents in question.

It was also emphasized that the cause of action in the letter of demand was the two written mandates and the response was based on that. In conclusion, it was also placed on record that it would have been impossible for Viljoen to respond to the letter of demand without input from Phillip.

[25] Viljoen was non-committal and evasive when confronted with facts that contradict his version. His answers were words such as "*it is not impossible*". His role in the matter appears to have been mainly to do damage control by ensuring that Mike's version is recorded and to reconstruct the events to formulate a defence.

He tried in vain to create an impression that Phillip and his son were always interested in Brebner's farm and that the matter was discussed with him. However, he could only mention the November 2011 consultation and could not recall earlier discussions.

[26] The next witness for the defence was **JOHANNA CATHARINA WASSERMAN**. She is an employee of Cosmos Macadamias. She is the person who received a draft affidavit from Viljoen after his consultation with Mike. She confirmed that she called Mike and asked him to read and if satisfied, to get it commissioned. Mike did as advised and brought back the affidavit, she scanned it and sent back to Viljoen.

She testified further that Phillip does not discuss any of his business with managers, especially Mike because he does not trust him.

[27] She conceded under cross examination that being asked to keep an ear on the ground for information about property sales is not a discussion of one's business. She denied being present when Mike handed the documents

from Felix to Phillip. She was in that meeting, but had stepped out briefly and when she returned, she saw some documents on the table.

[28] When asked to explain why Phillip does not trust Mike, Ms Wasserman simply stated that "I cant tell you". When pressed for an answer, she answered that Phillip did tell her that she should not discuss his business with Mike.

[28.1] Ms Wasserman's evidence appeared rehearsed to protect Phillip, hence she was at pains to create an impression that Phillip would never discuss his business with Mike, even though she conceded that giving information about farm sales does not amount to such. She did concede though that she was only asked to testify the previous day and she had to refresh her memory about what happened.

[29] **PHILIP VAN ROOYEN** was the next (and last) witness for the defendant. He testified that:

[29.1] He is a businessman and farmer and has been farming for 31 years at White River, Nelspruit.

[29.2] He has known Brebner for more than 10 years. He specializes in electronics and does work for his company.

[29.3] Around 2010, his son Roelof was working at the factory as a manager when he and Brebner struck a conversation about the latter's farm.

[29.4] He considered a joint venture with Tony Kennet and discussed other business ventures. Brebner priced his farm at R13m, and he considered it to be too high. He wanted to buy the entire farm.

[29.5] Phillip gave him details about the farm by email⁴⁴ dated 27 June 2011. It is a two page description of the property.

[29.6] On 07 October 2011 he sent an email⁴⁵ to his son, Roelof who was studying for an MBA at Stellenbosch University. He told him amongst other things about his plans to purchase a

⁴⁴ p.106, Exhibit A.

⁴⁵ p.120A, Exhibit A

farm. He also enquired from him whether Cosmos was part of his plans because he wanted him to join the business.

[29.7] He visited the farm with his son and found it to be in a state of neglect. He mentioned this to Brebner. They never discussed Felix or reduced price.

[29.8] He wrote an email⁴⁶ to Brebner and requested certain information about the farm.

[29.9] On 13 December 2011 Brebner sent him an email and referred to an offer he had made. Brebner indicated that he would accept R12m.

[29.10] He asked Viljoen⁴⁷, as his attorney and conveyancer to look into certain specified items as he was in the process of buying the farm. He was not considering buying the West Portion.

⁴⁶ p.130A, Exhibit A.

⁴⁷ email of 06 January 2012 (p.141, Exhibit A already referred to in the evidence of Viljoen)

[29.11] He confirmed the emails exchanged between him and Viljoen.

[29.12] When asked about Mike, Phillip testified about how he came to employ him. The plot that Mike manages is a buffer zone between a squatter camp and his farm. His neighbour recommended that he employ Mike. He pays him a salary of R7000,00 per month, and he has a 16%0 profit share. Mike, according to Phillip is a good vegetable farmer.

[29.13] He denied asking Mike to keep an ear on the ground for information about farm sales. He would not discuss his business with him. Mike has handed in his resignation on his own accord. There is no bad blood between them. In any event they had realized that vegetables are not profitable and Mike had started to establish a nursery.

[29.14] He also testified about the meeting of October 2011 at his office with his staff. Mike walked in and handed him a folder from an estate agent. He looked at it and realized that it is a farm that he knows about. He cannot remember what he did with the document. He did not count the pages. He refers to the

folder as a 2 page document because that is what he calls Brebner's offer he received earlier.

[30] **Under cross examination, PHILLIP** conceded that he was in court throughout the proceedings until Viljoen testified. He admitted that if anything was put to the witnesses that he did not agree with he would have taken it up with the attorney. He did not know how to respond to a question as to whether his version that was put to the witnesses was correct, but conceded again that he would not just let it go if it was incorrect.

[31] He agreed that his initial interest on the farm was for purposes of a joint venture with Tony Kennet, but reluctantly admitted that it changed and he wanted to buy the farm for his son.

[32] He admitted that he was fighting same fight with Brebner because of the indemnity clause that makes him liable for commission if the later loses this case.

[33] He denied a suggestion that he communicated the fact that he received documents from Mike to his legal team. They discussed the commission issue in Pretoria months ago.

[34] He reluctantly admitted, (after being confronted with an email he wrote to Viljoen about a consultation with counsel) that they discussed the merits of the claim, but only when they saw counsel, around September 2012.

[35] He denied that the defence team knew that he received documents from Mike. When asked if he told Brebner, his response was a long silence, followed by *"let me wreck my brain.."* and then a denial.

[36] He admitted that it has always been out in the open because he never disputed receiving certain documents from Mike. He referred to pages 122 and 123 of Exhibit A, being information about the farm. He did not see that the document related to a portion only, though he was aware that at some point only the West Portion was being marketed. Brebner has always been open that he was negotiating with other buyers and that his preference was to sell the West portion and stay in the East, in his nice house.

[37] He denied any insinuation that he considered what Mike did as being out of order . Mike is free to hand him any document and that does not constitute discussing his business. It was a coincidence though that he was looking for a farm and Mike brought the information.

[38] Phillip was asked why he only received the details about the farm only in November 2011. His answer was that he had the details, but wanted it in writing. He could not confirm if his partner, Tony, had any written details. He forwarded the details to him because he was not sure he had the information.

[39] The joint venture failed after he received the information about the farm. He continued discussions with his son.

[40] It was further established that he gave three reasons during his evidence why he wanted to buy defendant's farm; initially he wanted to buy the farm for a joint venture with Tony, then for his son and the third reason is that whether Roelof committed himself to farming or not, he would still have bought it.

[41] He denied a suggestion that he only discussed the farm with his attorney after he received documents from Mike. It was an ongoing consultation with a friend.

[42] He conceded that the reason they could not agree on the deal in 2010 and earlier in 2011 was because of the price. They started at R13m. He

could not answer the question as to how many times Brebner reduced the price.

[43] He denied what was put to Felix by his counsel that Mike gave him the document marked p. 121 (acknowledgment of receipt by Mike).

[44] He could not explain why his version about Brebner's intention to sell the West farm differed with the version of Viljoen that Brebner always wanted to sell the entire farm.

[45] He admitted that the identity of the ultimate purchaser is irrelevant because it is his company.

[46] He admitted that he was also considering and had looked at other properties to buy at the same time, but could not remember when the sales were concluded.

[47] He admitted having paged through the document Mike gave him and realized that it a property he knew.

[48] He did not know that there was an indemnity clause in the deed of sale, if he did, he would not have signed or advised his son to sign the agreement. He did not read the clause, as such he is not in a position to comment about the recording that there was no agent involved.

[49] Phillip was a hesitant witness. He often said that he was thinking, paused before answering. He appeared worried by the revelations in the emails and documents , some of which he admittedly did not know, such as the indemnity clause.

[49.1] His evidence on whether or not he saw the price on the document he received from Mike is not probable. It is a four page document. The name of the estate agent appears on the first page and in the second page in highlighted capital letters on top. He would have had to page to the second page to identify the farm.

I therefore make a finding that it is improbable that he did not see that the offer was coming from , AJESTATE AGENT , represented by Felix as it appears on the first page. The document has only four pages, and although the price appears on the last one, it is improbable that he would not have seen it.

[49.2] Although much is being made about the earlier negotiations between him and Brebner, all that there is before Felix left the documents with Mike is the email from Brebner of 27 June 2011 addressed to Phillip and forwarding details of the farm. On his version, this was for a joint venture with Tony. It failed after this email. The high price was the reason.

[49.3] The other evidence relied on to prove constant negotiations between Phillip and Brebner is the email dated 07 October 2011 from Phillip to his son, Roelof. This email does not mention the name of the farm that he says he would finalize a sale of the next week. There is no evidence that there has been negotiations after the failure of the joint venture in June and the date of this email.

[49.4] There is no evidence that the 2010 discussions between Brebner and Roelof yielded anything. The first result is the joint venture attempt in June 2011.

[49.5] The next meeting took place in November 2011 and by this time Felix had already left the documents at Phillip's farm. Viljoen could not recall any other earlier discussions. Strange enough, Phillip only gets to be shown the property on 21 November 2011.

WHAT WAS THE EFFECTIVE CAUSE OF THE SALE

[50] Defendant's counsel argued in his written and oral argument that the trigger for the sale was the fact that Phillip's son completed his studies and wanted to join in the farming business. This is basically what was pleaded.

This contention is supported in the main by an allegation that Brebner and Roelof discussed the sale of the farm in 2010. The next piece of evidence is the email dated 07 October 2011 from Phillip to Roelof. I have already cast doubt on this as an effective stimuli for the reasons stated above. I may add that there is no response from Roelof.

[51] The reduced price on the West Portion meant nothing according to the argument advanced on behalf of the defendant. The reason is that this price was further reduced in December 2011 to R6 200 000,00. Felix did not communicate this price to Phillip.

[52] This argument loses sight of the fact that there is evidence, in terms of the time line I have sketched with reference to emails, that Brebner and Phillip were already having sbehind the scenes meetings after Felix left the farm listing with Mike to hand over to Phillip. Felix testified that he was told that Phillip had no interest and has bought another farm. He then suspected that some information was being withheld from him and that he was being misled.

[53] Brebner's response to Felix when he warned him about his potential claim for commission is further proof that there was a trigger between 2010, the failed joint venture and the subsequent acceptance of offer by Phillip .

I repeat part of the email for emphasis:

"I can go further back to two years ago, when I heard from Phillip's son Roelof, that they were looking for a farm. I suggested then that Phillip should contact me. At that point, Phillip informed me that the farm was too small. So he has been well aware of the possibilities here for a long time, and has shrewdly been watching and waiting."

[54] It is common cause that there were many agents marketing the property at the time. This is clear from the fact that the deal involving Kellerprince Estate Agency for purchase of the West Portion fell through when Phillip's offer was accepted.

This is an indication that the intention throughout was to sell the entire farm and it accords with the testimony of Felix. Selling portions and joint ventures were compromises, hence the written mandates.

[55] The defendant ran the risk of exposing itself to potential claims for commission. In this case, Plaintiff's representative, Felix , realized that Brebner

was having meetings behind his back with potential purchasers he has introduced. He warned him.

[56] It is common cause, taking into account the efforts of Felix outlined in the timeline, that he was at all times marketing both portions and provided feedback to Brebner. At no stage did Brebner tell him to stop pursuing any prospective purchaser. He shows what he believes is his trump card (the email referred to in 71 above) to Felix only when confronted about his secret dealings with Phillip. There is no evidence to show that he terminated the oral mandate at anytime , instead they continued to engage about prospective buyers, including Phillip.

LEGAL PRINCIPLES

[57] Counsel for both parties submitted written submissions on the last day of trial and referred me extensively to decided cases on the question of effective cause of sale in the present context . I am indebted to their assistance in this regard.

[58] The approach I have taken is a common sense one, based on the timeline as outlined above. Both parties relied on dealings with each other to prove that the version of the other one is not the most probable.

[59] The issue here, in deciding what the effective cause was is to consider what triggered the interest of Phillip in the property after the failed attempts in 2010 and earlier in 2011. In my view, the fact that Phillip and Felix never met in person is of no consequence. The introduction part has been met because of the admission by Phillip that he did receive the documents from Mike and did glance at them.

I have already made a finding that, based on the circumstances⁴⁸, he must have seen the price.

[60] It is common cause that when Brebner first met Felix his price was unrealistic and that through the efforts of Felix of showing him comparable prices the price of the West Portion was reduced from R9, 5m to R7, 650m.

It is also common cause that the value of the entire farm lies in the West Portion.

Based on this, reduction of the West Portion price amounts to removal of a major hurdle. Brebner realized the wisdom of reducing price and further reduced it, in December 2011 to R6 200 000.00. The fact that this was not communicated to Phillip by Felix is not important and cannot be said to be an intervening and effective cause in the same way as described in the case

⁴⁸ the name of the agency appeared on the first page and second page and the fact that the document is a mere four pages as well as his admission that he glanced at it.

of **Aida Real Estate Ltd v Lipschitz**⁴⁹ that the further enquiry then will be whether such factor "outweigh the introduction by being more than or equally conducive to the bringing about of the sale.."

[61] In my view, the approach in the matter of **Webranchek v L K Jacobs & Co Ltd** referred to in paragraph 14 of the judgment of the Supreme Court of Appeal in the matter of **Wakefields Real Estate v Attree**⁵⁰ is more relevant in this case. Lewis JA in paragraph 14 said:

"[4] It is notoriously difficult, when there are competing estate agents, to determine who is the effective cause of the sale that eventuates. It may be that more than one agent is entitled to commission. This was put trenchantly by Van den Heever JA in **Webranchek v L K Jacobs & Co Ltd** **1948 (4) SA 671** (A) at 678 where he said:

'Situations are conceivable in which it is impossible to distinguish between the efforts of one agent and another in terms of causality or degrees of causation. In such a situation it may well be (it is not necessary to decide the point) that the principal may owe commission to both agents and that he has only himself to blame for his predicament; for he should protect himself against that risk.'

Van den Heever JA continued (at 679):

'[A] judge who has to try the issue must needs decide the matter by applying the common sense standards and not according to the notions in regard to the operation of causation which "might satisfy the metaphysician" The distinction between the concepts *causa sine qua non* and *causa causans* is not as crisp and clear as the frequent use of these phrases would suggest; they are relative concepts. . . . It stands to reason, therefore, that the cumulative importance of a number of causes attributable to one agent may be such that, although each in itself might have been described as a *causa sine qua non*, the sum of efforts of that agent may be said to have been the effective cause of the sale.'

⁴⁹ 1971 (3) SA 871 (W) at 873H-874A where Marais J sets out the principle as follows:

"

⁵⁰ {666/10} [2011] ZASCA 160 (28 September 2011)

[61.1] The reduced price of the West Farm clearly caught attention of Phillip and triggered renewed negotiations .

[61.2] I am unable to make credibility findings with regard to Brebner because he did not testify.

[61.3] However, it is abundantly clear from the emails exchanged between him and Felix that he withheld information that he was talking to and holding meetings with Phillip behind Felix's back.

This was confirmed by his wife and conceded by counsel during cross examination. This happened same time when he was leading Felix on by encouraging him to go after Phillip.

[61.4] In my view, it shows that there was an attempt to muscle out the agent by both parties. This coupled with the express provision in the deed of sale that no agent was involved , creates a prima facie impression that their renewed negotiations were triggered by Felix.

In the absence of testimony to the contrary from Phillip it becomes concrete proof.

The version of Brebner

[62] As stated above, the difficulty for the defendant is that the version of Brebner was not subjected to cross examination, even after it was put to the plaintiff's witnesses.

[63] I agree with the submission of plaintiff's counsel that the evidence of plaintiff's witnesses in as far as it should have been contradicted by Brebner's evidence must be accepted as proven or common cause unless they are found to be inherently incapable of belief either on credibility or probability.

[64] I have already outlined the sequence of events and communication between Brebner and Felix, supported by correspondence. I have no reason to disbelieve for instance, the fact that Brebner and Felix met after the latter met with Mike and that Brebner gave instruction that Phillip must be pursued.

In fact, Brebner's defence is that the information Felix gave Phillip was second hand. This is not correct, because the price had been reduced.

Therefore, there is nothing inherently improbable in oral and documentary the version of events as testified by plaintiff's witnesses before me.

[64.1] Brebner only mentioned his dealings with Roelof when Felix confronted him with a possible claim for commission. The question is

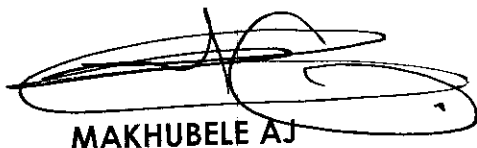
why he never mentioned it when he told Felix to pursue Phillip. He only mentioned the failed joint venture between Tony and Phillip and that they could not agree on price.

CONCLUSION

[65] Therefore, the action succeeds and I make the following order against defendant:

[65.1] Payment of the amount of R660 000,00 with interest at the prescribed rate *a tempore morae* to date of payment.

[65.2] Costs of suit .



MAKHUBELE AJ

Acting Judge of the High Court

DATE HEARD: 17, 18, 19 & 20 February 2014.

DATE OF JUDGMENT: 14 April 2014

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