




IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO .	
(2) OF INTEREST TO OTHER JUDGES: YES / NO .	
③ REVISED.	
26/7/2016.	
<u>DATE</u>	<u>SIGNATURE</u>

26/7/2016

Case Number: 56341/2010

In the matter between:

ATTORNEYS FIDELITY FUND BOARD OF CONTROL

Plaintiff

and

INTIBANE MEDIATES

First Defendant

ROMEO TSHEPO RAMOTHIBE

Second Defendant

ERF 49-1 MENLYN (PTY) LTD

Third Defendant

HEAD BROTHERS STEEL FABRICATING &

ENGINEERING (PTY) LTD

Fourth Defendant

WILLIE-BROWN VAN DER WALT

Fifth Defendant

JUDGMENT

POTTERILL J

BACKGROUND

- [1] The plaintiff ["AFF"] issued summons against the first defendant ["Intibane"] and second defendant ["Ramothibe"], Ramothibe being the managing director, owner and controlling mind of Intibane, for breach of fiduciary obligations when fulfilling a mandate to investigate and advise on the acquisition of immovable property by taking "secret commission" pursuant to the acquisition of the property.
- [2] The AFF did not seek any relief against the third ["Erf 49-1"] and fourth defendants ["Head brothers"]; the sellers of the property.
- [3] The fifth respondent is the attorney in whose trust account the commission of R5.5 million on the sale transaction is being retained. No relief is sought against him.

[4] Erf 49-1 and Head brothers took default judgment against Intibane on the basis that it was not entitled to commission due to its lack of an estate agent's fidelity fund certificate.

[5] Intibane was de-registered and Ramothibe has passed away.

[6] The AFF amended its particulars and set out 4 causes of action now against Erf 49-1 and Head Brothers. The person acting on behalf of Erf 49-1 and Head Brothers was their director Mr Du Plessis Roome ["Roome"]. For ease of reference Erf 49-1 and Head Brothers will collectively be referred to as Roome.

[7] The causes of action are:

7.1 Roome had the legal duty to disclose the agreements between Intibane and Roome disclosing the commission and due to the delictual non-disclosure the AFF suffered damages.

7.2 In the alternative Roome misrepresented to the AFF that its bottom line for the selling price of the property was R37,5 million whereas it was in fact

R32 million. Due to the misrepresentation the AFF suffered damages in the amount of the commission.

7.3 In the alternative Intibane's misrepresentations to the AFF induced the AFF to act on the misrepresentations and they never would have bought the properties for the amount of R37,5 million; never for more than R32 million.

7.4 In the alternative Roome initially first induced Intibane with R7 million if Intibane could sell Roome's properties for R50 million. This inducement was made with the intention of inducing Intibane to promote Roome's properties. This inducement was unlawful and a contravention of s 3 of the prevention of Combatting of Corrupt Activities, no 12 of 2004 ["Corruption Act"]. There was a further inducement in that Roome agreed with Intibane that any excess received for the properties over and above the sum of R32million would go to Intibane provided that it did not exceed R6million. This second inducement also unlawfully contravenes the Corruption Act.

[8] The AFF called 7 witnesses and Roome closed its case without calling any witnesses.

CHRONOLOGY AS SUMMARY OF EVIDENCE

- [9] The following chronology serves as background to the matter. The evidence is not summarised because this chronology sets out the common cause facts flowing from the evidence.
- [10] The Attorneys Fidelity Fund is represented by the Attorneys Fidelity Fund Board of Control and is a statutory body established by the Attorneys Act 53 of 1979.
- [11] In 2009 the Law Society of South Africa ["LSSA"] approached the AFF with a request that the board acquire for the LSSA new head quarters. The purpose was to procure one building that could accommodate all the divisions that were then spread over two buildings.
- [12] In 2009 the LSSA was keen to acquire an erf and to construct a building at a business park approximate to the R21 Highway ["R21 site"].
- [13] On 21 August 2009 Ramothibe was appointed by the LSSA as consultants and developers for the R21 site.

- [14] On 7 September 2009 the AFF approved the acquisition of the R21 site subject to conditions, to be resolved by joint committee of members of the AFF and LSSA finance committees.
- [15] The AFF Exco meeting on 15 November 2009 resolved to recommend that Mgxaji, Badal, Moorehouse and Stansfield constitute the *ad hoc* Building Committee of the AFF. The Board of AFF adopted this Exco recommendation.
- [16] The AFF appointed their own consultants, Boogertman & Partners, due to the significant investment it was to make. The consultants were mandated to assess the R21 site that Ramothibe had recommended. Boogertman criticised the R21 site for *inter alia*, the erf being so small that the proposed buildings would not fit on the site and it was a business park versus an office park.
- [17] 2 February 2010 – Meeting of joint AFF and LSSA Building Committee.
Boogertman presents its report of 3 December 2009:
- 17.1 Daya accused Boogertman & Associates of being conflicted.
 - 17.2 The LSSA representatives confirm that Ramothibe was to remain consultants to the LSSA.
 - 17.3 Daya proposes a fee structure agreement for Ramothibe.
 - 17.4 The meeting resolved that Ramothibe to respond to the Boogertman report, including the possibility of purchasing or renting an existing building.

[18] On 3 February 2010 Daya in writing advised Ramothibe of the resolutions taken by joint building committee on 2 February 2010.

[19] 24 February 2010 – First “NON-DISCLOSURE AND AGENCY COMMISSION AGREEMENT” between Roome and Ramothibe; not signed by Roome.

[20] 1 March 2010 – Ramothibe’s report on alternative premises for LSSA. *“Option 1”* is buildings 6 and 7, Glen Manor Office Park [Roome’s property]. It advises that no agents are involved in the sale and promotes these properties in glowing terms; *“highly recommend”* the Glen Manor property as the *“best buy for the LSSA and an excellent investment ...”*

[21] 1 March 2010 – Ramothibe tax invoice to the LSSA for R238 459,50, plus detailed bill for a consultation on R21 site.

[22] 8 March 2010 – Second “NON-DISCLOSURE AND AGENCY COMMISSION AGREEMENT” signed by both Roome and Ramothibe. It is the same as the first, save for the additional manuscript “special condition” inserted by Roome.

[23] 19 March 2010 – LSSA management meeting where Daya reports that the LSSA Manco is positive about Roome's property and that he [Daya] has requested the AFF to relieve Boogertman & Associates from their brief.

[24] 31 March 2010 – Interim meeting of AFF Board of Control:

24.1 Noted the recommendations of the joint AFF/LSSA Finance Committee meeting held on 26 October 2009.

24.2 Noted that the AFF had resolved on 16 November 2009 that Messrs Mgxaji, Badal and the AFF's executive and financial directors would constitute an *ad hoc* building committee to execute the recommendations.

24.3 Daya reports that an existing building, Roome's property, was identified and that the AFF's consultant would inspect the Menlyn property.

[25] 12 April 2010 – Site visit to Roome's property by members of building committees.

[26] In an e-mail dated 13 April 2010 from Boogertman to Daya, John and Andrew (the building committee of AFF) the following remark is made:

"The quoted building cost is R10 000 per bulk meter, but the buildings only total 2 600 m². Cost is tallied at R50 million which translates to about R20 000 per bulk meter, not R10 000. Intibane used the land area, not

building area in their calculation. Maybe they should first confirm their calculations before we advance too far?"

In a further e-mail Boogertman also makes the following remark:

"Right next door to the Glen Manor Development [Roome's property], in the new Menlyn Main development precinct. There exists an opportunity to own a part of 7 500 m² sectional title building, with a full green star rating at a total development cost of R21 100 per BULK meter. ... This can in no way be compared to the value of R20 000 per "BULK meter" that the Glen Manor development offers, with a mere 2 500 m² of B-grade office area. ... Thus for the same R50 million investment, one can own a AAA grade, fully 'Green' building in the most prestigious development in PTA, in Menlyn Main."

- [27] On 15 April 2010 Daya wrote to John Moorhouse (executive director of AFF) and Mr. S. Mgxaji (Chairman of the Board of the AFF) that Boogertman's mandate should be ended because they were acting unethically because they failed to disclose that they were punting a building in which they had acquired an interest the previous day. *"We have no recieved (sic) written advices from [Ramothibe] that the owner of the buildings at Glen Manor Office Park is already in discussions with third parties who have shown an interest in the buildings."*

[28] 19 April 2010 – Response by Moorehouse of AFF to Boqwana:

28.1 Advising that the AFF building committee had resolved to retain the services of Boogertman & Associates.

28.2 Advising that Rhode & Associates CC had confirmed the Boogertman estimate of value in the sum of approximately R25,7 million, roughly half of the proposed purchase price of R51 million, as a result of which the AFF Building Committee had resolved to commission a sworn valuator, the appointment to be settled in consultations with the LSSA.

[29] 27 April 2010 – Roome emails to Daya *“unless I get something in writing from you by Saturday, 1 May 2010, that indicates your serious intention to soon make an offer to purchase, I will be forced to let the property out again and offer the building to estate agents”*.

[30] 28 April 2010 – E-mail Daya to Roome, copied to Ramothibe, advising that he would be holding urgent telecom with LSSA and AFF the next day *“to discuss your concerns”*.

[31] AFF appoints a valuer; McIntosh.

[32] 28 April 2010 – E-mail Daya to Ramothibe and Roome, attaching e-mail from Stansfield advising the AFF's valuer (McIntosh) needs further information from Roome in order to finalise his report so that AFF can make an offer: *"Mr du Plessis has put us on terms and I take that seriously"*.

[33] 6 May 2010 – E-mail exchange between Daya and Roome. **Roome requires agreement by not later than Monday, 10 May 2010.**

[34] 6 May 2010 – ADDENDUM TO THE NON-DISCLOSURE AGREEMENT, signed by Roome on 6 May 2010 [ie, prior to McIntosh's advisory memo of 7 May 2010] and by Ramothibe on 7 May 2010:

34.1 *"The owner of the property will be paid R32 million".*

34.2 *"Any amount in excess of [R32 million] will be deemed to be agency commission".*

34.3 *"Intibane will be entitled to place this agency agreement before the attorneys representing the seller ..."*

[35] 7 May 2010 – Advisory memo from McIntosh to Daya and Stansfield, advising on range of purchase prices for negotiation purposes between R24,5 million and R35 million. Estimated values (after refurbishment) of R28 million and R32 million are mentioned.

- [36] 7 May 2010 – Letter Daya to Mgxaji and Moorehouse of AFF, reporting on LSSA building committee meeting following the report from McIntosh, requesting the AFF to *“immediately communicate an offer in writing for R35 million”*, recommending negotiating a purchase price *“up to a maximum of R40 million”*.
- [37] 10 May 2010 – E-mail Stansfield to McIntosh advising that he has been authorised on behalf of AFF to make an offer of R28 million and enquiring whether McIntosh will represent the AFF in its negotiations with the seller.
- [38] 10 May 2010 – E-mail Daya to Moorehouse and others, expressing disquiet at news that the AFF intended starting negotiations at R28 million, and setting up urgent teleconference for 13h00 on 11 May 2010, *“to discuss how we are to proceed herein”*.
- [39] 11 May 2010 – E-mail McIntosh to Stansfield recommending an opening bid of R30 million representing a premium over market value of R4,5 million, but that *“... the opportunity cost of securing a new building would support offering up to R35 million”*.
- [40] 11 May 2010 – E-mail Stansfield to Roome confirming mandate to offer R30 million, representing a premium of R4,5 million over the value of the buildings in their present condition of R25,5 million according to McIntosh.

[41] 11 May 2010 – SMS Roome to Daya: R30 million is *“completely unacceptable and I don’t know whether you are seriously interested”*.

[42] 11 May 2010 – E-mail Daya to Moorehouse and other AFF building committee members, attaching the SMS from Roome, and advising:

42.1 Telcon at 13h00 unanimously resolved that the chairman of the fund (Mgxaji) and co-chair of the LSSA (Boqwana) will constitute the negotiating team to meet personally with Roome and negotiate a final offer.

42.2 *“We must do nothing to jeopardise this matter and leave the negotiations to Messrs Mgxaji and Boqwana as resolved”*.

[43] 12 May 2010 – E-mail exchange between Stansfield and Etienne Horn (vice chair of AFF), and others:

43.1 Horne: *“... I am a wee bit uneasy with the way things are developing and the pressure being brought to bear on the fund”*.

43.2 Stansfield: *“... if the committee wishes to offer a figure in excess of the R35 million ceiling as determined by the valuer, Board of Control approval must be obtained”*.

[44] 13 May 2010 – Meeting of LSSA Manco

Daya reports that *"... the independent valuator, Grant McIntosh, had evaluated the building in its current form at R35 million"* [contrary to valuation in report].

Meeting resolves that Boqwana and Mgxaji to meet with McIntosh before entering into negotiations with Roome to determine the maximum amount to be offered.

[45] 13 May 2010 - Roome, Boqwana, Mgxaji met at airport to further negotiate sale of property.

[46] 13 May 2010 – E-mail Ramothibe to Roome *"... to confirm our agreement that we have signed on 7 May 2010 wrt the Non-Disclosure that contains an Agency and Commission Agreement ..."*

"As per our agreement ... DBR Trust will be paid a sum of R32 million from the sales by the AFF and LSSA and any excess ... will be paid to Intibane Mediates deemed to be commission [up to R6 million] and anything above that will be paid to the DPR Trust".

[47] 14 May 2010 – Covering e-mail to Ramothibe to Roome: *"Find attached letter as per agreed, for your attention. Please sign and send it to Raj".*

The draft letter, purporting to be written by Roome, reads: *"I indicated that I wanted R40 million. You wanted to know my bottom line. i indicated that if a written offer is made no later than Tuesday next week, I am prepared to offer a further incentive and settle at R37 500 000".*

"I am therefore placing you on terms ..."

- [48] 14 May 2010 – E-mail Roome to Daya attaching the draft letter signed by Roome.
- [49] 14 May 2010 – Telecon Daya/Boqwana to McIntosh. Daya requests McIntosh to motivate an offer of R37.5 million to Boqwana and to the AFF.
- [50] 17 May 2010 – E-mail McIntosh to Stansfield advising that, in the light of Roome's price of R37,5 million *"the business decision taking into account all costs and benefits for the AFF/LSSA becomes critical ..."* and that *"... to close the deal"*, recommending agreement on the figure of R37,5 million *"to reach a final agreement/settlement"*.
- [51] 17 May 2010 – AFF Exco meeting. Stansfield reports that McIntosh *"supports"* the price of R37,5 million. Mgxaji advises that the purchase price has been agreed at R37,5 million.
- [52] 17 May 2010 – E-mail Stansfield to Raj Daya and others confirming the Exco decision to purchase at R37,5 million, following the recommendation of McIntosh.

[53] 18 May 2010 – E-mail Stansfield to Roome confirming acceptance of the offer of R37,5 million and advising that Mr De La Rey of Maluleke Msimang Attorneys would draw up a deed of sale.

[54] 19 May 2010 – Discussion between Roome and Mr De La Rey. No reference to commission. Preparation of first draft of deed of sale by Mr De La Rey.

[55] 20 May 2010 – E-mail Stansfield to De La Rey advising that CP Fourie will sign the offer to purchase on behalf of Attorneys Fidelity Fund as he is Pretoria-based.

[56] 20 May 2010 – First draft of deed of sale forwarded by De La Rey to Stansfield.

[57] 21 May 2010 – Revised deeds of sale forwarded by De La Rey to AFF and Roome.

[58] 24 May 2010 – E-mail Ramothibe to Roome, headed *"New wording for the deeds of sale"* and attaches new wording for clause 11 of the deeds of sale:

"Dear Dup,

Raj drafted the amended wording that you must (sic) the transfer attorneys included in the agency commission. Please find attached the wording, for your attention".

"No agency commission is payable by the Purchaser. Any commission agreement between the Seller and any third party is a private and confidential agreement between the Seller and the third party and does not create any legal obligations on the Purchaser".

[59] 24 May 2010 – Meeting between De La Rey and Roome, at which the new agency commission clause proposed by Roome is provided to De La Rey.

[60] 25 May 2010 – Revised agreements forwarded by De La Rey to AFF and Roome.

[61] Shortly before 25 May 2010 – Daya telephones attorney Kalian and requests him to assist Ramothibe concerning his commission.

[62] 25 May 2010 – Ramothibe forwards draft deeds of sale to Kalian.

[63] 27 May 2010 – E-mail Ramothibe to attorney Shirish Kalian: *"Mr Roome ... has ... acknowledged that he will honour the agreement between us".*

"I hereby instruct you to act on my behalf to finalise the commission due to my company in terms of the agreement and the addendum I have forwarded to you".

The e-mail attaches the *"Addendum to non-disclosure Agreement"* signed on 6 May 2010 and 7 May 2010.

[64] 1 June 2010 – LSSA invoices AFF for the amount of R238 459,50 paid by LSSA to Intibane.

[65] 1 June 2010 – CP Fourie signs sale agreements on behalf of AFF and De La Rey informs Roome accordingly.

[66] 1 June 2010 – Ramothibe congratulates Daya on acquiring the Glen Manor properties and requests appointment as project managers and consultants to undertake the renovations.

[67] 2 June 2010 – Ramothibe e-mail to attorney Kallian: *"I don't trust [Roome] anymore ... I think he is becoming greedy"*.

"We have a valid contract that he signed and the other shareholders are aware of it ..."

[68] 4 June 2010 – E-mail Roome to Ramothibe requesting *"your attorney Mr Kallian, for a correct commission agreement between Intibane Mediates and two companies"*

that own the property ...” and advising that “... I cannot sign the purchase agreement until this issue is cleared up”.

[69] 6 June 2010 – Roome forwards to Raj Daya his e-mail to Ramothibe of 4 June which reads as follows:

“Dear Tshepo, I have asked you more than once and also asked your attorney Mr. Kallina, for a correct commission agreement between Intibane Mediates and the two companies that own the property. The agreement must split the commission up between the two properties, R2.2m inclusive of VAT and R3.3M inclusive of VAT respectively for Stand 49/1 Menlyn Pty Ltd and Head Brothers Steel Fabricating and Engineering Pty Ltd. Please state your VAT number, company number, Bank account details and the fact that the commission is payable against transfer by the transfer attorney directly into your bank account. We can not reserve the buildings any longer for your buyer and I can not sign the purchase agreement until this issue is cleared up. In view of the commission issue, unless cleared up by you by 11 am on Monday 7 June 2010, I will sign the purchase agreement but instruct the transfer attorney to carry on with the transfer and keep all commission payments back until we are supplied with the correct information. The delays are costing us a lot of money and can’t carry on any longer”.

[70] 7 June 2010 – Roome signs the sale agreements at De La Rey's office.

[71] 7 June 2010 – E-mail Ramothibe to Roome: *"I have talked to Raj today and he told me that you guys talked last night and asked to send you the two requested invoices for our agreed commission",* and enclosing the invoices.

[72] 8 June 2010 – E-mail Roome reply to Ramothibe: *"... it is my turn to tell you we had an agreement".*

"We are not prepared to lose any further money on this deal".

"Please draw up 2 new agreement between the owning companies and Intibane mentioning the commission payable ..."

"I am sorry but today it is my turn to tell you we had an agreement. So I suggest you immediately register your company for VAT – it's a very simple exercise. In any case it is fraud not to register for and pay VAT on a turnover of this magnitude. In view of the excessive commission you claimed from the outset, I told you that I don't want to get involved in any deceptive actions.

We are not prepared to loose any further money on this deal. Over and above the VAT issue, you must please formally by letter cancel the commission agreement

between our trust and Intibane Mediates PTY LTD, for the fact that the trust does not own the properties. Please draw up 2 new agreements between the owning companies and Intibane mentioning the commission payable and the fact that it is inclusive of VAT. Also send us 2 correct invoices mentioning the amount of VAT inclusive”.

[73] 9 June 2010 – E-mail Ramothibe to Roome attaching two amended NON-DISCLOSURE AND AGENCY COMMISSION AGREEMENTS and tax invoices.

[74] 29 June 2010 – Willie Brown van der Walt advises De La Rey that transfer documents ready for signature. It is arranged that CP Fourie will sign on behalf of AFF as he is conveniently situated in Pretoria.

[75] 30 June 2010 – The revised “NON-DISCLOSURE AND AGENCY COMMISSION AGREEMENTS” which had been forwarded on 9 June 2010, are signed by Ramothibe and Roome.

[76] 5 July 2010 – Letter De La Rey to Willie Brown van der Walt, advising that Fourie has signed all documents with the exception of the TD5 forms, “[t]he reason being that he, nor the Attorneys Fidelity Fund has any knowledge of the contents of any Commission Agreement that exists or may exist between the seller(s) and any third party ...”. This flows after Moorehouse alerted Mr. Fourie that there is some form of

commission according to the TD5 forms. Fourie also urges that seller disclose the commission agreement to AFF.

Reply Willie Brown van der Walt to De La Rey: *"After consultation with the seller and the Estate Agency and with reference to clause 11 of both Agreements of Sale the parties rely on the contents of the said clause concerning the confidentiality of the Commission Agreements"* and enclosing TD5 signed by Roome on 5 July 2010.

[77] 13 July 2010 – Meeting between De La Rey and Willie Brown van der Walt at the Deeds Office.

Van der Walt says, *"Sy klient is in 'n slap riem gevang oor die groot bedrag kommissie wat betaalbaar is."*

[78] 14 July 2010 – A confidential memorandum by AFF management (Stansfield and Moorhouse) is e-mailed to CP Fourie, referring to the information obtained by Stansfield from McIntosh, which revealed that Ramothibe and Raj Daya are neighbours.

[79] 15 July 2010 – LSSA Manco meeting. CP Fourie reports on why the TD5 forms have not been signed.

Resolved to address a letter advising Ramothibe that LSSA regards the matter in a very serious light.

[80] 19 July 2010 – CP Fourie signs the TD5 forms.

[81] 21 July 2010 – Letter Raj Daya to the co-chairs of LSSA, referring to the confidential internal memo produced by AFF management on 14 July 2010, disputing receipt of any “kick-back” from Ramothibe, and advising of prospective damages claims against Stansfield and Moorhouse.

[82] 2 August 2010 – AFF Board meeting. Resolved that:

82.1 Opinion to be taken on possibility of interdict or preservation order with regard to the R5,5 million commission.

82.2 Moorehouse and Stansfield required to report to the Board on what gave rise to the memo of 14 July 2010.

[83] 3 August 2010 – Revised memorandum by management of AFF, omitting reference to Raj Daya and Ramothibe being neighbours.

[84] 13 August 2010 – Letter Bowman Gilfillan to Willie Brown van der Walt threatening urgent interdict to prevent payment of commission to Ramothibe pending action to be instituted.

[85] 16 August 2010 – Letter Willie Brown van der Walt to Bowman Gilfillan undertaking to retain R5,5 million in an interest-bearing account.

[86] 16 August 2010 – Further “NON-DISCLOSURE AGREEMENT” signed by Ramothibe only:

“Intibane Mediates undertakes to pay the sum of R250 000 to Du Plessis Roome upon registration and transfer of the properties ...”

[87] 16 August 2010 – Pursuant to registration of properties Willie Brown van der Walt advises Bowman Gilfillan, advising that following a consultation with Roome “... *the sellers are contractually obliged to pay the agent, Intibane Mediates Pty Ltd, its commission due*” and advising that he has “*no other option but to release the total amount of R5.5 million in favour of the agent*”.

[88] 26 August 2010 – Bowman Gilfillan advise Willie Brown van der Walt that an urgent application would be launched shortly.

[89] 31 August 2010 – Letter Gildenhuys Lessing Malatji, Ramothibe’s new attorneys, to Willie Brown van der Walt and Roome, recording that Ramothibe had concluded a non-disclosure and agency commission agreement on 30 June 2010.

[90] 13 September 2010 – Revised draft deed of cession signed by Raj Daya on behalf of LSSA to AFF.

[91] 25 February 2011 – Interdict granted, restraining payment of R5,5 million, plus interest.

[92] 20 February 2012 – E-mail Mr Roome to Bowman Gilfillan:

92.1 *"The final price of the R37,5 million was negotiated between myself, Mr Max Boquana (chairman of the LSSA) and Mr Raj Daja (executive manager of the LSSA)".*

92.2 *"It was ... made clear to me by Intibane that they were consultants to the LSSA and that the LaW Society acts on their recommendations only".*

92.3 *"On the original price of R50m (a price held before me by Intibane), I was to pay Intibane R7m Finders commission".*

92.4 *"I was always very suspicious about their way of doing things ...".*

ARGUMENT ON BEHALF OF AFF

[93] On behalf of the AFF it was argued that it is common cause that Roome was aware that Ramothibe was acting on behalf of the AFF/LSSA. Roome was also aware of the improprieties' committed by him and Ramothibe:

- 93.1 The AFF was to be persuaded to purchase the properties at a price significantly in excess of what Roome was prepared to sell them for to accommodate the agreement between Roome and Ramothibe to earn commission on the sale of the properties.
- 93.2 The non-disclosure agreements between Roome and Ramothibe are atypical of any estate agent's mandate. The confidentiality clauses and the inflated figures are proof of the improprieties.
- 93.3 As an experienced businessman Roome knew the first selling price of R50 million and later R43 million was significantly above the market value of the properties. The fact that he settled for 32 million is indicative thereof that he knew the true value of the property.
- 93.4 Roome did not disclose to McIntosh the agent's name who purportedly told him to market the properties for R50 million. The only plausible reason why he would not divulge this information is because he knew his agreements with Ramothibe were improper.
- 93.5 When the tax invoices alerted the AFF for the first time that commission was payable Roome's attorneys declined to furnish the commission agreements between himself and Ramothibe as requested by the AFF; there must thus be some improprietary otherwise it would be discovered.
- 93.6 Roome did not discover the Addendum agreement despite discovering a variety of other Non-disclosure and related agreements. The AFF saw

reference to the Addendum agreement in an e-mail from Ramothibe. The AFF requested this agreement from Roome. Roome then answered that he did not have the document and did not know its whereabouts. In the request for further particulars for trial Roome answered that they were attempting to obtain the documents. The AFF then found the document one week before trial in Ramothibe's attorneys file. The relevance of this agreement is the following clause: *"any amount in excess of the sum of R32 million paid as the selling price by the AFF and the LSSA will be deemed to be agency commission legally earned by Intibane mediates in the exercise of their mandate to negotiate and sell the property to the AFF and LSSA on behalf of the DRP Trust"*. The AFF's stance is that Roome deliberately did not discover this centrally significant document because it undermined Roome's opposition to the action. Without him providing an explanation as to why he did not discover this document, the Court must accept that he knew he acted improperly.

93.7 This submission is strengthened with the meeting at the airport on 13 May 2010 between Roome, Boqwana and Daya and the confirmation of what took place at the meeting in a letter drafted by Ramothibe but finalised by Roome. Roome had informed the meeting that he wanted R40 million for the properties but that his bottom line was R37,5 million. Roome in this letter informed the AFF to make an offer of R37,5 not later than the following

Tuesday otherwise he would sell the properties to another buyer. Roome understood that "bottom line" meant the lowest price he was prepared to accept for the properties. Yet in the addendum agreement, concluded a week before the airport meeting the price was R32 million. He had thus contractually bound himself to the R32 million and anything above that to go to Ramothibe. He thus made a positive misrepresentation of fact to the AFF.

93.8 Of note is the role that Daya played in the negotiations, the drafting of letters and agreements. The letter confirming what transpired at the airport meeting emanated from Ramothibe, yet he was not present at the meeting. It was argued that it could only have been drafted by Daya, who attended the meeting, forwarded to Ramothibe and then to Roome. Roome did not testify to the contrary. The inference was that Daya, as the neighbour of Ramothibe, was involved in promoting the properties at an inflated price to provide for commission to Ramothibe and on the probabilities that Daya had a personal financial interest in procuring the result. It was obvious that only one property, Roome's property, was promoted in glowing terms. Roome pleaded that Daya knew of Ramothibe's commission and they discussed the commission agreements on diverse occasions. The Addendum agreement was signed by Ramothibe on 6 May 2010. This is a day prior to Mc Intosh's report dated 7 May 2010. McIntosh had informed Daya prior to finalising his report that he valued the property at R32 million. Yet the addendum between

Ramathibe and Roome reflected this amount; the only inference is that Daya informed Roome and Ramothibe of the amount.

On 24 May 2010 Ramothibe informs Roome that according to Daya the commission clause must be amended according to the wording provided by Daya as follows: " *I have talked to Raj today and he told me that you guys talked last night and asked to send you the two requested invoices for our agreed commission.*" "Our" implicates that more than one person was to receive the commission.

93.9 Reliance was also placed on Daya's distinctive punctuation style which can be summarised as a significant gap between the end of a word, and a comma or full stop. This is reflected in Ramothibe's report in the portion where Roome's properties are recommended. This punctuation also features in all the Non-disclosure agreements ["NDA"] as well as the amended NDA. Even in the e-mail dated 14 May emanating from purportedly Ramothibe this typographical phenomenon can be seen. The only inference is that all of these documents were drafted by the same author.

93.10 Daya promoted Ramothibe as a preferred service provider to the LSSA and AFF for the R21 project and the recommendation for a new headquarters for the LSSA. Daya actively promoted Roome's properties. He also promoted the properties for the price of R51 million, R40 million and lastly R37,5 million in an effort to improperly benefit Ramothibe to obtain a secret and illicit

“commission”. Roome was aware that Ramothibe and Daya collaborated to improperly persuade the AFF to pay a purchase price well in excess of the price that Roome was prepared to accept for the properties in order to secure the largest possible commission. In this knowledge Roome represented to the AFF that he wanted R40 million and that his bottom line was R37,5 million. He did this while aware that the AFF was ignorant of the “commission” as part of the purchase price.

[94] It is thus the AFF’s submission that it was induced by Roome’s active representation of his bottom line into entering a contract and this misrepresentation entitled it to rescind the contract. However the AFF is entitled to recover the damages while standing by the contract based on the fraudulent misrepresentation. Damages can also be recovered on the basis of a negligent misrepresentation. Roome’s silence amounted to a wrongful misrepresentation and as a seller he had a greater duty to impart information within his exclusive knowledge.

The commission fell within the exclusive knowledge of the seller and the buyer would be entitled to the frank disclosure thereof in accordance with the legal convictions of the community - **McCann v Goodall Group Operations (Pty) Ltd** 1995 (2) SA 718 (C) at 726G; approved in **Axiam Holdings Ltd v Deloitte & Touche** 2006 (1) SA 237 SCA) at para [15].

Any suggestion to the contrary offends one's sense of justice, is untenable and the law cannot countenance it.

[95] The causality lies therein that the AFF agreed to pay the R37,5 million because of Ramothibe's initial glowing report of Roome's property and the pressure placed on the AFF, especially Daya, to acquire the property. Furthermore Roome informed McIntosh that an agent [without disclosing that it was Ramothibe] recommended to him that the asking price of the property is R50 million. Roome at the airport meeting sought R40 million while he had a week earlier signed a contract with Ramothibe setting out that the purchase price should be R32 million. Roome then pressured the AFF in his e-mail of 14 May 2010 to buy for R32 million. Daya persuaded McIntosh to recommend purchasing at R32 million but McIntosh testified he would never had done so had he known that Roome had agreed with Ramothibe to take R32 million.

[96] Although the AFF's *de facto* loss is in fact R10 million because the buildings were sold in 2012/early 2013 for 27,5 million the damages claimed are R5,5 million being the difference between the price it agreed to pay for the property and the price it would have paid but for the misrepresentations.

ARGUMENT ON BEHALF OF ROOME

[97] On behalf of Roome it was argued that the AFF's claim against Roome is a claim in terms of the *lex Aquilia* and that harm is a prerequisite to succeed with a claim. The AFF failed to prove that it suffered harm and did not suffer patrimonial loss.

97.1 The LSSA and AFF inspected the properties and minuted that it was satisfied with the properties. They were presented by committees consisting of experienced lawyers.

97.2 There was no evidence to show that either Roome or Ramothibe exercised any influence over the management committees of the LSSA or AFF. In fact Ramothibe's inane valuation of R51 million was rejected out of hand. The pressure came from Daya, the chief executive officer and there was no evidence to suggest that undue pressure was exerted by the co-chairs of the LSSA.

97.3 The AFF obtained its own expert, Boogertman and Partners and they advised against the purchase of the property. They also advised that the market value of the properties to be worth an estimated R25,7 million.

97.4 The AFF obtained a report from Rode Valuations which valued the property at an estimated R25,7 million.

97.5 Any influence that Ramothibe could have exercised was nullified with the appointment of McIntosh. McIntosh estimated the value of the property

between R28 million and R32 million with a negotiation range of between R24,5 million to R35,2 million.

97.6 McIntosh informed Stansfield that he should make an offer of R30 million to test if the sellers are serious. The AFF thus made a free and willing offer. The offer of R30 million represented a premium of R4,5 million.

97.7 Stansfield was then replaced as negotiator by the chairman of the AFF and the CO-chair of the LSSA. Ramothibe was thus even further removed and could not exercise any control over the sale.

97.8 McIntosh then advised the AFF to agree to pay R37,5 million to reach a final agreement.

97.9 Roome did give his honest bottom line including the amount of his agent.

97.10 The decision to purchase goods at a price accepted by the purchaser does not constitute harm within the ambit of delictual liability.

[98] At the time of signing the deeds of sale the AFF knew of the agent commission because Roome had insisted that a term be included that the sellers would be liable for any commission. There is nothing untoward in the sellers agreeing to pay the commission. The AFF must thus have been aware that there is an agent, but through their conduct they did not care who the agent was and what amount the

agent would receive. This was not for the AFF a relevant consideration in determining the purchase price. The only harm they suffered was the AFF's own persistence to conclude the agreement.

[99] It was argued that Roome did not have a legal duty to disclose to the AFF that there was commission payable. Roome did know that Ramothibe was acting for the AFF. The AFF knew at the very least by 7 June 2010, date of sale, that an estate agent was involved. It was argued it was common cause the Ramothibe assisted the sellers. These facts did not create a legal duty.

[100] If there was a legal duty to disclose the relevant clause then they complied by including it in the agreement of sale. Ramothibe did not after the introduction of Roome influence the sale or the price. Therefore it was not unlawful or negligent of Roome not to disclose the identity of the agent.

[101] The inclusion of an anticipated expense in the calculation of the "bottom line" that a seller would accept can never be regarded as misrepresentation. It was argued that commission is always paid out from the gross amount.

[102] Putting pressure by referring to another buyer is sales talk only amounting to puffery.

[103] The AFF did not suffer harm because it elected for reasons peculiar to itself to purchase the properties at the price so advised by the AFF's own expert, McIntosh. The AFF elected to proceed with the agreements knowing all the facts they now rely on. Thus even if Roome's conduct was wrongful and culpable it did not factually or legally result in the diminution of the AFF's patrimony.

REASONS FOR DECISION

[104] On the common cause facts it was established that during the negotiation process the AFF had no, and could not have had, any knowledge that Ramothibe for his services would also earn an inordinate amount of secret commission. It goes without saying that Ramothibe had a duty to disclose this to the AFF. The question is whether Roome as the seller had a legal duty to disclose this fact to the AFF.

[105] There is in my mind no doubt that Roome can in law never be entitled to the commission he agreed to with Ramothibe and should be disgorged thereof. Roome had a relationship with the AFF's agent, Ramothibe. He also had a relationship with the AFF directly; he e-mailed them and met with representatives of the AFF. He

knew that Ramothibe was acting on behalf of the AFF in obtaining premises. He knew that as incentive for Ramothibe to promote Roome's properties Roome was agreeing to commission in non-disclosure and confidential agreements to which the AFF was not privy. In assessing all these facts the question to be answered is whether it is justified for the AFF to rely on the conduct of Roome.¹

[106] The AFF could reasonably have expected Roome to inform it that Ramothibe, their agent, was aspiring to secret commission that was inflating the purchase price. Roome would lose nothing; his real bottom price of R32 million would still be attained. Yet Roome found it necessary to conclude confidential NDA's and Addendums making it clear that Roome knew he was acting untoward. These facts command this inference, especially so with Roome not testifying to the contrary. One only acts secretly if you knew you had a duty not to do so. Roome relied on the confidentiality of the agreements not to provide them to the AFF; persisting with secrecy towards the AFF. Roome had no scruples to deceive the AFF about his real bottom line and the secret commission until he was annoyed that Ramothibe was not splitting up the commission between the 2 companies that owned the properties and was avoiding paying VAT on the commission. He then for the first time insisted on "*a correct commission agreement*" [p389].

¹ Volvo (SA)(Pty) Ltd v Yssel 2009 (6) SA 531 (SCA) at 537A-C.

[107] I am accordingly satisfied that Roome on the common cause facts and in the circumstances had a legal duty to inform the AFF of the secret commission. I am convinced that policy considerations would in these circumstances place a legal duty on Roome, as the seller, to inform the AFF that his real bottom line price was R32 million and that pressure was being placed on the AFF to pay more to accommodate a secret commission deal being induced by Roome and the AFF's own consultant. As an astute businessman he knew that Daya was playing a part in the whole transaction that was untoward. With no evidence to the contrary, the only inference is that Daya informed Roome that McIntosh's valuation was to be R32 million and that is why the Addendum mentioned the properties *"highest best use at R32 million"* even before the valuation was available.

With this information Roome was prepared to accept R32 million as purchase price and accommodate Ramothibe with R5,5 million as secret commission. It is quite true that in all sale agreements the seller might start with a sale price higher than the market value and will in most instances have a bottom line price, but then the agent's commission is reflected in the agreement and the bottom line price is known to the purchaser. This reflection of commission is most definitely necessary where the agent of the purchaser is, unbeknown to the purchaser, also receiving a secret commission. Mr Roome had a sufficient relationship of proximity to the AFF to reasonably contemplate that the AFF would not pay Ramothibe an exorbitant R5,5 million commission secretly agreed to by Roome as an inflated purchase price.

There is a reluctance to impose a legal duty for an omission due to the recognition of a *laissez faire* concept of liberty that recognises that individuals are entitled to “*mind their own business*”. The protection afforded by the Bill of Rights might even bolster this inhibition against imposing legal duties on private citizens.² I am not reluctant to impose a legal duty under these circumstances because the legal convictions of the community would dictate that Roome did not have the right to mind his own business. Roome as the seller should have disclosed to the AFF as purchaser that he was striking a deal with Ramothibe who had a close relationship with the AFF. Roome’s omission is accordingly wrongful.

[108] I cannot find that there is any consideration that negates the legal duty of Roome to disclose the secret commission. The fact that the sale agreement for the first time includes a commission clause that the seller will pay the commission most certainly could not alert the AFF that the seller is paying R5,5 million of the purchase price to their own consultant. The fact that the AFF did not rescind the contract but interdicted the commission from being paid out is a legal remedy at their disposal to attack the unlawful commission and not the purchase price the AFF was prepared to pay for the buildings.

² **Minister of Safety and Security v Van Duivenboden** 2002 (6) SA 431 (SCA) para [19].

[109] A negligent misrepresentation gives rise to delictual liability if Roome breached his legal duty to act where he needed to act positively.³ Roome's silence can in the words of Navsa JA "undoubtedly" constitute negligent misrepresentation.⁴

[110] Thus where there is a duty to speak, Roome negligently made a misrepresentation to the AFF about the purchase price and commission pertaining to the sale transaction by representing that his bottom line price is in fact R37,5 million.

[111] I am also satisfied that the inflated purchase price is a material fact intrinsically relevant to the sale agreement.

[112] It was submitted that there was no causal connection between the misrepresentation and the averred harm because the AFF bought the property at that price on the recommendation of their own expert, McIntosh. There is accordingly also no harm suffered. On the common cause facts I am satisfied that the misrepresentation induced the contract. McIntosh testified that he would never have advised the AFF to clinch the deal at R37,5 million had he known of the commission and the NDA's. He was only prepared to advise to offer R37,5 million because Daya informed him that the LSSA was desperate for one building, time had been wasted on the R21

³ *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) at 726A-D.

⁴ *Axiam Holdings Ltd v Deloitte & Touche* 2006 (1) SA 237 (SCA) at para [15].

project, this property was in the ideal location and time was of the essence otherwise they would risk losing the properties. All those factors plus the cost of starting a search afresh can be seen as a premium that a business is prepared to pay above market value. In this instance it was personal investment value that a company would attach to the property. The market value of the property was R32 million. Had McIntosh in fact known that the R37,5 million included R5,5 million commission he would never have advised that the AFF pay a premium of R5,5 million for commission for their own agent.

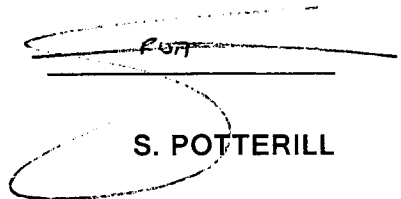
[113] The AFF did in fact suffer patrimonial loss. They are R5,5 million out of pocket, a reduction in patrimony, that they would not have paid, but for the misrepresentation. Roome was happy to sell for R32 million and on the McIntosh report and advise the AFF would have been happy to pay R32 million. McIntosh would have advised against payment of R37,5 million had he known it included R5,5 million for commission. All the factors that led to the AFF to pay R37,5 million was induced by the misrepresentation and caused it to suffer R5,5 million loss. In any event Roome should be disgorged of claiming the R5,5 million loss.

[114] I accordingly make the following order:

114.1 The third and fourth defendants are to pay the plaintiff R5,5 million jointly and severally the one to pay the other to be absolved.

114.2 Interest on the amount of R5,5 million per annum *a tempore morae*.

114.3 The third and fourth defendants are to carry the costs jointly and severally, costs to include the costs occasioned by the amendment brought on 24 May 2013.

A handwritten signature in black ink, appearing to read 'S. POTTERILL', is written over a horizontal line. Below the signature, the name 'S. POTTERILL' is printed in a bold, sans-serif font.

JUDGE OF THE HIGH COURT

CASE NO: 56341/2010

HEARD ON: 11 November 2014-14 November 2014 and 30 May 2016-3 June 2016

FOR THE PLAINTIFF: ADV. J. MULLER SC

INSTRUCTED BY: Bowman Gilfillan Attorneys

FOR THE 3rd, 4th and 5th DEFENDANTS: ADV. S.D. WAGENER SC

INSTRUCTED BY: Johan van de Vyver Attorney

DATE OF JUDGMENT: 26 July 2016