IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case number: 1479/09

In the review between:

CAPE AGULHAS HOTEL CC **PLAINTIFF**

And

LIESBEEK MOTORS (PTY) LTD **DEFENDANT**

JUDGMENT

BLOMMAERT A J

INTRODUCTION

1. On the banks of the Breede River on the Malgas side, somewhere between Malgas and Infanta is a large house known in the area as the White House.

2. The White House was built in or about 1989 by the late Mr Myburgh Streicher, a well known political figure. It is a large house consisting of

some 26 rooms, 6 of which are bedrooms and 6 bathrooms.

3. The immovable property on which the house is situated ("**the property**") is described as portion 51 (a portion of portion 3) of the farm Potberg Estates, No 516, in the division of Swellendam, Cape.

4. On 24 January 2006 the property was sold to the Plaintiff, represented by its sole member, Dr Richard Young. The seller was the Defendant represented by Ms Gwen Streicher, who is, and was at the time of the sale, the widow of Mr Myburgh Streicher who had passed away in April 2005. For the sake of convenience, I will refer to the Plaintiff as ("**Young")** and the Defendant as ("**Streicher**").

5. The estate agent who facilitated the sale was Ms Riana Gibson ("**Gibson**"). At the time she was an employee of a Seeff franchise, Catwalk (Pty) Ltd t/a Seeff Southern Cape which has its principal place of business in Swellendam. For the sake of convenience, I will refer to the company as ("**Seeff**") and in this Judgment the owner of Seeff, Mr Ian Badenhorst as ("**Badenhorst**"). Transfer of the property was effected on 28 February 2006.

6. Prior to the conclusion of the Deed of Sale, Young alleges that Streicher, duly represented by Gibson and Badenhorst, orally represented to him that there was a Water Supply Agreement with the owner of the neighbouring property in terms of which the property had access to and

pumped water using its own equipment from a borehole on the neighbouring property. The neighbour is a Mr Malcolm Wallace ("**Wallace**"). These representations Young alleges were made on, or in the vicinity of the property, on 16 and 20 January 2006.

7. Young alleges that these representations were false in that the Water Supply Agreement had expired on 1 May 2005 and that Streicher knew them to be false.

8. Young further alleges that the Defendant knew that water would be required by him for various purposes and therefore that Streicher was under a duty not to misrepresent the position regarding the Water Supply Agreement. Had the misrepresentation not occurred, Young alleges he would not have purchased the property, or would have purchased the property at a lower price. Furthermore he alleges that the misrepresentations were intended by Streicher to induce him to purchase the property, or to purchase the property at a higher price than he would otherwise have done. Accordingly Young claims damages from Streicher pertaining to the costs in providing water to the property.

9. At this stage it is important to note that I am tasked only with the issues regarding the so-called "merits" as opposed to the quantum of the Plaintiff's claim.

10. Summons was issued on 27 January 2009. On 22 October 2009 the

Defendant pleaded thereto. In its Plea the Defendant alleges *inter alia* that, prior to the conclusion of the Deed of Sale, Young had been informed by Gibson of the following:

10.1. That water in the Malgas area was a problem for all properties situated in the area;

10.2. That there was a Water Supply Agreement with Wallace, but that Gibson was not aware of all the detail pertaining thereto and that Young should speak to Streicher to obtain more details;

10.3. That another person in the area was searching for water and, should that person find water, and should the property not be sold, Streicher and that person intended laying a pipe to bring water to their properties, with Streicher sharing the costs of doing so.

11. The matter was duly enrolled for hearing on 9 September 2013. On the afternoon of 3 September 2013, Defendant served on Plaintiff a Notice of Intention to Amend its Plea. Plaintiff opposed the amendment and the Defendant accordingly brought an application for leave to amend. The said application for leave to amend was supported by affidavits deposed to by Streicher and Gibson. The Defendant now specifically denied that, prior to the conclusion of the Deed of Sale, Badenhorst and Gibson had acted as authorised agents or represented Streicher. In fact, Streicher pleaded, Badenhorst and Gibson had been instructed or employed or

mandated by Young.

12. Young did not persist with the opposition to this amendment and the amendment was duly made. In light of the amendment the trial was postponed.

13. Thereafter Young took steps to join Seeff, Badenhorst and Gibson as Second, Third and Fourth Defendants respectively. The order joining them as such was granted on 20 June 2014.

14. Pursuant to that order, Young amended the Particulars of Claim by inserting, in the alternative and in the event that the Court should find that the estate agents had indeed been mandated by Young, rather than Streicher, a claim against the estate agents for damages arising from breach of contract.

15. In his evidence Young denied having been the mandator of Seeff in regard to the property. During his cross-examination, counsel for the Defendant put no contrary version to him. Counsel for the estate agents put to Young that Gibson would say "*he phoned Mrs Streicher, asked whether she can show the property, she consented and she took you there"* to which Young replied "*so she got a mandate to sell – yes*". To this counsel for the estate agent said, "*she got the consent to show it to you - correct".*

16. Based on the aforesaid the Plaintiff decided not to proceed with its case

against the estate agents. An agreement in regard to costs was reached with the agents and the trial thereafter proceeded only against the Defendant.

17. I will return to the issue of who the mandator was at a later stage.

THE EVIDENCE

18. Young is a well-known personality, primarily in the context of what is known as the arms deal saga. As such he has, according to him, been the subject matter of surveillance and resultantly, his privacy was of particular importance to him.

19. He had previously lived in Struisbaai and had relocated to Knysna. The Knysna environment did not suit him as he wanted more privacy and he wanted a property in which he could protect himself. He said that he needed to create an environment which would allow him to observe who was observing him, and for this reason he proceeded to look for an alternative home. With this in mind he contacted one Attenborough, who was the Seeff agent for the Witsand area.

20. Attenborough sold properties on the eastern side of the Breede River i.e. on the Witsand side. Young was however more interested in acquiring a property on the Infanta side of the river.

21. Having spoken to Attenborough telephonically, Young drove to Witsand

with his girlfriend on 16 January 2006 to meet with her. She offered to show him properties on the Witsand side, but he was not interested and she thereafter proposed to hand him over to the accredited Seeff agent on the Infanta side, one Gibson.

22. Young and his girlfriend then drove to Malgas and met Gibson on the Swellendam-Infanta Road. Gibson showed them four properties. The third of the four was the property which is the subject matter of this dispute.

23. Upon viewing the property on 16 of January 2006, Young was immediately enamoured with it.

24. He testified that upon their arrival at the property, the garden was green and vibrant. The swimming pool was full and was, in fact, being filled further by means of a hosepipe. He also saw fruit trees and testified that there was nothing to indicate that there was a shortage of water on the property.

25. Young testified that on 16 January 2006 he could not view the inside of the home as the person who was "renting" the bottom part of the house, and had a key to the house, was not there.

26. Young specifically testifies as follows regarding the questions he asked:

"Well, I mean I was asking a lot of questions. Off course, when one is

buying a property, especially a farm one must know a lot about things like sewerage, electricity and water."

27. As to specific questions asked by Young, he enquired about the electricity and was told that there was at that moment only a generator, but that Eskom was installing power. When he was asked whether he was planning to live there, he replied "*absolutely*".

28. As to the water ,Young testified as follows:

"Anyway at this stage I was talking to Mrs Gibson and she explained the water situation to me - to be frank in pleasing detail, enough to actually realise what was going on. "

29. She told him that in that area there were water challenges. Furthermore she said "*But the most important part of that is that they had solved those challenges and that was that they had come to there was a water supply arrangement with the neighbouring farm".* Young further testified that this made sense to him as portion 51 was one of 10 portions, each of 25 hectares along the river that had been subdivided and sold for development. The rest of the 750 hectare farm, portion 3, was where the water came from. He testified "*So it made absolute sense to me was if, well if there is a place that we are cutting of and selling it as a 25 hectare farm and that there was no water there, but there was abundant water on portion 3 that it would make sense that that arrangement had been made*

when the subdivisions were made to supply".

30. More importantly he testified that when he asked about the water supply arrangement he asked: *"Is it a permanent one? And she says yes: I said: is it a servitude? and she, - I remember very clearly she says: it is like a servitude."*

31. On further questioning as to the servitude he testifies as follows:

"… *but I did at a stage said if it is a servitude, surely it must be in the Title Deed and I don't think I got a direct answer, but I did ask whether I can get a copy of the Title Deed and the answer was no, because Mr Streicher had died a couple of years before and he had been right in the throes of selling his Durbanville property and the whole sale had come to a standstill because the estate complications was companies and whatever and that the Title Deed was caught up in the estate and it wasn't available at that stage."*

32. Furthermore he testified as follows:

"Also it was never told me that it was a - the water supply was via a written agreement between the Streichers, Mr Streicher on behalf of the property owning Company, Liesbeek Motors and the neighbour, Mr Wallace. It was just a permanent water supply agreement or arrangement and it all made sense to me that this place had been existing since at least 1989 there'd

been up to 45 Aberdeen-Angus cattle there, there was clearly not so much agriculture but water culture so that the water challenges had been solved".

33. On being asked how the arrangement physically worked, Young testified as follows to Gibson's explanation:

"Frankly I was quite pleased to get that level of detail, because this was somebody who obviously knew. She either knew or she had been briefed, but certainly knew the detail"

34. What he was told, he testified, was as follows:

"… I was told that the windmill was like visible, like a 100 metres away from the main road and that was 3.2 kilometres away from this homestead, the water was piped through a 32mm - its actually not a black plastic. It is a polyethylene pipe of 32mm. That is important to me because it can give me the indication of how much volume of water you can pump in so many hours. The - the borehole was owned by the neighbouring farm, but the windmill itself and the pipes were owned by the Streicher's farm, the farm that I was buying. It was part of that property".

35. Furthermore he was shown the fairly high 5 metre water tower with four 5000 litre plastic tanks and a further five 5000 litre tanks on the ground. There were thus nine tanks altogether and he was told the water got

pumped into these tanks.

36. He testified that he had been asked what he wanted to do with the farm. He explained that he wanted to do small-scale farming.

37. According to him he had bought a cheese making machine in Knysna and he wanted two cows so that he could have fresh milk to make cheese. Moreover he always liked fruit trees, not only the existing fruit trees, but he wanted to plant a few more fruit trees. When told this Young testified that he remembered Gibson saying:

"*We've solved the challenge or these people have solved the challenge of water for this small scale operation, but if you ever wanted to do something big like big-scale olives – or one of my neighbours three kilometres away owns the biggest olive farm in Africa. An incredible thing to do, but he's got boreholes and if I want to do something like that, I would have to find more water.*

So that there was discussions about extra water and about this other persons in the neighbourhood who was looking for water. Those went around extra water, not replacing the water supply arrangement that I was told was permanent".

38. When asked to comment on the Defendant's plea - to the effect that Gibson would have said to Young that there was a Water Supply

Agreement with the owner of the neighbouring property, but she was not aware of all the details and that he should speak to Mrs Streicher for more details - Young responded as follows:

"She did tell me that, but that was not – that was told to me in Seeff offices in Swellendam and I was on the premises first on Monday the 16th and again on Friday the 20th and that was never mentioned on the premises. By the time she told me that, I already knew that there were water challenges and that that had been solved and I had a full explanation of how the water worked. What she – her exact words to me, in fact I broached the subject, not her. During the discussions around the offer to purchase, I sitting in the Seeff offices in Swellendam with Mr Badenhorst and their internal company attorney was there at one of the sessions as least as I said: Should we not include something about the water? And Mr Badenhorst actually turned to Ms Gibson, Mrs Gibson and looked at her and said: What do you say? And she didn't look up at me, she just said to me: If you want to know how – If you want to know how the details of how the water works, ask Mrs Streicher.

But I already knew how the water worked. I knew that they had solved the challenges. I knew that the water had been working at least apparently for going on 20 years. My girlfriend was outside on a very hot summer's day, with our two dogs in the car and I didn't know Mrs Streicher. There was

no reason for me to stop whatever we were doing, which was finalising the offer to purchase and go and phone her to find out how the water worked. I had been told that."

39. It is to be remembered that, initially, Young had not seen the interior of the house and therefore the offer made on 17 January 2006 contained the following clause:

"*The sale is also subject to final inspection by the purchaser to verify the house is in accordance with the advertised description on Seeff's website as the purchaser did not have access to the interior of the homestead"*

40. On 20 January 2006 Young inspected the interior of the property. On this occasion he was accompanied by Badenhorst from Seeff with whom he got a lift from Swellendam to the property. Gibson met them there independently. Furthermore the "tenant", one Mr Raymond Fourie who was renting the downstairs flatlet from Streicher was also present. Fourie had been living on the property for several weeks or months and according to Young, he once more enquired as to the water situation. He wanted certain details from Fourie as to where to go and switch on the water and the like. Fourie, more or less, precisely repeated the same run-down of the 32 mm plastic pipe, the windmill and that, even though the Water Supply Agreement stated once a week, he was told that they were allowed to, or could, fill up twice a week. Fourie showed him the other boreholes on the property, but explained that they were of no effect

because "*ons praat van brakwater"* and that the water was actually too "brak" to be used for irrigation.

41. Young concludes as follows about the information that he received on 20 January 2006:

"*But anyway, everything he explained to me juxtaposed or dovetailed with what Riana Gibson had told me, and much of what he told me. I won't say every single thing about we walked off to the boreholes, is that Riana actually asked him to explain and in quite a lot of the time she was standing close within earshot. So anyway that - at the end of the day I had a pretty comprehensive understanding about how the water worked. I heard it twice. I'd had five days to think about it in between so I was reasonably sure that this - this place was a going concern as far as water was concerned"*

42. The only significant role that Badenhorst played in the negotiations was to indicate to Young the homestead where the neighbour, Mr Wallace, from whose property the water was piped, lived.

43. The further significant evidence by Young as to the water relates to a suspensive condition in the Deed of Sale that a valuation would be done of the property. He testifies that he contacted somebody called Kevin Wynne who lived in Paarl and who produced a valuer's report. This report under the heading "Land Description" contained the word "Water

Servitude".

44. Of further importance is the fact that, shortly before transfer of the property, and while in occupation of the property as a tenant, Young was phoned by one of the staff members to say that they had no water. He thereafter contacted Streicher who said that she would see to it. Apparently this was remedied.

45. The only physical meeting that Young had with Streicher was at a lunch on 17 February 2006 in the Strand. He had called upon her to introduce himself and to tell her of his intentions with the property. As to the discussions at that lunch Young testified as follows:

"So I spent two and a half hours odd with her over lunch and we certainly discussed the kind of things I mentioned about my – my plans for the – ideas for it, but a lot of the discussion, at least, at least half an hour and maybe even three quarters of an hour went around not only the water, when but also Mr Wallace. There was a lot of discussion about Mr Wallace and the plough all kinds of things about neighbourliness, in fact also about access and gates across the road because of all the cattle. All the irritations and things like that. So yes, we discussed water and the – arrangement, the agreement at some length, but not one single thing was said that this was actually a written Water Supply Agreement and more so, that it actually expired the previous May. That was not mentioned in the slightest".

46. Furthermore Young testified that Streicher told him that he must remember that the windmill and pipeline belonged to the farm, although not the borehole itself.

47. Young's first awareness of the non-existence of a Water Supply Agreement is described as follows in a letter by himself to Mr Gerhard Gous, Streicher's attorney of record. In this letter he says:

"*1. I telephoned Mr Wallace yesterday. He almost immediately turned the conversation confrontational. He told me provision of water to the Streicher's farm was regulated by an agreement with Myburgh Streicher which expired last year in May. This is the first time that I knew of this because when I signed the agreement of sale I was advised that there is an agreement currently in place. He said he was no longer prepared to have an agreement with Mrs Streicher, however he was prepared to enter into a completely fresh agreement with me and then he revealed his stratagem and that's all about price."*

48. As to when Young initially saw the expired Water Supply Agreement he testified that at the end of his lunch with Streicher she handed him a blue A4 file. When he enquired as to the contents, she said it was the farm file. Subsequent to being told by Wallace that the Water Supply Agreement had come to an end he perused the file, and in fact found the expired Water Supply Agreement.

49. From Young's evidence it appears that, subsequent to this, he had made various attempts to reach a new Water Supply Agreement with Wallace, but by all accounts the correspondence revealed that there was an intransigence on Wallace's part and the issue of the cost at which Wallace would supply water was the essential stumbling block. I am of the opinion that this evidence is not particularly relevant seeing that it came to nothing. It is clear that Young made every attempt to obtain Wallace's cooperation, but to no avail. Eventually Wallace refused to communicate any further. What is clear however, is that Young tried everything in his power and did very detailed research as to the costs of water in the area, but again with no success.

50. During cross examination Young, by and large confirmed his version, as given in chief. Some of the more significant aspects of his evidence during cross examination were:

50.1. As to the visit of Mr Wynne, the valuator, Young testified as follows:

> "*Ok, but a couple of days later Mr Wynne came out there with Ms Gibson in his car. They were together for four/five hours. He - she was the only person briefing him and he came out with an independent report of which, the content of which I have absolutely zero to do with. It is in front of us. We went through it yesterday. It says "servitude".*

50.2. This evidence was not challenged by Mr Klem who appeared for Streicher.

50.3. Young specifically denied that Gibson would have said to him that water in the Malgas area was a problem.

51. As to the issue of the alleged statement by Gibson that she would have said "*if you want to know how the water works ask Mrs Streicher"* it was put to Young that Gibson would say the following:

"1. Mrs Gibson can't remember where she said it to you, whether it was at the farm or at the office, but she is prepared to concede that it happened the way you described that she told you in relation to the question you asked about the contract that you must refer that question about the water to Mrs Streicher. You got to discuss how the water works with Mrs Streicher that will be her evidence"

52. Thereafter Plaintiff closed its case and withdrew its action against the Second, Third and Fourth Defendants.

53. The Defendant led a number of witnesses, of whom only two are of real importance in this matter, namely Streicher and Gibson.

54. Streicher testified in chief that she was aware of the fact that water was pumped from Wallace's property to the property from a borehole on Wallace's property. She further testified that she knew that there was an

agreement between her late husband and Wallace. Furthermore she testified that she knew that, in terms of the aforesaid agreement, there was an obligation on Wallace to supply water to the property.

55. She also knew that the agreement was no longer in force.

56. According to her there were not 45 head of cattle on the property, but 12 head of Black Angus cattle.

57. It is important to note Streicher only met Young personally on one occasion and that was during a lunch on 17 February 2006.

58. Resultantly Streicher's evidence relates in essence to the question of the mandate as well as what occurred at the lunch on 17 February 2006.

59. As to the question of the mandate, Streicher testified that on the late afternoon of 17 January 2006, Gibson telephoned her and told her that she had a signed Sales Agreement. According to her the fax arrived at 18:33 that afternoon.

60. As to the lunch, Streicher testified that she had gathered together all her documents pertaining to the Breede River property and put them in a file at the front door so that she would not forget to give them to Young.

61. The file, she testified, contained the Labour Agreements with her staff, because Young was taking over her staff plus documents from the Labour

Relations company with which she had a contract and all other documents, probably the documents with the rates accounts as well as the agreement that the late Mr Streicher had had with Wallace. She further testified that she was aware of the fact that the contract with Wallace had expired.

62. According to her he did not tell her that he intended farming on the property nor that he intended irrigating a portion of the property.

63. As to discussing water, her evidence reveals the following:

"*Did you during this lunch, advise Mr Young there was a borehole on the property of the neighbouring farm. No, we never discussed the water or the workings of that we, just discussed the house.*"

64. Furthermore Streicher testified that Young never advised her that he intended to stay on the property permanently.

65. Streicher further admitted that she was dependant on her neighbour for water, but testified as to the plans for the future as follows:

"*Yes. I was dependent on my neighbour, but Mr Paul de Waal and I were in discussions with Mr Wallace to broker an agreement and as well as Mr de Waal, was also looking for water, and should he find water the two of us would have gone together into that water agreement.*"

66. She testified that she and Paul de Waal were trying to achieve a permanent water arrangement.

67. Of further significance is the following evidence by Streicher:

"The fact of the matter is that your property was not independent for water, it was reliant on neighbouring properties for water, was it not. Yes, if you wanted to do more than just weekends"

68. During cross-examination, Streicher confirmed that the supply of water from Wallace's farm was a matter of great importance to them.

69. Streicher further testified that neither she, nor her husband had had any difficulties with Wallace regarding the water. She testified as follows:

"And prior to the death of your husband, you had no difficulties I think you testified that there were no problems. Absolutely none."

70. When confronted with the following e-mail by herself to Young,

"Does this man have no shame and no end? He did the same to me and kept closing our water even, though we had a valid water contract. What is his case? What happened to peace and joy to all mankind?" her answers were vague in the extreme. Despite the aforesaid, Streicher simply denied that she had had any problems with Wallace regarding water.

71. As to the mandate, and more particularly the issue of how it was possible that Streicher could have received a signed agreement before any previous contact had been made with her, while the signed agreement in fact contained an annexure which clearly emanated from her, she was unable to answer the question adequately.

72. As to the issue of changing her sworn affidavit (which was also confirmed by Gibson) she had to admit that her evidence contradicted what was contained in the affidavit.

73. When confronted with the question that both versions cannot be true her answer was as follows:

"I stand by the story that Ms Gibson phoned me on the 17th to ask – to tell me she had a signed sales contract."

74. Ultimately the following exchange between Mr Fagan for the Plaintiff and Streicher is significant.

"But which again means it couldn't have been a signed contract - if that information came off your fax and it couldn't have been a signed contract before that fax was sent by you. Once again, maybe my memory is fading."

75. As to the lunch on 17 February 2006, when asked whether the water had been discussed and why Streicher did not inform Young about the water

problems, her evidence was that they had not discussed water, but only the house.

76. Despite admitting that water was an important issue and that she probably should have told Young, she certainly did not do so.

77. Furthermore Streicher specifically denied that the water issue and Wallace were discussed with Young at this lunch at all. Ultimately, when it was put to her that it is overwhelmingly probable that the issue of water had been discussed with Young, Streicher answered:

"That might be so, but I am afraid I don't recall."

78. In contrast to the aforesaid evidence the following evidence by Streicher is significant:

"And you were trying to conclude an agreement for permanent water from Mr Wallace's farm… Yes. And you were doing that for a reason. Yes, so that I would have a permanent water arrangement so that there wouldn't be a concern about whether it was going to rain or not rain and that my staff could have as much water as what they wanted. It is always nice to have more water. We wouldn't have needed much more but it is nice to know that there is more".

79. When asked whether she thought it was likely that Young would have discussed water with the estate agent her answer was:

"He probably would ask about a lot of other things as well."

80. During her evidence in chief Gibson testified that she could remember having met Young in January, but that she was not sure of the date.

81. According to her, she informed Young that fresh water in the Malgas area was a problem.

82. She further testified as follows:

"I informed him that there is an arrangement with the neighbour for water. I also told him that I am not sure of the particulars of or the - details of this arrangement. I was also told that the - another next door neighbour was also looking for fresh water and that him and Mrs Streicher had an agreement that, if he should find fresh water, they would share the costs of running pipes to the respective properties and, of course any implements that needed to be installed as well as pumping water."

83. According to her, this information was given to her by Raymond Fourie who was the "tenant" on the property.

84. Gibson denied that Young had advised her that he intended living permanently on the property nor that he intended having a couple of cows to make his own cheese.

85. As to the issue of whether Young had asked whether the water

arrangement was a permanent one, her answer was as follows:

"Mr Young, I am sure would have asked, but I did tell Mr Young that I didn't have any details, and I did refer him to Mrs Streicher."

86. As to the issue of whether Young asked her whether the arrangement was in terms of a servitude her answer was simply that:

"*He could have. I can't remember."*

87. Furthermore, she testified that it is possible that Young could have asked her for the title deeds.

88. When confronted with Young's evidence that, at the meeting in Swellendam where Young alleges that he asked whether they should not refer to the water arrangement in the offer to purchase and the fact that Badenhorst looked at Gibson and asked whether it was necessary to contain it in the agreement and that she replied no, her comment was as follows:

"I can't remember it happening, but if it did happen, I would understand why I said no: because the offer to purchase had to do with the property. The arrangement with the water would be an arrangement between the owner of that neighbouring farm and either Mrs Streicher or the new owner. It is not something that is included in the sale."

89. As to the issue of her mandate and the fact that she had indicated that she had first obtained permission to show the property, Gibson testified that it is factually incorrect.

90. Of further significance is that Gibson denied ever having travelled to the property with the valuer, Wynne.

91. Under cross-examination Gibson again stated that regarding the mandate she had made an honest mistake in her affidavit.

92. When confronted with the fact that both Streicher and Gibson's affidavits were similar the following exchange took place:

"Aren't the overwhelming probabilities, Ms Gibson, then that what you and she both remembered, was simply correct? Possibility is there that she gave me permission before the time to go - and well to show Mr Young the property when I contacted her. Yes and that would have been then on the 16th according to the days given to me – Yes."

93. Finally the following was put to Gibson:

"Well your evidence yesterday you see was that the first time you made contact with her was only after you had the offer to purchase. Now that we know is not right. Yes."

94. On being questioned whether her memory, as to what had transpired at

the Seeff Offices at Swellendam was poor, Gibson testified that:

"Of those visits, yes absolutely that time actually."

95. Gibson furthermore admitted in cross-examination that water was a material issue.

96. Mr Fagan, on behalf of Young, specifically put the following to Gibson:

"Similarly I would suggest to you, you can't remember clearly what exactly was discussed regarding water generally - Generally no."

97. Similarly the following evidence is relevant:

"What I do remember is that I did tell him that fresh water and Malgas is a problem. I definitely mentioned the water agreement to him and I definitely mentioned the other neighbour that was looking for water as well or another water source and that would have been the water information that I gave to him. But there might have been further information, you don't recall that… I don't recall not at all, no."

98. When Gibson was asked whether she would have asked Streicher about details concerning the water, her answer was that she could not remember, but she was pretty sure that she would have.

99. Gibson confirms this as follows:

"Yes, so you say you're are pretty sure you would have asked Mrs Streicher about this, but you can't recall doing so. No, I don't, but I am sure I would have."

100. So too the following evidence of her discussion with Streicher is significant:

"So there was some discussion about water, but what precisely it was you don't now recall… No."

101. She further admitted that she would have told Young that water in the Malgas area was a problem in response to questioning by Young.

THE ISSUES

102. To my mind the essential issues to be decided are:

102.1. Who was the mandator?

102.2. Was there a representation and was it false?

102.3. If there was a representation, was it done by Defendant with the necessary intention?

THE MANDATE

103. In my view there is no merit in Defendant's contention that Young was in

fact the mandatory and not Streicher. I say this for the following reasons:

103.1. The contract itself records, in clause 13.5, that Young was introduced to the property by the Defendant and not by any "**party**" other than Seeff and that Seeff is the effective cause of the sale;

103.2. Clause 26 also records that the deed of sale was negotiated by Gibson;

103.3. It is clear that Young contacted Attenborough who was the Seeff Agent for the Witsand Area and she, in turn, referred him to Gibson to show him properties on the Malgas side of the river.

103.4. Furthermore, Attenborough indicated to Young that what she called her "favourite property" on the river was the White House which would be shown to him.

103.5. It is important to note that Attenborough did not testify and the only witness, on the question as to whether Young was the mandator, was himself. His evidence was unequivocal. His discussions with Attenborough had only pertained to properties on the Seeff books. The property was on Seeff's books and on its website. Even if the evidence suggests that the property might have been on Seeff's books erroneously, in as much as Seeff's previous mandate to sell it had been terminated by the late Mr Streicher, this has no

relevance to this case.

103.6. Young never considered that he might be liable for the payment of commission. He was certainly never told that he would be liable for commission, nor was he factually. I can think of no reason why commission would be payable to an estate agent by a party other than one that gave the mandate.

103.7. The issue as to the affidavits and the retraction of the admissions therein clearly shows that both Streicher and Gibson were economical with the truth, to say the least. To my mind it is not worth analysing all the evidence, save to say neither Streicher nor Gibson was credible on this issue.

103.8. In any event, even on Streicher's own version, she at least gave Gibson permission to show Young the interior of the house prior to the deed of sale being concluded on 24 January 2006. Thus Seeff, even on Streicher's own version, at the very least had a tacit mandate to sell the property. As pointed out hereinbefore, Gibson ultimately conceded that the conversation with Streicher could have taken place on 16 January 2006. In this case she would have had Streicher's permission to show the property.

103.9. Furthermore Streicher's intention was to sell the property. In my view Streicher's permission to Gibson to show the property

amounted to an express mandate, given the fact that the property was already on the market. At the very least it constitutes a tacit mandate.

THE REPRESENTATIONS

104. As is evident from the evidence aforesaid, the only person who can really testify as to the representations that were made to Young, were Young and Gibson.

105. Young visited the property on two occasions before concluding the deed of sale. The first was on 16 January 2006 and the second on 20 January 2006. On both these occasions both he and Gibson were present.

106. Furthermore, it is evident that on Young's second visit to the property Badenhorst was present as well as a so-called "tenant", one Raymond Fourie.

107. As Badenhorst was not called as a witness and neither was Fourie, Young's evidence as to Badenhorst's involvement is the only evidence before me. This evidence was that when Young asked Badenhorst whether a property they had driven past was the neighbour, from whom the water came in terms of the water supply arrangement, Badenhorst had answered in the affirmative.

108. As appears from the evidence aforesaid Gibson's memory of what took

place was, to say the least, to use her own word “foggy”. She could remember that there had been some discussion about water, but not precisely what it was. She did however confirm that Young definitely asked her about water.

109. In my view, bearing the aforesaid in mind, Young’s version is to be preferred and should prevail.

110. I therefore accept that Gibson made a number of representations to Young regarding the property and, more particularly, about the water supply from Wallace’s property to the property. I thus accept the following evidence by Young:

110.1. That he had asked a lot of questions, because when one is buying property, especially a farm, one must know a lot about things like sewerage, electricity and water.

110.2. That he was asked whether he intended living on the property and that he had answered in the affirmative, stating that he wanted to live there semi-permanently.

110.3. That Gibson had told him that there were water challenges, but that these had been solved through a water supply arrangement with the neighbouring farm.

110.4. That he had asked whether the arrangement was a permanent one

and that Gibson answered in the affirmative, upon which Young had asked whether it was a servitude and Gibson had said, it was "like a servitude".

110.5. That he was not told that there was a written water supply agreement.

110.6. That Gibson was able to give Young a great deal of detail regarding the water supply from Wallace's farm.

110.7. That he advised Gibson that he wanted to do small-scale farming on the property and that Gibson had advised him that this was feasible with the available water.

110.8. More particularly, I accept the evidence of Young to the effect that he was told by Gibson that the arrangement with Wallace was "like a servitude". Gibson could certainly not refute this evidence as she had only a hazy recollection of what had been discussed.

110.9. To my mind it is inherently probable that Young's evidence is accurate. This is so because Young's follow up question related to the title deeds. The response that these title deeds were caught up in the deceased estate of the late Mr Streicher cannot be explained in any other way. It is important to note that this fact was never queried under cross-examination. The question that arises is how

Young would have known about the whereabouts of the deeds, if Gibson had not told him.

110.10. Furthermore, I accept Young's evidence that the valuer, Kevin Wynne confirmed that the water supply was a servitude. That this was a comfort to Young, is evident.

111. That a principal is liable for misrepresentation made by his or her agent, is trite.

112. The Appellate Division (as it then was) in **Randburg Beperk v Santam Versekeringsmaatskappy Beperk 1965 (4) SA 363 A at page 372C - F** sets out the legal position as follows:

*"Ek sou eerder meen dat die volgende stelling uit 'n Engelse gewysde wat in **Ravene Plantations Limited v Estate Abrey and Others** **1928 AD 143** op bladsy 153 goedgekeur word, ook vir die geval waar magtiging van 'n agent om voorstellings te doen regtens versonderstel word, hier van toepassing is:*

> *"I think that every person who authorises another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution of the authority given as much as he undertakes for its absence in himself when he makes the contract."*

Dit is redelik dat die prinsipaal wat sy verteenwoordiger kies en

hom voorhou as 'n betroubare persoon, en nie die ander party wat geen seggenskap by die keuse het nie, die risiko van sy moontlik oneerlike voorstelling of verwysings sal dra, ook waar die oneerlikheid so 'n gestalte aanneem dat die Verteenwoordiger dit uit die aard van die saak ongetwyfeld vir die ander party sal verberg. Dat 'n versekerde hom in 'n geval soos hierdie op die aangevoerde grond die voordeel van sy verteenwoordiger se bedrog of misleiding kan toeëien, ten koste van 'n argeloos onwetende versekeraar, is 'n gevolgtrekking wat ek nie vir ons reg kan aanvaar nie."

113. Accordingly I find that the representation made by the agent, Gibson was authorised by Streicher in the sense that she accepted the risk of those representations.

114. That the representations were material goes without saying. As Young testified repeatedly without water the property was worth nothing.

THE VOETSTOETS CLAUSE

115. In the present matter the contract contains a voetstoets clause as well as a so-called non-representation clause.

116. In **Odendaal v Ferraris 2009 (4) SA 313 (SCA)** Cachalia J A at page 537 says the following:

"It is trite that if a buyer hopes to avoid the consequences of a voetstoots sale, he must show not only that the seller knew of the latent defect and did not disclose it, but also that he or she deliberately concealed it with the intention to defraud (dolo malo). Where a seller recklessly tells half-truth or knows the facts, but does not reveal them because he or she has not bothered to consider the significance, this may also amount to fraud. But as the Court has said fraud will not lightly be inferred, especially when sought to be established in motion proceedings. And where a party seeks to do so the allegations must be clear and the facts upon which the inference is sought to be drawn succinctly stated."

117. Furthermore in the present case the seller is a company. In this respect Blackman "Companies" in Joubert the Law of South Africa 1st re-issue, Volume 4(1) at paragraph 35 sums up the legal position as follows:

"Whenever liability depends upon the performance of an act or a mission by the company itself, or possession by the company of a particular state of mind, the law treats the act or state of mind of those who represent and control the company as the acts and state of mind of the company itself." *See also* ***Levy v Central Mining and Investment Corporation Limited 1955 (1) SA 141 A at page 149H to 150A, R v Kritzinger 1971 (2) SA 57 A at page 59E – F, Anderson Shipping (Pty) Ltd v Guardian National Insurance Company Limited 1987 (3) SA 506 A at page 515H – J*** *and* ***Commissioner of Inland Revenue v Malcomuss Properties (Isando)***

(Pty) Ltd 1991 (2) SA 27 A at page 36G – 37H.

118. To my mind there is no evidence to show that either Badenhorst or Gibson knew that the representation that they were making was false at the time when they made them. Furthermore Streicher did not make any representations regarding the water. In order to escape the effect of the voetstoots and non-representation clause it is therefore necessary for me to consider whether Streicher, who represented the Defendant for these purposes either knew that false information would be used by Badenhorst and Gibson to make representations to the Plaintiff or foresaw the possibility that false information might be used and reconciled herself to this because she did not bother to consider its significance.

119. It is therefore necessary to consider whether Streicher recklessly told the half-truth or knew of facts, but did not reveal them, because she had not bothered to consider their significance as required in **Odendaal v Ferraris** op cit. In other words, has the Plaintiff succeeded in proving the necessary intention on the part of Streicher?

120. What Streicher knew or foresaw in this regard, by the nature of things, in the present matter can only be determined inferentially.

121. In my view, on the probabilities, the necessary inference can be drawn against Streicher and therefore against the Defendant for the following reasons:

121.1. Gibson testified that she was not sure of the details regarding the water supply agreement as she did not have the written agreement and could not confirm anything. Then however, she said:

"And Mrs Streicher did not give me any details either. I can't remember whether I asked her about it, but I am pretty sure I would have."

121.2. Thereafter she repeated this and confirmed that she would have asked Streicher "*because that is part of what you would regard as your job as an estate agent."*

121.3. If this is so the only conclusion can be that Streicher was aware that Young had raised the issue of the water or at the very least, she should have anticipated that he would raise the issue of the water.

121.4. To my mind Streicher's testimony was not only evasive, but sometimes blatantly dishonest. I say this for the following reasons:

121.4.1. Streicher testified that she had no dispute with Wallace regarding water.

121.4.2. She testified that she had only spoken to Wallace once, when her staff told her that they were running short of water.

121.4.3. Furthermore she testified that Wallace had been very agreeable and had put the water back on. According to her there had been no dispute.

121.4.4. According to her there were absolutely no problems in regard to water, prior to Mr Streicher's death.

121.4.5. This evidence by Streicher was however directly contradicted by the e-mails sent by her to Young in which she said:

"Does this man (Wallace) have no shame and no end?? He did the same to me and kept closing our water even though we had a valid water contract. What is his case??? What happened to peace and joy to all mankind?"

121.4.6. I have already mentioned the testimony concerning the date on which Gibson had a conversation with Streicher in which she allowed Gibson to show the property to Young. As I found previously this was clearly untruthful.

121.4.7. Streicher's evidence was that at the lunch on 17 February 2006, Wallace was at no stage discussed. This, in turn, is contradicted by an e-mail which she sent to Young on 23

February 2006, in which she refers to what she had told Young regarding the access road to the property which traversed Wallace's property. Streicher testified that she had never discussed water with Young. However, she testified that he had told her that he needed to repair the water tanks under the house. Clearly water was discussed on 17 February 2006.

121.4.8. As referred to before, Streicher's belated endeavour to make the estate agents Young's agents, rather than hers, smacks of dishonesty and could only have served the purpose of avoiding liability for misrepresentations made by her agents. This attempt by Streicher served only to cast doubt on the veracity of her evidence in general.

121.4.9. From the evidence it is clear that Young, Streicher and Gibson agreed that water was of crucial importance to the property.

121.4.10. Streicher herself testified that she knew that the supply of water from Wallace's farm was a matter of great importance. She also knew that the only available source of water, other than run-off water from the roof, which was insufficient for the purposes of the property, was by way of the pipeline from Wallace's property.

121.4.11. She furthermore knew that the agreement with regard to water had come to an end. The resultant unavailability of water to the property was something which, to my mind, should have been conveyed to a prospective purchaser.

121.4.12. This is more so if regard is had to the fact that the property had a successful and vibrant garden; it had been marketed as a small hotel or large guest house, it had 26 rooms including 6 on-suite bathrooms. It had a swimming pool. The property gave the impression that there was no shortage of water.

121.4.13. When it was put to her that, on her version, she had not told Gibson anything about the water problem and knowing that Gibson was trying to sell the property to Young she responded "*I told Miss Gibson nothing, knowing that she presented me with the sales contract.*"

121.5. To my mind it is obvious that Streicher knew that Young would, in all probability, ask about the water. She furthermore knew that the less she told Gibson, the more certain it was that Young would be brought under a misapprehension regarding the water. Clearly Streicher knew that the water arrangement had come to an end. This she should have revealed. Not to have done so, because she had not bothered to consider its significance, amounts to fraud.

122. I thus find that Streicher had the necessary intention needed to avoid the consequence of the voetstoots and non-representation clauses.

123. It is furthermore self-evident to my mind that, had Young been advised about the termination of the water supply agreement, the Plaintiff would either not have purchased the property or would have purchased the property at a price below that which he paid.

124. Furthermore, it is clear that the only purpose of the Defendant not disclosing the termination of the water supply agreement was to induce the Plaintiff to purchase the property at the highest price possible.

THE DEFENDANT'S FURTHER DEFENCES

125. It would seem that Defendants rely on the following dictum from **Odendaal v Ferraris op cit at page 324 (paragraph 35)**

"*As a general rule, where a buyer has an opportunity to inspect the property before buying it, and nevertheless buys with its patent defects, he or she will have no recourse against the seller. It is apparent that respondent discovered the water damage immediately after taking occupation- , and thus that he would've done so, had he asked for access at the time of the inspection. He has himself to blame for failing to do so and cannot hold his failure against Appellant."*

126. What is immediately apparent from this dictum is that it relates to patent

defects. In the present case the defects are clearly not patent. No amount of looking at the property could have indicated to Young that there was a lack of water. In fact the very opposite is clear.

127. It is trite law that contributory negligence can never be a defence to intentional wrongdoing. Even if such a defence existed in our law, it would not succeed in this case, as Young says that he did ask questions about the water and that he received answers and he had no cause to think that those answers were false. He knew everything he needed to know about the water and the agreement with Wallace except that there had been a written agreement that had expired. This information he could only have obtained from Streicher, and in my view, there was an onus on Streicher to bring these facts to Young's knowledge. As Young testified, the only reason that there could have been a problem is that he was being lied to.

128. As appears from my analysis of the evidence hereinabove, I accept that Young was told that there had been a permanent water arrangement that was "like a servitude". To my mind this lends credence to Young's evidence that he understood the remark by Gibson as to "how the water works" to mean the precise mechanics of the amount of water, the working of the valves and the like. Seen in its context, I am of the view that it was not unreasonable for Young to have placed this interpretation on the words, "how the water works".

129. It was furthermore argued that, the fact that Young admitted that he had

been told that the neighbour was looking for water and that Streicher intended to share this water, should have alerted him to the fact that there was not enough water and therefore he should have been more vigilant.

130. What is clear from the evidence quoted hereinabove is that Streicher herself thought that extra water would come in handy. To my mind it is not unreasonable for Young to have thought that this referred to extra water, should he intend full-scale farming.

131. Furthermore, it was argued that the fact that Streicher handed Young a copy of the Water Supply Agreement although she did not alert him to its presence in the blue A4 file was indicative of the fact that Streicher was not hiding anything. It is clear that Streicher failed to alert Young about the expired water agreement. This failure is never properly explained. In the context of the case as a whole I do not think that the handover of the blue A4 file is sufficient to neutralise Streicher's intention. In my view it should be seen in the context of the following dictum form **Odendaal v Ferraris opcit**:

"*Where a seller recklessly tells a half truth or knows the fact but does not reveal them because he or she has not bothered to consider the significance this may also amount to fraud".*

COSTS

132. The costs of the joinder application were settled by the parties *inter partes* and made an order by myself.

133. The costs occasioned by the postponement of the trial on 11 September 2013 to April 2014, including the costs of the Applicant's application for postponement have stood over for determination by me.

134. In my view, the postponement was purely as a result of the Defendant's very late amendment to its Plea and the resultant need to join the estate agents as further Defendants, and should be for the cost of the Defendant.

135. The costs occasioned by the further postponement of the trial on 14 April to 1 September 2014 also stood over for later determination. The matter was postponed on that date because the estate agents had not yet been joined. In my opinion the Plaintiff had ample opportunity to join those Defendants and Defendant cannot be held liable for the costs of the postponement. Those costs should be borne by the Plaintiff.

CONCLUSION

136. It is accordingly ordered as follows:

136.1. Judgment in respect of the separated issues, so far as those issues pertain to the dispute between the Plaintiff and the Defendant, is granted in favour of the Plaintiff.

136.2. The questions of law and fact that arise from paragraph 20 to 27 of the Particulars of Claim as amended and from paragraph 8 to 10 of Defendant's Plea, as amended, are postponed for later determination.

136.3. Defendant is to pay the Plaintiff's costs on the party and party scale as taxed or agreed.

136.4. Such costs are to include the costs occasioned by the postponement of the trial on 11 September 2013, including the costs of Plaintiff's application for postponement.

136.5. Plaintiff is to pay the wasted costs occasioned by the further postponement of the trial on 14 April 2014.

BLOMMAERT A J

CAPE TOWN