

SUMMARY OF THE JUDGMENT

AGENT EFFECTIVE CAUSE OF SALE WITHOUT HAVING SET EYES ON PURCHASER

Elbie Eiendomme CC t/a El Madre Properties v Ryton Estates (Pty) Ltd (51863/08) [2011] ZAGPPHC 58 (15 April 2011)

An estate agent introduced a facilitator of a business transaction to a property and an agreement of sale was ultimately concluded with a Purchaser with whom the facilitator negotiated. The agreement did not make provision for commission and the Seller further argued that the Agent did not have a mandate, was not involved in the negotiations of the agreement and in fact never dealt with the Purchaser in any way whatsoever. Despite this, the Court found that it was the estate agent who was the effective cause of the sale.

The Judgment can be viewed [here](#).

FACTS

This matter deals with a claim for commission by one Odendaal for an amount of R2 million plus VAT.

When Odendaal was still an estate agent with Realty 1 (ELK) in Nelspruit, the agency received a mandate to procure a purchaser for Ryton Estates (a group of properties collectively called Ryton Estates), owned by a company represented by Watson.

Odendaal put a considerable amount of time and effort - during 2003 - in preparing a brochure for the purpose of marketing this property. He enlisted the help of several individuals where necessary to properly value the property and draw up various tables.

During the period 2004-2005, one Elliot (a facilitator of business transactions and in this case his intention was to lease the property from the Government if the latter would purchase it) was instrumental in introducing certain potential BEE purchasers. Two of three potential purchasers made offers which were put to Watson but they could not secure the necessary finance and, in any event, Watson rejected the offers as being too low. A third group of purchasers, says Odendaal, also did not qualify to purchase the property. Odendaal himself agreed with Watson that the two offers that were made were too low.

Odendaal resigned from Realty at the end of 2005. In 2006 Odendaal was incapacitated by ill health and was therefore not active as an estate agent for the entire year, but in

2007 he began trading as an estate agent again, but this time for his own account under the name and style of El Madre Properties. He informed Mr Watson of this fact and Watson informed him that he (Watson) wanted to have nothing to do with estate agencies and other persons and that he wanted him (Odendaal) to do his work.

After his period of inaction a co-employee of Odendaal at Realty 1, Flewin, re-introduced Elliot to Odendaal. Flewin said Elliot came back to him in early 2007 in connection with the sale of the property whilst in the meanwhile, Odendaal had kept him (Flewin) informed about Elliot's negotiations with the government as a potential purchaser.

Odendaal then arranged a meeting where Watson, Elliot and himself were present and introduced Elliot as a potential buyer. At the time Elliot indicated that he, together with the Government, wanted to buy the property. Elliot testified that the project was brought to him by Odendaal and they facilitated the sale of the property to the government. He also stated that he received the marketing brochure from Odendaal which he in turn passed on to the Government.

The property was ultimately sold to the government in 2008, after Watson and the Department of Land Affairs ('DLA') negotiated an agreement. The agreement provided that no estate agent commission was payable.

The essential disputes between the parties were two-fold: firstly, did Odendaal have a mandate; and secondly, was Odendaal the effective cause of the sale? Watson argued that the reason the government ultimately purchased the property was due to its prior dealings with him in 1999. Furthermore, it was argued that Odendaal had no dealings whatsoever with the DLA or with the transferring attorneys. Nor was he involved with contractual negotiations and he had not even seen the contract of sale before he issued summons and the defendant discovered it as part of the discovery procedure.

Odendaal argued that whilst the mandate was originally given to Realty 1, it was transferred to him in February 2007, proof of which could be gleaned from two letters sent between the owner of Ryton Estates ('Watson') and Odendaal. The first letter was from EL Madre Properties to Watson which referred in its heading to the commission that was payable and then confirmed commission would be payable to El Madre Properties, as

discussed, and thanked Watson for his co-operation. Watson, on a Ryton Estate letterhead, responded and confirmed that commission will only be paid to El Madre properties if it succeeds in selling the property.

HELD

Mandate

- The mandate in favour of El Madre Properties was confirmed by the two letters and in his own testimony, Watson confirmed the mandate. In light thereof, the question of the mandate having initially been given to Realty 1 is beside the point. The original instruction to Odendaal whilst he was still with Realty 1 came to naught; so too the efforts to conclude a sale with some BEE groups.

Effective cause of the sale

- The principle that emerges from case law is that enquiries relating to effective cause of sales are factual and each case must accordingly be dealt with on its own unique set of facts. While previous cases may be helpful they are not decisive because generally speaking, no two cases are identical.
- The facts show that the initial interest by the Department of Land Affairs (in 1999) was in a completely different context and for a different purpose altogether, i.e. Labour Tenant Tenure and Reform, which had nothing to do with the eventual sale. Moreover, given that a successful sale was concluded, Odendaal's claim was not dependant on details of the negotiations between the purchaser and the seller as contended for by Watson.
- The sale transaction came about after Mr Watson was contacted much later by the Government, as he himself confirmed. The probabilities favour Odendaal's argument that the fresh interest by the Government was due to his efforts, practising under the name of El Madre Properties at the time. This was also the direct evidence of Elliot, who confirmed that Odendaal introduced him to Watson, after Odendaal and Elliot rekindled the interest in 2007.
- On the evidence of Mr Elliot and Mr Flewin (the latter in particular describing the revival of interest by Mr Elliot preceding the ultimate transaction), the chain of causation between the input of Odendaal and the ultimate sale was never ruptured by any new or intervening cause. On that evidence the requisite nexus is inescapable.

- This is similar to what was stated in the matter of *Webranchek v Jacobs & Co Ltd* 1984(4) SA 671 (A) where it was held:

"It was agreed therefore that 'effective cause' means something more than that which causes in a mechanical sense. If I may use a figure: counsel were at one that if plaintiff brought about a super-saturated solution and a stranger merely jarred it into crystallization, defendant could not lawfully withhold plaintiff's commission. That admission immediately brings into play moral causes and moral effects, and it is difficult, if not impossible, to track and define causation in such a transcendental field.

*Accordingly a Judge who has to try the issue must needs decide the matter by applying the common sense standards and not according to the notions in regard to the operation of causation which 'might satisfy the metaphysician' (Yorkshire Dale Steamship Co v Minister of War Transport (1942, A.C. (H.L.) 691, 706)). The distinction between the concepts *causa sine qua non* (a cause without which the transaction could not have happened) and *causa causans* (the cause of the transaction) is not as crisp and clear as the frequent use of these phrases would suggest; they are relative concepts. Where a *causa sine qua non* emerges as the only known causative factor, one is easily persuaded that it was also the *causa causans*;*

*And further: "It stands to reason, therefore, that the cumulative importance of a number of causes attributable to one agent may be such that, although each in itself might have been described as a *causa sine qua non*, the sum of efforts of that agent may be said to have been the effective cause of the sale."*

- Odendaal falls within the ambit of such principles. It was primarily the efforts of Odendaal that lead to the ultimate purchaser and the seller coming together. Watson criticised the lack of involvement of Odendaal in the negotiations and the finalization of the ultimate contract. However, it is no requisite that the agent be involved therein or perhaps even be aware thereof at the time.
- Much was further made of the fact that the deed of sale states that no commission is payable to anyone. This was however inserted at the request of the purchaser, the government. Apart from anything else, Odendaal was not a party to such agreement and cannot be bound thereto. Moreover, Odendaal was clearly mandated by Watson, not by the Government. From the government's point of view there certainly was no commission payable.

- From the aforementioned, it was obvious from the evidence of Odendaal, Elliot and Flewin that Odendaal was actively involved in ensuring that a deal was concluded.

The claim for commission therefore succeeded.

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