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CONFLICTING CLAIMS FOR ESTATE AGENTS COMMISSION

General requirements for entitlement to commission are:

1. Existence of a mandate (sole and exclusive OR open)
2. Performance of the mandate (terms of the mandate must have been fulfilled)
3. Effective cause

Three important cases relating to the question of effective cause are:

1. **Webranchek v L K Jacobs – 1948 (Appeal Court)**

Seller gave several agents mandates to find a buyer at an asking price of 40 000 pounds

Agent 1 introduced a buyer, and buyer was so interested that a sale was about to be concluded and was prepared to pay between 39 000 & 40 000 pounds

Buyer also contacted agent 2 (who also had a mandate) and after much bargaining 2 reduced his commission making it possible to conclude at 39 500 pounds

Court:

- many causes contributed to the sale
- agent 1's efforts were the effective cause as it was through his efforts that the situation was right to crystallize into a sale and real sales resistance had already broken down

Conclusion:

If the buyer simply wanted a better deal and negotiates the transaction through another estate agent who is willing to reduce his commission, this does not make the latter the effective cause

2. **Munitz v Steer's Trust Co (Pty) Ltd – 1993 (C)**

Agent 1 introduced B to a property on 1 August 1988. Seller wanted a net price of R500 000 while B was only prepared to pay a gross amount of R525 000. If the commission to the then recommended tariff of 5.5%, being R28 875 was paid the seller would have received a net price of R496 125

B who was introduced to the property through A1 then submitted a formal offer through A2 who successfully negotiated a sale of R525 000, after having agreed to cut's its commission to R25 000 leaving the seller in the end with R500 000

From the hearing it emerged that B wanted to buy a house large enough to accommodate a snooker table. The house in question did not have a room large enough for this purpose, but according to A2 they had indicated to B that there was a dry wall separating the two rooms into one that would then be big enough to accommodate a snooker table. It was contended that A1 had done nothing to overcome the snooker room problem and was therefore not the effective cause of the sale.

Court:

- Upheld A1's claim for commission on the grounds that it was the effective cause
- That A1 told the buyer about the dry wall and that this was the decisive factor which cause B to buy the property
- That A1 would have undoubtedly also have been prepared to drop its commission to make the sale possible if the need to do so had arisen.

Conclusion:

The general impression one gets when reading the judgment is that the Court did not regard the drop in commission to be the major issue at all in deciding who was the effective cause.

3. Grobbelaar v Winterhoek Estates – 1996 (Eastern Cape)

In Jan 1991, G (owner of a property in Uitenhage) gave A1 an open mandate to find a buyer for the property at an asking price of R250 000 excluding agent's commission.

On 17 March 1992 (more than a year after the mandate was given) P submitted a written offer through A1 for R245 000 gross

G informed A1 that he would accept R235 000 nett so A1 returned to P to persuade him to increase his offer by R3 000 so that A1 could earn at least R10 000 commission.

Before deal was concluded P withdrew offer and told A1 that they were looking at other houses. A little later A1 received advice from G that the property had been temporarily withdrawn from A1's agency and that the sole agency has been given to A2

The following day it comes to A1 knowledge that the property had been sold through A2

A1 sued for 6% commission

Magistrate Court:

"...nothing more was done by A2 than taking a cut in commission and had they not done so a sale would have eventuated as a result of the effort of A1 who were effectively pipped at the post by A2 who slipped in the back door at the most opportune moment and concluded the sale with out much effort at all...and that it is clear that had A1 the slightest inkling that this would happen, they would have been happy to in effect match A2's deal.

Appeal to High Court:

"...the Court conceded that P's mind was set on the property when introduced by A1 but held that that did not appear to be the *overriding factor* which led to the conclusion of the sale of the property...and that the act of lowering the commission was the effective cause of the sale...and that A1 did not cease the opportunity to reduce it's commission to make the deal possible when P advised that he will be looking at other houses.

The High Court's reasoning in coming to its conclusion:

Some phrases/terminology emerging from cases over time to convey the concept of effective cause

- decisive factor (Barnard v Parry – 1946)
- causa causans (major cause) (Eschini v Jones – 1929)
- overriding operative – (Aida Real Estate Ltd v Lipschitz – 1971)
- "whether the efforts of the agent claiming commission has been sufficiently important in achieving a result for the accomplishment of which the principal had promised to pay him, so that it is just that the principal should pay the promised compensation to him" – American Law Institute's Restatement of the Law
- If an estate agent fails to prove that his endeavours constituted the major cause of the sale, the fact that he incurred considerable expenses and devoted a lot of time and effort, does not avail him – Basil Elk v Curzon – 1990

The heart of the matter is that the estate agent will be regarded as the effective cause of a transaction if he can show that it was his efforts which resulted in the sale being concluded, notwithstanding other factors which also played a role such as the intervention of other estate agents, the persuasiveness of the seller himself or that a complete outsider financed the transaction. It is not sufficient to merely establish that the event would not have taken place without the agent's intervention. For example because the parties would have never met. What has to be established is

that the agent's activities were the *causa causans* (major cause) of the transaction. To answer this question a twofold enquiry needs to be made:

- a) In the first place the factor(s) and or efforts must be identified which played a role in bringing about the transaction in question. These efforts/factors can be said to have caused the transaction without necessarily being the effective cause thereof.
- b) In the second instance it must be determined which factor(s) or efforts, independently or taken together, played the most significant role in bringing about the transaction. Those factors or efforts would then constitute the effective cause of the transaction.

Conclusion

Although the judgment in the above case has been criticised far and wide, this case certainly does not mean that all cases where a competing estate agent takes over another agent's buyer and closes a deal after taking a cut in commission is necessarily the effective cause of the transaction. Each case must be determined on its own merit and it appears that the general rule will not be that merely reducing commission to a deal with the same buyer will result in being the effective cause of the sale.

4. Wakefields Real Estate (Pty) Ltd v Attree (666/10) [2011] ZASCA 160

In this matter, Wakefields Real Estate (Pty) Ltd appealed against a decision of the High Court. The respondents were Mr and Mrs Attree who sold their home in Monteith Place, Durban North to Mrs Howard. The dispute revolved around who was the effective cause of the sale and therefore who was entitled to commission.

The Attrees had already paid commission to Pam Golding Properties, which they shared with Remax who had the sold mandate at the time that the sale was concluded.

The KwaZulu Natal High Court found as follows;

- when Wakefields took the purchaser to view the property, the purchaser could not afford the property at the asking price
- the Pam Golding agent did more than the Wakefields agent to close the sale
- the sellers were persuaded to reduce their asking price
- at the time the sale was concluded the purchaser's were no longer under financial pressure

and as a result of these cumulative factors the first judgment handed down ruled;

- there was no oral mandate given to Wakefields to find a purchaser (*on appeal the sellers did not persist in their argument that Wakefields had no mandate based on the evidence that Wakefields brought potential purchasers to view their property) and
- that the Pam Golding agent was the effective cause of the sale

The South African Supreme Court of Appeal found as follows;

- when there are competing estate agents it is notoriously difficult to determine who the effective cause of the sale is, and it is possible that more than one agent is entitled to commission as was noted in *Webranchek v L K Jacobs & Co Ltd* 1948 (4) SA 671 (A)
- but for the Wakefields agents' introduction to the house, the purchaser would not have been aware of the existence of the property
- it was the Wakefields agents' wisdom and business acumen (as quoted from *Aida Real Estate Ltd v Lipschitz* 1971 (3) SA 871) that made her take the purchaser to the property and the agent only stopped trying to negotiate a sale when the purchaser told her that they decided not to buy and were going to renovate their existing home instead and invest in their business
- if the purchaser approached the sellers and persuaded them to sell their property to them at a lower price, Wakefields would have undoubtedly been entitled to their commission. The same would apply if the sellers directly approached the purchaser and offered to sell their property at a lower price. Wakefields was therefore the effective cause of the sale

- Pam Golding's agent found out fortuitously that the purchaser was interested in the property and did nothing about it until the seller phoned her and advised her that he had reduced the selling price. The effort of the Pam Golding agent amounted to no more than making a phone call to the purchaser, arranging with them to view the property, drawing up an offer to purchase, persuading the sellers to lower their price even further and accepting a reduced commission
- Although the Pam Golding agent was instrumental in concluding the sale, she was not the effective cause
- Had the Wakefields agent not shown the house to the purchase initially, the Pam Golding agent would not have known that the purchaser was interested in the property and 'loved it' and therefore Wakefields was the effective cause of the sale

The Supreme Court of Appeal ruled;

- that Wakefields was entitled to their commission at 6% plus VAT
- that the fact that the sellers found themselves liable to pay more than one estate agency was of their own making

Conclusion

It is clear from the above ruling that sellers need to protect themselves from a similar situation by appointing a sole agent to market their property, rather than have multiple agents with the attendant dangers as set out above.