



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO.: AR82/2016

In the matter between: -
WOOTHAMEN PATHER

APPELLANT

And

WAKEFIELDS REAL ESTATE (PTY) LIMITED

RESPONDENT

ORDER

The appeal is dismissed with costs.

APPEAL JUDGMENT

Phillips AJ (Henriques J concurring):

Introduction

[1] The respondent successfully sued the appellant in the Chatsworth Magistrate's Court for the payment of estate agents commission arising out of the sale of the appellant's house.

[2] Judgment was granted by the magistrate against the appellant for the sum of R 67 117.50 together with interest thereon at the rate of 15,5% per annum and costs. This appeal is against the entire judgment.

[3] The respondent's case (as plaintiff in the court a quo) as formulated in its particulars of claim, may be summarised as follows:

- (a) At all material times hereto, and, insofar as same may be necessary, the respondent had complied with the provisions of 'section 26 of the Estate Agents Act' (presumably an erroneous reference to what should have been the 'Estate Agency Affairs Act 112 of 1976').
- (b) During or about August 2012 and at Chatsworth, the respondent, duly represented by Nadira Gunpath ('Ms Gunpath') and the appellant, acting personally, entered into an oral agreement, 'the material express and/or implied terms of which were as follows:'
 - (i) the appellant granted to the respondent a mandate to procure a willing and able purchaser for the immovable property situate at 162 Damarosa Crescent, Moorton, Chatsworth ('the appellant's property'); and
 - (ii) in the event of the respondent introducing a willing and able purchaser to the appellant and/or to the appellant's property, and in the event of a sale of the appellant's property being concluded as a result of such introduction, the appellant would pay to the respondent an agreed commission at the rate of 7.5% plus VAT thereon based on the purchase price of the property.

- (c) Pursuant to and in accordance with the terms of the aforesaid agreement, the respondent, duly represented by Ms Gunpath, introduced the appellant and/or the appellant's property to Mrs Shamilla Gajraj and Mr Vinesh Gajraj (hereinafter referred to collectively as 'the purchasers').
 - (d) As a result of that introduction, the purchasers purchased the appellant's property for R785 000 on or about 14 August 2012.
 - (e) The introduction by the respondent was the effective cause of the sale.
 - (f) In the circumstances, the respondent fulfilled its mandate and earned its commission of R67 117.50.
- [4] In his plea, the appellant:
- (a) Pleaded 'no knowledge' as to the respondent's alleged compliance with the Estate Agents Act;
 - (b) Denied the mandate and the terms thereof;
 - (c) Denied being introduced to the purchasers by Ms Gunpath. [Somewhat curiously in the plea did not deny that the respondent introduced the purchaser to the property];
 - (d) Denied that the property was sold as a result of the introduction by Ms Gunpath;
 - (e) Denied that the respondent was the effective cause of the sale;
 - (f) Denied the fulfilment, by the respondent, of its mandate and accordingly denied that the respondent had become entitled to commission in the sum of R67 117.50, or at all.
- [5] Accordingly, at the trial in the court a quo, the onus was on the respondent to prove:

- (a) Compliance with s 26 of the Estate Agents Act.
- (b) The conclusion of an oral agreement in terms of which it was mandated to procure a willing and able purchaser of the appellant's property.
- (c) Its concomitant entitlement to commission at the rate of 7.5% plus VAT of the purchase price of the property.
- (d) That it, duly represented by Ms Gunpath, was the effective cause of the sale.

Common cause facts

[6] It was common cause, alternatively not disputed that:

- (a) The appellant was the owner and seller of the property.
- (b) The appellant concluded a written agreement for the sale of the property with the purchasers on 14 August 2012.
- (c) The purchase price was the sum of R785 000.

The evidence

[7] The original recording of the trial in the court a quo having gone missing, the parties and the presiding magistrate compiled a reconstructed record for the purposes of the appeal.

[8] At the hearing of the appeal, the parties agreed that the appeal is to be determined on the reconstructed record, as read with the documents adduced as evidence during the trial, notwithstanding that the reconstructed transcript is somewhat telegraphic and seemingly does not provide as complete a record of the proceedings as a transcription of a mechanical recording would have provided. Accordingly, this appeal falls to be determined with reference to that reconstructed transcript, its inadequacies notwithstanding.

Respondent's evidence

[9] The respondent's first witness was Ms Gunpath. She stated that during 2012 she was an estate agent employed by Wakefields and was the holder of a valid Fidelity Fund certificate. She confirmed that she lived in the same road as the appellant and that they had been known to each other.

[10] She testified that she and a friend, Saffia Cassim, also an estate agent, had encountered the appellant at the Fragrance Street Market where the appellant, had informed them that he wanted to sell his property. She also knew that the appellant had previously worked with Saffia Cassim at Remax Estate Agency.

[11] According to the relevant portion of the reconstructed transcript, that encounter occurred as follows:

Adv S Hoar: Do you know Defendant?

Nadhira Gunpath: Yes, we live on the same road. I live at 219 and he at 162 Demarossa Crescent.

He has business in fragrance street – market

My friend and I were walking there. Saffia Cassim – she used to work with him at Remax. He was an agent.

We met defendant. He said he wanted to sell property, he said he wouldn't give either of us a sole mandate. He asked if we have buyers, because we have 164 Demarosa for sale we can bring them through to 162. He knew we were selling 164 Demarosa due to boards outside the house.

Adv S Hoar: Did he indicate the price?

Nadhira Gunpath: Said 900k – 950k

Adv S Hoar: Anything else discussed?

Nadhira Gunpath: He said sell through Wakefield's if we bring our buyer through. We then left the market.

Adv S Hoar: When in 2012 did the interaction take place?

Nadhira Gunpath: June/July¹

[12] What emerges from the aforesaid extract from the transcript is the following:

- (a) The appellant was aware that Ms Gunpath was an estate agent and that she, acting on behalf of the respondent, had been mandated to find a potential buyer for a house next door to the appellant's house.
- (b) The appellant had seen the 'for sale' boards outside that house.
- (c) The appellant enquired if Ms Gunpath and her friend had any potential buyers for his house.
- (d) The appellant would not give either of them a sole mandate.
- (e) The appellant indicated to Ms Gunpath that he was looking for a price in the range of R900 000 – R950 000. [Gunpath's alleged acquisition of that information becomes an important pointer to assessing the probabilities hereunder.]

[13] The next encounter with the appellant was when Ms Gunpath was showing the purchasers the property next door to the appellant's property during early August 2012. The reconstructed transcript reflects that encounter as follows:

'Nadhira Gunpath: As we got off, Mr Pather was standing at 162. He was at his gate, standing inside. He asked if they were buyers. I said yes. He asked why not bring them to his property. Told him that his price range was out of client's budget, they were looking at a lower price. So, he said nevertheless, show it to them and let them make a decision. He opened the gate and allowed us through. I explained to Gajrajs that price range was out of their budget, but they can view it and decide. Showed them through the property. Spent under 5 minutes. Thanked Pather and left with Mr Gajrajs. They live directly opposite to 156 Demarosa I think. Looking for property for son. Discussed property with them on the way home. Mr and Mrs Gajraj said the price was too

¹ Supplementary Volume, page 132, line 17 to page 133, line 12.

high and they liked the property. They weren't interested in putting up an offer because the price range was not within their budget. Told them if anything else comes up I'll let them know.'²

[14] As far as Ms Gunpath was concerned, that was the end of any dealings between the purchasers and the appellant and or the appellant's property. However, during January 2013, Ms Gunpath noticed a car, which she recognised as the purchasers' son's car, parked outside what had been the appellant's property. She was, for whatever reason, suspicious and, after conducting some research, her suspicions were confirmed when she discovered that the appellant had sold the property to the purchasers with neither the applicant nor the purchasers having referred back to her before concluding the sale agreement.

[15] Presumably feeling aggrieved at what had happened, and in order to secure evidence of her and/or the respondent's entitlement to claim commission arising from the introduction of the purchasers to the property and the ensuing sale, Ms Gunpath drafted two letters for signature by the purchasers which respectively read as follows:³

'I, Mrs Shamila Gajraj, hereby confirm that my family and I have viewed the above property with Nadhira Gunpath from Wakefields in early August 2012. We viewed 164 Demarosa Crescent and the seller of 162 Demarosa Crescent also asked Nadhira to show us his property which we then also viewed. After we viewed the above property with Nadhira, we then purchased the property privately without her knowing.'

and

'I, Mr Vinesh Gajraj, hereby confirm that my family and I have viewed the above property with Nadhira Gunpath from Wakefields in early August 2012. We viewed 164 Demarosa Crescent and the seller of 162 Demarosa Crescent also asked Nadhira to show us his property which we then also viewed. After we viewed the above property with Nadhira, we then purchased the property privately without her knowing.'

[16] Ms Gunpath testified she personally presented the letters to the purchasers at their home. On this aspect, the reconstructed transcript reflects that encounter as follows:

² Supplementary Volume, page 133, line 21 to page 134, line 4.

³ Volume 1, pages 111-112.

'Nadhira Gunpath: I drafted two letters for Mr and Mrs Gajraj stating that I had shown them the property but they purchased privately. Then took the letters to property at 156 Demarosa crescent. I explained that because I showed them both properties and they bought 162 – I need them to sign documents to state its true. Spoke to Mr Gajraj himself not his son. He said it is ok, no problem. He took both documents, I stood at the door. He and Mrs Gajraj signed both the documents and gave them back to me. I stood at the door and they were in the lounge. I could see them sign from where I was standing.¹⁴

[17] Under cross-examination, it was put to Ms Gunpath that the appellant denied her version of events and that the appellant's version was that, on an occasion when she, Ms Gunpath, had visited the appellant to collect some jewellery, the appellant had mentioned in passing that he was interested in selling his house. The following line of cross-examination was put to Ms Gunpath:

'Adv Pillay: Mr Gajraj and everyone else will say you showed them the property in February 2012 [This is presumably a reference to the house next door to the Appellant's house].

Nadhira Gunpath: Defendant not

Adv Pillay: They say at no stage did you visit Pathers [the appellant's] property with Them

Nadhira Gunpath: They viewed it with me

Adv Pillay: Did you visit 162 with them?

Nadhira Gunpath: I did

Adv Pillay: Who else was at the property when you visited them?

Nadhira Gunpath: Mr Pathers wife.

Adv Pillay: She will say that you were never there with them.¹⁵

[18] The respondent's second and only other witness was Peter James Lomax ('Mr Lomax'), a Director of the respondent and manager of its Chatsworth and Yellowwood Park branches.

[19] Mr Lomax's evidence in chief was extremely brief. He confirmed having discussed the matter of the sale of the appellant's property with Ms Gunpath and that she had reported the matter to him as having occurred as follows:

'Pather popped his head over the wall and said show them my property.'¹⁶

⁴ Supplementary Volume, page 134, lines 13-21.

⁵ Supplementary Volume page 140, lines 5-14.

⁶ Supplementary Volume page 143, line 2.

[20] Lomax stated that he 'checked lightstone' presumably to confirm the transfer of the appellant's property to the purchasers.⁷

[21] On the issue of commission, the reconstructed transcript reflects his evidence as follows:

'Commission is 7,5 percent.... it's a recommended tariff of estate agents...'⁸

[22] Under cross-examination, Mr Lomax was questioned as to the disparity between his and Ms Gunpath's evidence as to who had conducted the lightstone search. In my opinion nothing turns on this.

[23] On the issue of the requirement of a written mandate, the reconstructed transcript reflects the following:

Adv Pillay: Does your company policy require a written mandate:

Peter James Lomax: Correct

Adv Pillay: Failure to obtain mandate would constitute a breach in company policy is that true?

Peter James Lomax: No, not at all. Not hard and fast rules. Sellers give us house to sell with no written mandate in place.

Adv Pillay: Is that called open mandate?

Peter James Lomax: Agreed, we have three mandates – open mandate, sole mandate and network mandate.

Adv Pillay: There is no written mandate here

Peter James Lomax: Agree

Adv Pillay: You as principal, is it in the companys (sic) best interest to get a written mandate?

Peter James Lomax: Completely

Adv Pillay: Company policy does not dictate it, but you prefer it?

Peter James Lomax: Absolutely, a discussion was held at his jewellery shop. Property was never listed in our books as such. Arrangement very loose. It's a mandate.⁹

[24] His evidence confirmed that it was not a prerequisite for the respondent's employees to obtain a written mandate although, for obvious reasons, it was a preferable option.

⁷ Supplementary Volume page 143, line 3.

⁸ Supplementary Volume, page 143, lines 3-4.

⁹ Supplementary Volume, page 143, line 13 to page 144, line 10.

[25] Perhaps the most significant part of the cross-examination of Mr Lomax revolved around the issue of whether or not he had been upset about Ms Gunpath's failure to obtain a written mandate. That exchange unfolded as follows:

'Adv Pillay: You were not upset she didn't get written mandate?

Peter James Lomax: No, not at all, I was not aware of the property till she told me. Not upset about it.'¹⁰

[26] Its significance looms large as Mr Lomax was never challenged on his response, namely, that he had not been upset about Ms Gunpath's failure to secure a written mandate. His unchallenged evidence on that issue flies in the face of Yashika Gajraj's evidence referred to hereunder and which will be dealt with, with reference to the visit by Ms Gunpath to the purchasers in order to secure their signature on the letters.

[27] Significantly, Mr Lomax's unchallenged evidence confirmed that he had told Ms Gunpath to 'get a letter' signed by the purchasers. On this aspect Mr Lomax's evidence was as follows:

'Adv Pillay: You chose to institute legal proceedings on loose arrangements?

Peter James Lomax: Yes, felt strongly about it. She had loose arrangements, confirmed by Mr Pather when she said bring them through to his place. Told her to get a letter signed by Gajraj's to give some proof.'¹¹

Appellant's evidence

[28] The appellant himself gave evidence. He stated that he had decided to sell his house late in 2011. When asked about how he went about the selling of the property, he stated that he had been trained 'part time at Remax and in practice for two years' (presumably as an estate agent). In respect of how he intended to sell the property the reconstructed record reflects the following evidence:

'Adv Pillay: How did you go about selling property?

Mr Pather: I was also trained part time with Remax, and in practice for 2 years. Approached all friends and family and also told people about the business.

¹⁰ Supplementary Volume page 144, lines 11-13

¹¹ Supplementary Volume page 144, lines 14-17.

Adv Pillay: Do you have an idea of what price you wanted for the property?

Mr Pather: Yes

Adv Pillay: How did you determine the price?

Mr Pather: I had friends that worked at Remax, together with market research on other properties. I also looked at local newspapers'¹²

[29] He indicated that the price he was initially seeking was R800 000.

[30] He stated that the purchasers' son, Shanthi Gajraj came to look at his house early in March and seemed interested in the property but that he, the appellant, had informed Shanthi Gajraj that he could not sell immediately and that his intention was to sell in the later part of the year.

[31] He stated that at a later stage the purchasers visited his property with a view to buying it. He later discovered that the house was actually for Shanthi Gajraj but that Shanthi, had problems qualifying for a bond.

[32] Asked if he knew Ms Gunpath, the appellant confirmed that he did and that she had lived:

'... in the area across me in Demorosa Crescent.'¹³

He stated that she had visited him during January 2012 when he had given her a quote in respect of some jewellery that she wished to have made.

[33] The appellant was pertinently asked by his counsel the following question: 'Can you say why she [Ms Gunpath] may have lied?'¹⁴

[34] The reconstructed record reflects the appellant's answer to that question as follows:

Mr Pather: I wasn't at the gate so I never. Possibly because she fabricated a story about signing them over. Probably at work they discussed lies she tells us. She even forgot [presumably "forged"] signatures with Gajraj's. I put the sale together, she had no interaction. I learn of no reason why she has gone to such lengths. I have no relationship with Gunpath.

¹² Supplementary Volume page 146, line 22 to page 147, line 5.

¹³ Supplementary Volume page 148, line 19.

¹⁴ Supplementary Volume page 148, line 22.

- Adv Pillay: In court on previous occasions, Gunpath said she brought Gajraj to the property
- Mr Pather: That's an absolute lie, she only came to visit in respect of jewellery
- Adv Pillay: In her testimony she introduced Gajraj family to you
- Mr Pather: Also a lie
- Adv Pillay: She said she met you at the gate?
- Mr Pather: Also a lie, it didn't happen'¹⁵

[35] When asked about commission, the appellant confirmed that he understood that if an agent introduced a purchaser to a property that they became entitled to commission. Although not evident from the reconstructed transcript, it has to be assumed that the appellant's answer in the affirmative would be subject to his acceptance that such agent had been mandated to introduce a purchaser to a property.

[36] Significantly however, the following evidence emerged during evidence in chief:

'Adv Pillay: If a friend from Remax brought someone to view the property would you pay him?

Mr Pather: If they had a signed mandate'¹⁶

[37] In order to clarify the situation further, the appellant's counsel asked:

'If a friend from Remax sold without signing a mandate, would you have paid?'¹⁷

The appellant's response was as follows:

'Not saying that, if they did work I would have paid them.'¹⁸

[38] The appellant confirmed that the property had been sold for the sum of R785 000.

[39] Under cross-examination, the respondent's counsel also enquired of the appellant as to why Ms Gunpath would lie. The appellant responded as follows:

'Mr Pather: Because she fabricated the story and she was going to be sticking to it. If you work as an agent maybe at work they would have discovered this. She even forged

¹⁵ Supplementary Volume page 148, line 23 to page 149, line 7.

¹⁶ Supplementary Volume page 149, lines 15-17.

¹⁷ Supplementary Volume page 149, lines 18-19

¹⁸ Supplementary Volume page 149, line 20

signatures, I don't know why. Nadhira and I would greet each other but the relationship went no further. I've never had a problem with her'¹⁹

[40] The appellant was also cross-examined on discrepancies between his evidence in chief and what he had stated in his affidavit opposing summary judgment. Ultimately, the appellant's version was a complete denial of Ms Gunpath's version in respect of almost each and every aspect thereof. In doing so, he relied entirely on the prospect of a rejection of Ms Gunpath's evidence in order for him to succeed.

[41] There can be no question of him relying on an interpretation of the evidence adduced by Ms Gunpath. Once the appellant denied Ms Gunpath's version, and her version is accepted, the appellant is no longer able to provide input as to the import of the interaction between Ms Gunpath and him as narrated by Ms Gunpath.

Analysis

[42] The respondent's version, as narrated by Ms Gunpath and Mr Lomax, if accepted, confirms that:

- (a) The appellant knew that Ms Gunpath was an estate agent employed by the respondent.
- (b) The appellant invited Ms Gunpath, in her capacity as an employee of the respondent, to show prospective buyers his property with a view to selling it to such buyers.
- (c) Mr Lomax told Ms Gunpath to obtain written confirmation that the purchasers had been introduced to the property by her.
- (d) Ms Gunpath prepared letters and went to the purchasers in order to obtain their signatures thereto.

¹⁹ Supplementary Volume page 150, lines 5-9.

[43] It was never put to Ms Gunpath in cross-examination, nor was any evidence adduced by the appellant, to suggest that any communication between the appellant and Ms Gunpath concerning the sale of the appellant's house was no more than a friendly exchange between neighbours or friends. In fact, the communications, as narrated by Ms Gunpath, were simply denied by the appellant as having occurred. It must therefore be accepted that, if any such communications are found to have ensued, then it can be concluded that the appellant was addressing Ms Gunpath in her capacity as an estate agent and seeking her professional services to be rendered pursuant to the sale of his house. Although it was put to Ms Gunpath under cross-examination that 'Mr Pather will say when you visited for jewellery, he told you in passing that he was interested in selling his house', according to the reconstructed transcript, there is no evidence of Mr Pather ever giving that evidence.²⁰

[44] There were a number of witnesses who both parties could have, and should have, called, to testify, yet failed to do so. The respondent failed to call Saffia Cassim, Ms Gunpath's friend with whom she said she had been walking when the alleged meeting with the appellant took place during June / July 2012. Similarly, the appellant failed to call the purchasers. They may have confirmed Yashika Gajraj's evidence that the signatures on the letters, which Ms Gunpath stated she had secured from the purchasers, in her presence, were forgeries or that the letters presented to court were not the same letters which Ms Gunpath had presented to them for signature.

[45] Both parties can be criticized for not calling these witnesses and for not providing any explanation as to the inability or failure to adduce what would have been crucial and definitive evidence. That having been said, this court, being faced with two irreconcilable versions is left to assess whether corroboration, of any sought, is to be found for either party's version in the objective and uncontested or common cause evidence. The best place to turn in this regard is to the letters.

²⁰ Supplementary Volume page 137, lines 20-21.

The letters

[46] Ms Gunpath testified that she had drafted the letters which she gave to the purchasers who had signed them in her presence. Her evidence in that regard is direct evidence. It was challenged under cross-examination as follows:

Adv Pillay: Look at page 12 of Exhibit A

Nadhira Gunpath: Yes

Adv Pillay: Let me tell you what is bizarre about this signature, what is the first letter of the signature?

Nadhira Gunpath: "S"

Adv Pillay: Ms Gajraj will say it's a poor forgery of their signature. You gave them another document to sign and not this

Nadhira Gunpath: No, they signed this one

Adv Pillay: She will say in December you arrived in tears and are in trouble at work and need this document signed they signed a document, which is not before court.

Ms Gajraj will say you visited the property of Mr Pather in February 2012. I suspect your employer became suspicious and you did a private sale and pocketed the commission.²¹

[47] However, Ms Gunpath's evidence in respect of the letters was never contradicted by any cogent evidence to the contrary. As stated above, the appellant had every opportunity to call the purchasers to give evidence but failed to do so and, failed to explain his failure or inability to do so.

[48] Also and significantly, at no stage in the cross-examination of Mr Lomax, was it put to him that Ms Gunpath was '... in trouble at work', as alleged by Yashika Gajraj. Neither was it put to Lomax, the alleged reason Yashika Gajraj stated had been given to her by Ms Gunpath as to why she, Ms Gunpath, had required the purchasers to sign the letters. In any event, Mr Lomax's evidence that he had requested that Gunpath obtain such letters, was never challenged.

[49] Furthermore, despite putting to Ms Gunpath that in fact the purchasers '...signed a document, which is not before court',²² nothing further was put to her in

²¹ Supplementary Volume page 140, lines 16-29.

²² Supplementary Volume page 140, lines 25-26.

cross-examination about that document, nor was any evidence lead as to what such other document may possibly have contained.

[50] If it is accepted that the letters adduced into evidence by Ms Gunpath were as presented by her to the purchasers, and were signed by them, it should be accepted that the purchasers, prior to signing the letters, had read the contents thereof and by their signatures to the respective letters, had confirmed that they endorsed the truth of the contents thereof. There is no evidence that the purchasers disputed the contents of the letters or even questioned same before signing.

[51] If it is accepted that the letters were signed by the purchasers and that the contents thereof are true and correct, then it confirms the plaintiff's version that the purchasers had been introduced to the property by Ms Gunpath and that the respondent, acting through Ms Gunpath, had been the proximate cause of the sale of the property to the purchasers.

[52] If one accepts Ms Gunpath's evidence in respect of the letters, then her evidence about the 'over the fence' encounter during August 2012 is corroborated. If there is such corroboration, the failure to call the purchasers to testify is a failure which must be visited upon the appellant.

[53] If the court accepts that that encounter between Ms Gunpath and the appellant took place as described by Ms Gunpath, then it should follow that it is accepted that, when the appellant invited Ms Gunpath from 'across the fence' to bring the purchasers next door to view his property, he was, to his knowledge, communicating with her in her capacity as an estate agent who had with her potential buyers for his property.

[54] If that is the case, then, even if the earlier evidence of the alleged giving of a mandate to sell the property does not pass muster, the 'over the fence' incident in and of itself would amount to the granting of a mandate to sell the property to purchasers who had been brought to view, initially, only the neighbouring property.

[55] Even if it is accepted that the contents of the letters are hearsay, as argued by appellant's counsel, because the purchasers never testified, the letters and the evidence surrounding them cannot be ignored and must be taken into account in assessing the probabilities.

[56] It is not in dispute that Gunpath prepared a document or letters and specifically took them to the purchasers to sign. Lomax's evidence corroborating Ms Gunpath on that issue was not challenged.

[57] It seems unlikely that Ms Gunpath would have wasted her time approaching the purchasers unless there was a purpose in her doing so. She told the court her purpose. The creation and delivery of the letters, their contents notwithstanding, if nothing else, are confirmation of her stated purpose, namely, to attempt secure evidence from the purchasers as to the fact that she had introduced them to the property.

[58] Why Ms Gunpath would have attempted to procure the purchaser's signature on a document other than in the form of the letters, given that she wished to secure evidence of her entitlement to commission, remains wholly unexplained by the appellant.

[59] The notion that Ms Gunpath went through the exercise of delivering a document, the contents of which is unknown, to the purchasers, procuring their signatures on that document, and thereafter manufacturing the letters she placed before court and forging the purchaser's signatures thereon, is so inherently improbable that it can safely be rejected as being false. Yashika Gajraj's evidence on that score can therefore safely be rejected as false.

[60] Having rejected Yashika Gajraj's evidence, the court also needs to consider the evidence of the appellant. The incident whereat Ms Gunpath was showing the purchasers the house next door to the appellant's house, as described by Ms Gunpath, on Ms Gunpath's version, reveals that Ms Gunpath was aware of the purchase price that the appellant was looking for in respect of his house. That knowledge, on the probabilities, could only have been communicated to Ms Gunpath by the appellant on a prior occasion. The only evidence of such prior occasion is that of Ms Gunpath in

respect of the meeting with the appellant at Fragrance Market in the company of Saffia Cassim.

[61] The key to unlocking the truth in this matter, in the absence of corroborative direct evidence from witnesses, is the letters signed by the purchasers. The unchallenged evidence of Ms Gunpath and Mr Lomax, and an assessment of the probabilities, as stated above, leads to an acceptance of the respondent's version in respect of the letters. That acceptance has a knock-on effect on the evidence of the appellant in respect of other features of this case.

[62] Specific reference is made to the allegation, put to Ms Gunpath under cross-examination that Ms Gajraj would say that the signatures on the letters were poor forgeries and the appellant's allegation that Ms Gunpath had forged the signature. These were substantial and serious allegations of criminal conduct, a fraud, on the part of Ms Gunpath and yet no evidence whatsoever was adduced in support of these allegations.

[63] It is this court's conclusion that those allegations were scurrilous and untrue and reflect poorly, uncorroborated as they are, on the credibility of both Yashika Gajraj and the appellant himself.

[64] In any event, there was direct evidence by Ms Gunpath that the purchasers signed the letters she produced to them in her presence. That evidence remains unchallenged or contradicted by any evidence as to any other document having been presented to the purchasers by Ms Gunpath or her, Ms Gunpath, having forged any signatures. This court has no hesitation in accepting Ms Gunpath's version of the letters.

[65] The acceptance of Ms Gunpath's and Mr Lomax's evidence in respect of the letters inevitably leads to the compelling conclusion that the appellant's evidence on the meetings between him and Ms Gunpath can be rejected as false.

[66] Accordingly, on a conspectus of the evidence, it is more probable than not that:

- (a) The meeting between Ms Gunpath and the appellant at Fragrance Street Market took place as narrated by Ms Gunpath.
- (b) The 'over the fence' meeting between the appellant and Ms Gunpath, in the presence of the purchasers, during June/July 2012 did take place as narrated by Ms Gunpath.
- (c) The letters were delivered to the purchasers by Ms Gunpath and signed by them as narrated by her in her evidence.

[67] The appellant having denied the occurrence of these events, cannot therefore be heard to be explaining the import of such encounters.

[68] It is up to the court to look at the words exchanged, in the context in which they were exchanged, and to conclude whether or not they passed the necessary threshold to establish the commencement of a contractual relationship between the appellant and the respondent as asserted by Ms Gunpath.

[69] The appellant's flippant and unsubstantiated dismissal of Ms Gunpath as a liar and 'forger' of documents and signatures, fortifies the view that the magistrate in the court a quo was correct in preferring the evidence of Ms Gunpath to that of the appellant.

[70] It seems to me to be an inescapable conclusion, from the established facts, that the appellant, in communicating with Ms Gunpath about the property as he did, did so with a singular purpose. When he communicated as aforesaid:

- (a) He knew that Ms Gunpath was an estate agent.
- (b) He wished to sell his property.
- (c) He knew that estate agents charged a commission for performing the task of finding a willing and able purchaser.

[71] The appellant denied throughout the trial that any mandate had been given to Ms Gunpath. Inherent in that denial was a denial of any agreement with Ms Gunpath regarding the payment of commission. And indeed, Ms Gunpath never alleged an express agreement in respect of commission. However, the appellant was aware of the basis upon which commission was payable to estate agents in the normal course. The reconstructed record reflects the following evidence in chief:

Adv Pillay: If a friend from Remax brought someone to view the property would you pay him?

Mr Pather: If they had a signed mandate.²³

[72] And, under cross-examination:

Adv Hoar: You told the court that you have experience as an estate agent?

Mr Pather: Yes

Adv Hoar: So you understand commission?

Mr Pather: Yes

Adv Hoar: No commission payable?

Mr Pather: Yes

Adv Hoar: So you know that if commission payable you would pay?

Mr Pather: No, no need to get an agent as my sister was helping me with legal issues. Also had friends at Remax.²⁴

[73] The appellant seems to have laboured under the notion that commission would only be payable by him if there had been a signed mandate given to Ms Gunpath. That notion tends to tie in with his overall denial and leaves the court with the impression that, for all that was stated by the appellant, his core belief was that he would not be required to pay commission unless there had been a written mandate.

[74] It seems, given what the appellant stated with regard to commission, that all along, notwithstanding having solicited Ms Gunpath's professional services, he believed that he could avoid paying commission for so long as he had not committed anything to writing. The appellant's belief that commission would only be payable in the event of a written mandate having been given is ill-conceived.

²³ Supplementary Volume page 149, lines 15-17.

²⁴ Supplementary Volume page 151, lines 13-21.

[75] It is accordingly the conclusion of this court that the appellant's communications with Ms Gunpath were no more and no less than him mandating her, in her capacity as an estate agent, to find a purchaser for his property and for which Ms Gunpath (and thereby the respondent) would receive the usual commission to which an estate agent would be entitled (see *Bosch v Flower Box (Pty) Ltd* 1971 (4) SA 640 (E); *Muller v Pam Synman Eiendomskonsultante (Pty) Ltd* 2001 (1) SA 313 (C); *Dorfman & another v Kimberley House Jewellers (Pty) Ltd & another* (19253/2016) [2017] ZAGPJHC 328 (10 October 2017)).

[76] In the result, this court finds that those encounters having occurred, as testified to by Ms Gunpath, that she, and thereby the respondent, were duly mandated by the appellant to procure a willing and able purchaser for the appellant's property, that Ms Gunpath, and thereby the respondent, duly discharged that mandate by introducing the purchasers to the property and that that introduction led to the sale of the property to the purchasers on or about 14 August 2012 for a purchase price of R785 000 thereby entitling the respondent to payment of the amounts referred to in the judgment of the court a quo.

[77] Accordingly, the appeal is dismissed with costs.



Phillips AJ

I agree



Henriques J

CASE INFORMATION**APPEARANCES**

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Date of Hearing : 29 November 2019

Date of Judgment : 29 May 2020