

In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 7863/2009

In the matter between :

Vicki Momberg t/a Homes & Properties

Plaintiff

and

Graham John Shellwell NO

First Defendant

Roderick Robert Stainton NO

Second Defendant

Peter C Odgers NO

Third Defendant

Judgment

Lopes J

[1] The plaintiff in this matter carried on business as an estate agent under the name and style 'Homes & Properties'. During 2005 she was given a mandate by Classic Crown Properties 157 CC ('Classic Crown') to find a purchaser for a property situated at 28 Hillbrow Road, Kloof, KwaZulu-Natal ('the property'). The property was suitable for development as a housing estate.

[2] In due course, and pursuant to her work and industry the property was sold to the Wenlin Trust. The defendants are the trustees of the trust.

[3] The plaintiff avers in her claim that at the time of the conclusion of the written sale agreement it was orally agreed that the trust accepted liability for, and agreed to pay, the plaintiff estate agent's commission. It is also alleged that the defendants undertook to give the plaintiff a sole mandate to sell the sectional title units ('the units') to be erected on the property in settlement of her commission claim. In due course and on the 7th June 2006 the property was transferred to and registered in the name of the trust.

[4] The plaintiff alleges that the trust repudiated its obligations in terms of the oral agreement by failing to give her the sole mandate, and in the circumstances she has suffered damages in the amount of the commission which she should have been paid. That commission is in the sum of R267 847,56.

[5] The trust admits that the plaintiff introduced the property to the trust and that she was the effective cause of the sale. They also aver that she performed her obligations in terms of the mandate and became entitled to receive payment of her commission claim, albeit on the basis pleaded by the trust.

[6] The defendants admit the conclusion of the oral agreement between the plaintiff and the trust, but aver that the trust was to pay the plaintiff commission of

R15 000 and to provide the plaintiff with a mandate to sell the units which were to be developed on the property. They expressly deny that the agreement was that the trust would furnish the plaintiff with a sole mandate for those sales. They aver that having paid the R15 000 and having offered the plaintiff a joint mandate with Acutts of Kloof to market and sell the units, the trust has complied with its obligations in terms of the oral agreement.

[7] A number of witnesses testified for the plaintiff and I deal with them in what I view to be the most logical sequence.

[8] Johan George Anthony Lochner told the Court that he was one of three members of Classic Crown and that he had been involved in property deals for approximately 15 years. Classic Crown owned the property and because they were not interested in developing it as a residential property development, Classic Crown gave the plaintiff a mandate to sell the property for R4 500 000.

[9] An offer was made by the trust but because it was insufficient the offer was not accepted. Eventually an agreement was reached that Classic Crown would sell the property to the trust, but that Classic Crown would not be in any way responsible for the payment of the plaintiff's commission. Various agreements were signed by Classic Crown, the necessity for more than one agreement being signed having been occasioned by the substitution of the trust,

as the ultimate purchaser of the property, in place of a close corporation which had previously been intended to be the purchaser.

[10] Mr Lochner confirmed that the plaintiff was the effective cause of the sale of the property, and he recalled that there had been a commission structure in place, but he could not recall the details of it. It was his view that it would have been based on the plaintiff's usual charges. However, because Classic Crown could not get the purchase price they wanted for the property, it was agreed that Classic Crown would not pay the plaintiff's commission. That was to be sorted out between the plaintiff and the trust.

[11] Mr Lochner was adamant that he was not aware of the financial limitations of the trust but simply knew and understood that Classic Crown would not be paid the R4 500 000 which it wanted, and accordingly they agreed not to be bound to pay the commission. There were extensive negotiations regarding the purchase, but the commission was to be sorted out between the plaintiff and the trust.

[12] David Patrick Jones testified that he was employed as the managing agent for Acutts, estate agents operating in Kloof and Hillcrest. In 2008 Acutts were given a sole mandate by the trust to market, promote and sell five of the six residential units which had by then been developed on the property. That sole mandate was to endure for three months.

[13] Pursuant to a request made by Peter Odgers, a trustee of the trust, a meeting was held between Mr Jones, Mr Odgers and the plaintiff. Mr Odgers had told him that he had a moral obligation to include the plaintiff in the sale of the units and wanted her to share in the commission. In an effort to please the trust as his client, Mr Jones agreed to attempt to accommodate the plaintiff. At the meeting Mr Jones proposed two options :

- (a) that the plaintiff and Acutts share the anticipated advertising and promotional costs of selling the units, and split the commission on a 50/50 basis; or
- (b) that the plaintiff work as an agent and be paid accordingly – i.e. 50% of the commission would be paid to Acutts, and the remaining 50% would be shared equally between the plaintiff and Acutts.

[14] Mr Jones understood from the tenor of the meeting that there was an arrangement between Mr Odgers and the plaintiff that she would get the commission. At the meeting Mr Odgers sat in front of him and said that there was nothing in writing which he had to get excited about.

[15] It was clear to Mr Jones that the plaintiff was unhappy with both the suggested arrangements, and the meeting ended abruptly with the plaintiff leaving the meeting in what he described as an agitated or excited state. However, Mr Jones did not know the background to the meeting, or the

arrangements which had been concluded between Mr Odgers and the plaintiff. No agreement was reached with regard to the involvement of the plaintiff in the sale of the units.

[16] Mr Jones told the court that despite heavy marketing only one unit was sold by Acutts in the first three months of 2008. He attributed this to the economic depression which occurred in January of 2008. That unit had been sold for R3 000 000 and Acutts expended R100 000 on advertising and promotional costs. Another three units were sold by Acutts over the next two years but on an open mandate basis.

[17] Fiona Margaret Patrick told the court that she was an estate agent working for Harcourts in Pietermaritzburg. She had been told about the property by the plaintiff at a time when she worked for Nile Properties . One Anthony Wilmans was her employer and he was interested in purchasing the property. Mr Wilmans then decided that he did not want to do the project on his own, and approached Mr Odgers because they had previously worked together on property developments. However, eventually Mr Wilmans decided not to go ahead, and Mr Odgers decided to purchase and develop the land, through the vehicle of the trust. Ms Patrick and the plaintiff were involved in various discussions with Mr Odgers, showing him plans, taking him to the site, etc.

[18] When asked by the plaintiff whether she recalled her negotiations with Mr Wilmans regarding the terms and conditions of the sale and commission, Ms Patrick said it had been discussed with Mr Wilmans that in lieu of commission the plaintiff would get a sole mandate for the units to be developed. When Mr Wilmans decided not to go ahead with the project and Mr Odgers took over, it was clear that the same terms and conditions would apply. The sole mandate for the units to be built would be given to the plaintiff.

[19] When asked by the plaintiff if the sole mandate had not been for her, Ms Patrick replied that the sole mandate was always in lieu of the commission on the sale of the land.

[20] By agreement between Ms Patrick and Mr Odgers, Ms Patrick was paid the sum of R15 000 by Mr Odgers for the work which she had done. This was because she was not included in the commission arrangements, but had nonetheless done work together with the plaintiff for Mr Odgers. Ms Patrick confirmed in cross-examination that the agreement had been that the mandate to sell the units was given in lieu of the commission due to the plaintiff on the original sale of the land.

[21] Ms Patrick also said that she was present with the plaintiff and Mr Wilmans when it was discussed that he would withdraw from the sale and he made it clear that the situation regarding the commission payable to the plaintiff

would continue. With regard to the discussions between the plaintiff and Mr Odgers regarding the offer of a mandate in lieu of the commission for the original sale of the land, Ms Patrick said she was not involved in those discussions but had understood from the plaintiff that it was a sole mandate.

[22] The plaintiff then testified that during 2005 she had been given a mandate to sell the property by Classic Crown, and she had introduced the property to Mr Wilmans of Nile Properties. He was keen to buy it but had considered doing it together with Mr Odgers. Pursuant to various negotiations, and at the time they sat down to sign the first agreement, Mr Odgers told her that Mr Wilmans would not be buying the property with him. She told Mr Odgers she could not offer him a commission deal on the same basis as she would have offered to Mr Wilmans because she had previously dealt with Mr Wilmans and did not know Mr Odgers. Mr Odgers then said that he would honour the same terms offered to her by Mr Wilmans which the plaintiff recorded in her evidence as being that she would be paid commission for the sale of the land or she would be given a sole mandate to sell the individual units to be developed on the property.

[23] The plaintiff had approached Ms Patrick for assistance because she worked for Mr Wilmans whose offices were in Hillcrest. She assisted in obtaining information required by the plaintiff regarding the property.

[24] The plaintiff told the court that she was never introduced to the other trustees of the trust and only dealt with Mr Odgers. The negotiations had taken place over a three or four month period and although the initial contract records that it was signed during 2005, that was an error and it was in fact signed in 2006.

[25] After the sale, the plaintiff approached Mr Odgers to record her sole mandate in writing, and he said that that would only be done when the units were completed. Much later the plaintiff became aware that Mr Odgers had given a sole mandate to Acutts and phoned him to ask him about it. He denied he had done so but the plaintiff was then presented with evidence in the form of an advert in a publication described as 'The Home Guide'. The advert was by Acutts recording that they had a sole mandate. The plaintiff again phoned Mr Odgers who asked her to go and speak to Mr Jones and discuss the question of the joint mandate with him. The plaintiff protested that that was not the agreement that was reached, and that she had agreed not to charge commission only if he awarded her a sole mandate.

[26] The plaintiff testified that she attended the meeting with Mr Odgers and Mr Jones but said that contrary to Mr Jones's evidence she was not given an option of paying half the costs and sharing the mandate with Acutts. The only option of which she was aware was that Acutts would take 50% of the commission as the

sole mandate vested in them, and she would have to split the remaining 50% commission equally between herself and Acutts.

[27] After leaving the meeting the plaintiff again contacted Mr Odgers who proposed to give her a sole mandate over certain properties he was selling down the South Coast. As she did not work down the South Coast and it was not feasible for her to do so, and because those properties were going for a lower price, she viewed this offer as not being beneficial to her and rejected it. In due course she rendered an invoice for 6% (plus VAT) of the purchase price to the trust. The plaintiff recorded that she had charged Mr Odgers 6% because that was approximately what she had charged on previous deals.

[28] In cross-examination and in reply to a suggestion that Mr Odgers would say that the trust was unable to pay more than R4 000 000 and that is how the purchase price and commission had been arrived at, the plaintiff said that the deal she concluded with Mr Odgers regarding the commission had been done to enable Mr Odgers to have more money to develop the property. In reply to the suggestion that she had insisted on the commission the deal would have fallen through, the plaintiff recorded that Mr Odgers accepted that he would pay the commission or give her a sole mandate for the sale of the units. The plaintiff reiterated that this is what had initially been offered to her by Mr Wilmans.

[29] When it was put to the plaintiff that Ms Patrick had testified that she was to be given a sole mandate in lieu of the commission, she insisted that that was wrong and that it had been an alternative arrangement. She had not recorded the agreement in writing because she trusted Mr Odgers.

[30] The plaintiff said that in her subsequent discussions with Mr Odgers, he said that the market had turned and he thought that she would not be able to sell the units. She agreed that her case was that she had concluded a verbal agreement with Mr Odgers to pay her commission on the sale of the land. No rate had been agreed for the commission and no fixed amount had been agreed. The incentive to the plaintiff to accept a sole mandate instead of being paid the original commission was that she would earn more commission on the sale of the units and would release Mr Odgers from paying the commission on the sale of the property.

[31] In reply to the suggestion that Mr Odgers would say in his evidence that the agreement was that the plaintiff would be given a mandate to sell the sectional title units on the property and not a sole mandate, the plaintiff pointed out that she would never have agreed to that because she would simply not have entertained the possibility of forfeiting her commission to every other agent who could sell the property. She reiterated that there were only two options, either the trust was to pay her commission on the original sale, or give her a sole mandate for the sale of the individual units.

[32] In cross-examination the plaintiff reiterated that she had only gone to see Mr Jones because Mr Odgers had asked her to do so. She also emphasised the fact that she did not accept the shared mandate offered to her by Mr Odgers instead of the commission which she was due on the sale of the property. She was not concerned about accepting the sole mandate because she was confident that with her very good sales record she would be able to sell the units.

[33] The plaintiff denied the suggestion that had she concluded an agreement with Mr Jones as he suggested, that she would have made as much money as she would have on the commission on the land deal.

[34] It appeared from the evidence of the plaintiff that she was at odds with counsel and the court on the way in which the evidence of Mr Jones was to be interpreted reading the options which he had put to her. In her view, on either option offered by Mr Jones, Acutts would have taken 30% of the commission and the remainder would thereafter have been split in accordance with the options which he proposed.

[35] In cross-examination it was put to the plaintiff that at no stage did Mr Odgers promise to pay commission on the land deal. The plaintiff pointed out that it would not have been a feasible proposition for her to abandon the right to

commission in exchange for R15 000 and the right to sell the units on the basis of a mandate equivalent to that of other agents.

[36] The only explanation which the plaintiff could give for not having included her right to commission from the trust in the final sale agreement, was because she took Mr Odgers at his word. She pointed out that in the advertising literature put out by Acutts for the sale of the individual units, Rod and Cheryl Hall were cited as agents, and they were related to Mr Odgers and recorded as the agents who were operating the sole mandate.

[37] That was the case for the plaintiff. Mr *Prior* who represented the trust applied that the defendant be absolved from the instance. I gave a short judgment at that stage and dismissed the application for absolution.

[38] Peter Cecil Odgers then testified that he was the third defendant and trustee of the Wenlin Trust. He had been in property development as a contractor or developer on small projects and did so via the vehicle of Ivory Palms Properties CC of which he was a 100% member. He developed residential property only, and mainly in the Kloof/Hillcrest area.

[39] Mr Odgers admitted that during mid 2005 Classic Crown had given the plaintiff a mandate to sell the property. He had been telephoned by Ms Patrick who asked him if he wanted to look at the property. Ms Patrick and the plaintiff

had then shown him the property. He had known at that time that Ms Patrick was employed by Mr Wilmans who was a property developer in Hillcrest. Mr Odgers in fact rented offices from Mr Wilmans.

[40] He said that although Mr Wilmans may have phoned him at the time, Mr Wilmans was not involved with him in the deal. Mr Odgers was unable to recollect whether the recorded date of 2005 in the original offer to purchase drawn up by the plaintiff was a mistake, and should have read 2006. Mr Odgers had no recollection of the rejection of the initial offer to purchase and could not remember the original price which Classic Crown had asked for the property.

[41] Mr Odgers emphasised that his ability to purchase the property was limited by the maximum amount of R4 000 000 which the trust could raise for the purchase of the land. He did not believe he could have obtained more money than the R4 000 000 as he had based his fundraising on a deposit of R800 000.

[42] Mr Odgers said that he had put the deal to his fellow trustees who were happy with it and signed the sales agreement and transfer documents. He said that his role in the matter was effectively that of a manager who executed construction activities on the site.

[43] Mr Odgers was adamant that there was no commission payable to the plaintiff because there was no money to pay her. He stated in cross-examination

that under normal circumstances in KwaZulu-Natal the commission is paid by the seller and there was no reason for him to get involved in the commission. He said that he could not go up in price and Classic Crown was not prepared to accept R3 900 000 and then pay the commission. A stalemate had been reached and had the plaintiff been paid any commission the deal would not have gone ahead.

[44] Mr Odgers said that he and the plaintiff had sat down and discussed the option of providing a future financial benefit but not one in lieu of the commission. He emphasised that no deal was concluded with her. She could walk away from the deal or get involved in the marketing of the units to be built on the property. Mr Odgers then said that he had offered the plaintiff a mandate to sell the units at a future date when he completed them. They were finished by October 2007. Mr Odgers emphatically denied having agreed to be liable for the commission payable to the plaintiff on the sale of the land.

[45] When asked about the interpretation of Clause 10 of the sale agreement which dealt with agent's commission, Mr Odgers emphasised that in the clause he indemnified the seller against claims by agents other than the plaintiff. He also emphasised the fact that the clause in no way bound him to pay any commission whatsoever to the plaintiff. Mr Odgers stated that at no stage did the plaintiff insist on her claim for commission, and he recorded that she must have

known that the code of conduct of estate agents required that sole mandates had to be in writing.

[46] Mr Odgers stated that the scheme had been launched in October of 2007 by Mr Jones of Acutts with whom he had concluded a sole mandate. He said that before he had given Mr Jones a mandate he had told him he had given the plaintiff a mandate to sell the property. He said that because of that he would like to arrange a meeting to discuss a dual mandate between the plaintiff and Acutts to market the six units, and he asked Mr Jones to contact the plaintiff. He then phoned the plaintiff to tell her to expect a call.

[47] Mr Odgers was adamant that he did not attend the meeting which was held with Mr Jones and the plaintiff. When referred to the fact that the plaintiff said she had phoned him regarding the sole mandate which he gave to Acutts, he initially said she may have phoned him and then said he had no recollection of it. He said that he had been told by Mr Jones that he had offered the plaintiff a 50/50 deal and she had walked out. When he later phoned the plaintiff she said that she did not want to get involved.

[48] Mr Odgers then stated that when the plaintiff refused her mandate, he had given the sole mandate to Mr Jones. When questioned on this statement later he said that this had been after the meeting between Mr Jones and the plaintiff.

[49] Mr Odgers went to great lengths to explain the working of a sole mandate and the importance of negotiating the rate of commission, the length of time of the mandate and the amount which would be spent on the promotion and advertising of the units. He confirmed that no units had been sold by Acutts during the three months of the sole mandate given to them. The only unit that was sold was one which he had sold privately.

[50] In cross-examination Mr Odgers confirmed that he had at no stage undertaken to pay commission to the plaintiff. When it was pointed to him that in the initial offer to purchase it was recorded that he was responsible for commission, he conceded that he had been wrong in making the initial statement. Mr Odgers also accepted that, contrary to the defendants' pleading, the R15 000 had been paid to Ms Patrick and not to the plaintiff.

[51] Mr Odgers was emphatic that he had offered the plaintiff a mandate and not a sole mandate. What he said he had meant by that was that he sent the plaintiff to enter into a joint mandate with Mr Jones and she had walked out of the meeting. He seemed unwilling to concede the point that he had only offered the plaintiff a joint mandate, and insisted that he had offered her a mandate. He said that he had phoned the plaintiff and told her that she was not entitled to a sole mandate and wanted her to discuss the matter with Mr Jones. He had wanted them to arrive at an agreement regarding the sharing of the commission. Mr

Odgers said that he had told Mr Jones that he had an arrangement to give the plaintiff a mandate and wanted them to do a deal.

[52] When the plaintiff put to Mr Odgers in cross-examination that he had suggested to her that he had properties on the South Coast which she could market, he replied that he was doing property deals at the time on the South Coast. When the question was repeated he said that he could not remember. Exhibit 'A', which Mr Odgers conceded was an email sent by his secretary to the plaintiff, was then put to him which demonstrated clearly that he had suggested to the plaintiff that she market his properties on the South Coast.

[53] When pressed about his knowledge of the selling price of the land, he eventually conceded that he must have been aware of it but could not recall it. When it was put to Mr Odgers that when Mr Lochner had rejected his first offer, they had held a meeting, he could not recall whether Mr Lochner was there or not.

[54] Mr Odgers was then referred to page 32 of the plaintiff's discovered documents. That document was an extract from a sale brochure covering the period from the 29th January 2009 to the 4th February 2009. It described Acutts as having a sole mandate over the sale of one of the units and recorded the agents as Rod and Cheryl Hall. Mr Odgers stated that he had cancelled the sole mandate he had given to Acutts after the end of the first three months of 2007,

and that they had simply carried on on their own initiative in describing themselves as having had a sole mandate during 2009. In evidence of this he pointed to a sale which had been made by Pam Golding Properties on the 5th October 2008.

[55] When asked whether he had ever agreed to, or proposed, that the plaintiff share her mandate, Mr Odgers replied that she had never referred to a sole mandate. When the question was repeated, he said that he could not recall whether he had done so.

[56] When further cross-examined on whether he expected the plaintiff to walk away from the sale of the land with no commission, he curiously replied that he had never said so. He reiterated that it was not the duty of the purchaser to pay commission and that he had told her that he only had R4 000 000 to spend on the property.

[57] In reply to a further question Mr Odgers suggested that although the plaintiff had introduced the buyer and seller she had not done so effectively. When it was pointed out to him that that was common cause and that the parties had accepted that the plaintiff was the effective cause of the sale, Mr Odgers did not reply.

[58] When again asked on what basis he believed the plaintiff would simply have walked away from her commission, he said that they had discussed the mandate and she had signed the sale agreement. He also said that he had told Mr Jones that he had to share the sole mandate with the plaintiff. Mr Odgers then reiterated that he had given the plaintiff a mandate and then told her to go and see Mr Jones. He had also made it clear in his evidence that he expected her to share a mandate with Acutts. Mr Odgers then appeared not to understand the difference between giving the plaintiff a mandate and requiring her to share a mandate with Acutts. When the economic difference between those two arrangements was pointed out to him he stated that he had not viewed the matter that way.

[59] When asked whether he had a copy of the sole mandate which he concluded with Acutts, he replied that it had probably been shredded. He said that Mr Jones did not have a copy.

[60] When it was pointed out to Mr Odgers that his counsel had not put to either the plaintiff or Mr Jones that he had not attended the meeting which they said he had attended, he said that he had told his counsel that.

[61] The next witness for the defence was Roderick Robert Stainton a chartered accountant who had worked as a property developer since 1990. He was one of the three trustees of the trust which he administered together with the

other trustees. He recorded that the trust had typically used Mr Odgers for property transactions and that Mr Odgers's authority was limited. All purchases, sales and encumbrances of properties had to be authorised by the three trustees. He recorded that the beneficiaries of the trust were two of Mr Odgers's daughters. He said that when Mr Odgers found a suitable transaction he would bring it to the other trustees and they would consider it.

[62] The remainder of Mr Stainton's evidence may be summarised as follows :

- (a) he went to great lengths to persuade the court that both he and Mr Shellwell, the first defendant, effectively controlled the trust and that the role of Mr Odgers was a lesser one and that he was required to obtain the sanction of the other defendants with regard to any important decision affecting the trust;
- (b) although he was not involved in the negotiations for a commission he was adamant that there was nothing improbable in the plaintiff walking away from a commission of R250 000 in exchange for a mandate to sell the units which would only have benefitted her if she sold the units, and had to do so in competition with other agents;
- (c) Mr Stainton had no real recollection of the financial limits which had been placed on the trust at the time but said that the trust would not have proceeded unless it could have afforded to do so. It would have borrowed against the funds which it had, but that would have been dependant upon Standard Bank with whom they raised finance;

- (d) Mr Stainton described Mr Odgers as being very enthusiastic about the deal and he said that had funds been available Mr Odgers would have tried everything to persuade them to pay more;
- (e) Mr Stainton had not become aware that there was a problem for the commission payment until the trust had been summonsed by the plaintiff;
- (f) Mr Stainton was aware of the sole mandate which had been given to Acutts and he had been involved in the making of that decision. He was unable to say whether any units had been sold in terms of that sole mandate, but knew that they were concerned at the time because the market had turned and the banks were insisting that they sell some of the stock; and
- (g) Mr Stainton reiterated his view that at the time the sale of the land had taken place, the property boom was at its height and any broker would do whatever they could to secure access to stock, and that is why the plaintiff would have been willing to forego her commission in order to attempt to sell the units being developed on the land.

[63] In cross-examination it emerged that despite Mr Stainton having told the court that he had been involved in property development since 1990, he had worked as a project manager at Group 5 during 1997 and had left the industry and only returned in approximately 2006 or 2007. At the time of the sale of the property he had been involved in a surf shop and was consulting to a software company and what he described as a telematics company.

[64] When asked whether he and the first defendant had been active trustees in the trust at the time of the sale of the immovable property he first said he was not sure of the date of the sale and then said that since the trust's inception he had had the influence and control over all fixed property deals or encumbrances to the fixed properties. When asked what he and the first defendant did more than Mr Odgers in the running of the trust, he said that his role was to protect the assets of the trust and that Mr Odgers's authority to do so was limited.

[65] When it was put to Mr Stainton that the first defendant had told the plaintiff that he was just a signatory to the trust and had no real say in the decisions of the trust and wanted to step out of the trust, Mr Stainton replied that soon after this crisis the first defendant had tendered his resignation. He described the first defendant as a family friend and the conveyancer for the trust. He had not been called as a witness because he was no longer involved in the trust.

[66] It was put to Mr Stainton by the plaintiff that if he had been closely involved in matters of the trust, as he alleged he was, he would have realised that the former girlfriend of Mr Odgers had been defrauding the trust for a number of years. Mr Stainton confirmed that the trust had been extensively defrauded by the ex-girlfriend of Mr Odgers but said that he had not detected this because he had relied on the auditors of the trust to detect these sorts of problems.

[67] Despite the fact that Mr Stainton said that Mr Odgers's authority was limited and that he could not in any way bind the properties, he conceded that Mr Odgers would have had the authority to make decisions about the commission payable to the plaintiff. When questioned about the relationship between the plaintiff and Mr Odgers with regard to the agreement reached between them, he said he had no doubt that Mr Odgers had offered the plaintiff a mandate as a recognition for the work which she did. He said that the R15 0000 had been paid to Ms Patrick because he had been comfortable with the fact that she was no longer part of the plaintiff's team and that R15 000 was due to her for what she had done.

[68] Significantly, in his evidence Mr Stainton said that he had never before done a deal where no commission was paid to the agent responsible for the sale of the property. He said that he had not applied his mind to the question of commission at the time.

[69] When it was put to him by the plaintiff that the first defendant had said that he and the first defendant had had nothing to do with the trust, Mr Stainton did not answer the question directly but resorted to saying that he could only account for his own actions. When asked whether, prior to the negotiations for this deal, he had been involved in dealing with the bank for the trust or whether that had

been done by Mr Odgers, he said that there were instances where he had done so and instances where he had not done so.

[70] Mr Stainton told the court that the trust was insolvent. Although it had some assets in the form of properties, the bonds owed to the banks on those properties far exceeded their value. He said that if the plaintiff was successful in her action she would not be able to recover the amount sued for, nor even her costs. He said that he had personally undertaken to pay the trust's cost in the action.

[71] Mr Stainton said that although he conceded that Clause 10 of the sale agreement which dealt with the commission was an unusual clause he had not paused to consider it when he had signed the contract. He said that this was because he had not been party to the discussions regarding commission with Mr Odgers.

[72] That was the defendants' case.

[73] In assessing the evidence of the various witnesses in my view Messrs Lochner, Patrick and Jones were good witnesses who gave their evidence in a straightforward manner. I accept that they honestly believed that what they told the court had taken place.

[74] With regard to the plaintiff, she was in some respects an unsatisfactory witness. She refused to answer questions and constantly launched into speeches which had nothing to do with the question put to her. What she appeared to be doing was trying to anticipate where the questions were going, and then to neutralise the effect of the questions by giving long explanations. She constantly spoke over the top of persons asking questions and frequently interrupted when questions were being asked.

[75] In assessing the evidence of the plaintiff I am mindful of the fact that she was an unrepresented litigant. Had she been represented and had she received proper legal advice, I have no doubt that many of the problems which she exhibited in her evidence and in the running of her case would not have occurred.

[76] In my view Mr Odgers was a poor witness. He appeared to have a perfect recollection of certain events and yet on numerous occasions when he could not answer a question, he said the matter had happened five or six years ago. His evidence was, in my view, contradictory on the following aspects :

- (a) he said that he had had no reason to get involved in the commission payment to the plaintiff and repeatedly said that he was not responsible for the commission. This was despite the fact that commission had clearly been discussed between him and the plaintiff

as evidenced by the initial sale agreement which had been drafted, and in which he had acknowledged liability for commission to her;

- (b) Mr Odgers had initially distanced himself from the suggestion that he had proposed that the plaintiff market properties on the South Coast. It was only when Exhibit 'A', the email from his secretary was put to him, that he conceded this, and then apparently reluctantly;
- (c) the defence as pleaded was that Mr Odgers had concluded an agreement with the plaintiff in terms of which the trust was to give her R15 000 and a mandate to sell individual units once they had been developed. In his evidence he said that he had made no deal whatsoever with the plaintiff and then claimed that he had complied with his obligations in terms of the agreement by sending her to Mr Jones, whom he had told to share his mandate with the plaintiff. He appeared to have no understanding of the difference between offering the plaintiff a mandate, and offering her a mandate which she had to share; and
- (d) Mr Odgers's evidence was unsatisfactory with regard to his reasons for including Clause 10 in the final sale agreement. He initially sought to explain it on the basis that the purchaser bore no obligation for commission in KwaZulu-Natal and that it was normally a seller's obligation. He said that in terms of Clause 10 he was not liable for commission and had undertaken to indemnify the seller, Classic

Crown, from any claim for commission by any other agent, excluding the plaintiff.

[77] In my view Mr Odgers's evidence cannot be in accordance with the probabilities. On his version the plaintiff, who was the effective cause of the sale of the immovable property, was prepared to walk away from a substantial commission on the promise of a R15 000 payment and the right to a mandate to sell the individual units to be developed on the property. This is improbable because :

- (a) the commission which had been earned by the plaintiff at that stage was in excess of R250 000;
- (b) the units in respect of which a mandate was offered to the plaintiff were not yet constructed. It was Mr Odgers's view as a developer that a better purchase price would be obtained by not selling the units off plan but rather completing them, establishing proper gardens around them and furnishing them. Mr Odgers may well have been correct in this assumption, but it meant that the plaintiff would have had to wait for the completion of the units which took approximately 18 months before she could exercise the mandate which Mr Odgers said he had given her;
- (c) the mandate, as pleaded by the defendants and testified to initially by Mr Odgers was, as emphasised in both the pleadings and evidence, not a sole mandate but a mandate. Why would the plaintiff agree to

compete against other agents for her commission on the basis that if she did not sell the units she would get no commission whatsoever when she was entitled to be paid over R250 000. This seems to be wholly improbable. The probabilities in this regards are bedevilled by the fact that Mr Odgers clearly did not understand the difference between a mandate and a shared mandate and this was despite his long experience as a property developer. The suggestion that the plaintiff would have accepted a shared mandate is as improbable as the suggestion that she would have waived her right to commission and elected to compete openly with other agents in an effort to recover monies which she had already earned and which were due to her.

[78] With regard to Mr Stainton, in my view he was a witness who tried his best to resurrect the unsatisfactory aspects of Mr Odgers's evidence. Like Mr Odgers and the plaintiff before him, he frequently did not answer the question, and resorted to rambling explanations in an attempt to neutralise the effect of questions put to him.

[79] What remains for me to consider is whether the plaintiff has established the right to commission on a balance of probabilities. In that regard she bears the onus.

[80] The principal problem with the plaintiff's case is that her version of the agreement and the version of the agreement as testified to by Ms Patrick differ significantly. On Ms Patrick's version the plaintiff was promised a sole mandate in lieu of the commission she would have earned on the land. This was stated by Ms Patrick in her evidence-in-chief, in cross-examination and in questions from the court. There is no doubt that on the evidence of Ms Patrick the deal was that the plaintiff abandoned her right to commission on the sale of the land in exchange for what she believed would be a sole mandate from the trust to market the units once they had been developed on the property. There was no conditional aspect about that arrangement.

[81] On the evidence of the plaintiff however, the contract was that she would only give up her right to commission on the land deal if she was given the sole mandate. She described these terms as being in the alternative – i.e. that if she did not get the sole mandate she would be paid the commission.

[82] The problem is that the plaintiff's evidence is directly contradicted by that of Ms Patrick. When the plaintiff's pleadings are examined, the allegations made in paragraph 12 of her particulars of claim as to the terms of the agreement complicate the matter further. The two terms of the agreement i.e. the acknowledgement of the plaintiff's right to commission and the grant to her of a sole mandate are recorded as two terms of the agreement without indicating how they are linked. It is clear on the evidence of the plaintiff and all the other

witnesses that that was never the arrangement. Given that the relationship between the plaintiff and Mr Odgers was at that stage a new one, it is highly improbable that he would have given her both commission and the sole mandate, 18 months in advance. Indeed, that was never what was contended for by the plaintiff.

[83] On the plaintiff's case there are three possible versions of the contract – that pleaded, that put forward on the plaintiff's own evidence and that related by Ms Patrick. In the circumstances I cannot be satisfied that the plaintiff has established, on a balance of probabilities, the contractual basis on which she was entitled to be paid by the trust. The differences in her version are not insignificant because on the version of Ms Patrick the measure of the plaintiff's damages would not have been the amount of the commission on the sale of the property, but rather the profit which she forfeited on the sale of the units. Had this measure of damages been pleaded the trust could no doubt have raised questions as to the extent to which the plaintiff could have or should have mitigated her damages.

[84] With regard to the version as pleaded by the plaintiff it is not only improbable but not in accordance with her evidence. The version to which the plaintiff testified is the most probable version but is contradicted by her pleadings, the evidence of Ms Patrick and the defendants' version. The plaintiff did not seek to amend her pleadings to accord with her evidence, and I did not believe it was

appropriate for me to suggest to her that she do so, particularly at the end of the case. That may have constituted an undue interference in the defendants' defence.

[85] In all the circumstances I am not satisfied that the plaintiff has established her cause of action on a balance of probabilities and her case must fail.

[86] With regard to the question of costs, I have decided to exercise my discretion in ordering each party to pay their own costs. I do this because :

- (a) in the pleadings of the trust and the evidence given by its trustees, the trust did not honour the contractual arrangements which it admitted having owed to the plaintiff;
- (b) the trust embarked on, and continued the litigation in the certain knowledge that if the plaintiff won her case she would not have been able to recover either her claim or her costs;
- (c) the trust itself was not placed in any position of economic prejudice by the action because one of the trustees had undertaken in his personal capacity to pay the legal costs of the trust;
- (d) I was not impressed with either of the witnesses who gave evidence for the trust; and
- (e) it is clear that whatever the agreement which was concluded between Mr Odgers and the plaintiff, he sought to deprive her of any realistic form of compensation for the work she had carried out, and for which

she was, at the time of the conclusion of the sale of the property, entitled to be paid. That the provisions of Clause 10 of the sale agreement were worded as they are clearly indicated that the trust did not want to record in writing at that stage that it was liable for the plaintiff's commission. However, it was clear on the evidence of the trust's witnesses that Mr Odgers concluded some form of agreement with the plaintiff.

[87] In the circumstances I make the following order :

- (a) the defendant is absolved from the instance;
- (b) each party is to pay their own costs of the action.

Date of hearing : 29th November 2012

Date of judgment : 6th December 2012

For the Plaintiff : In person

For the Defendant : P Prior (instructed by Pearce Du Toit and Moodie)