**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: D42/2019**

In the matter between:

**GOLDEN REWARDS 120 CC T/A REMAX MARINE** **PLAINTIFF**

and

**M3 HOLDINGD (PTY) LTD** **DEFENDANT**

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**ORDER**

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**The following order shall issue:**

1. Judgment is granted in favour of the plaintiff in the alternative claim, against the defendant as follows:

    1.1. Payment of the sum of R407 402.34, calculated as at March 2024.

    1.2. Further commission calculated for each and every month after March 2024 that Bearing Man continues to remain in occupation of the property.

    1.3. Interest on the amount of R407 402.34 at the legal rate from 1 December 2017 (10.25% per annum) to the date of final payment.

1.4. Interest on further commission calculated for each month that Bearing Man remains in occupation of the property after March 2024 at the legal rate.

1.5. Costs of suit.

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**JUDGMENT**

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**SIPUNZI AJ**

**Introduction**

[1] This is an action in terms of which Golden Rewards 120 CC t/a Remax Marine, with its principal place of business at [...] A[...], Aboretum, Richards Bay, KwaZulu-Natal (the plaintiff) claims payment of estate agent commission on the basis of services rendered at the instance of M3 Holdings (Pty) Ltd (the defendant).

[2] The defendant is a company duly registered and incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business at 2[...]-2[...] B[...] Bay, Alton, Richards Bay, KwaZulu-Natal. The defendant was the owner of immovable industrial property described as Erf- 8[...], Alton, situated at 1[...] A[...] Street, Alton, Richards Bay, KwaZulu Natal, (the property).

[3] The plaintiff seeks judgment against the defendant for the payment of:

‘(a) the sum of R637 321.16, *alternatively*, the sum of R407 402.34, calculated as at March 2024;

(b) further commission calculated for each and every month after March 2024 that Bearing Man continues to remain in occupation of the premises;

(c) interest on the amount of R637 321.16, *alternatively*, R407 402.34 at the legal rate from 1 December 2017 (10.25 % *per annum*) to the date of final payment;

(d) interest on the further commission calculated for each month that Bearing Man remains in occupation of the premises after March 2024 at the legal rate, calculated from 1 December 2017 (10.25 % *per annum*) to the date of final payment;

(e) costs of suit.'

[4] Before the commencement of the trial, and during the pre-trial conference, the parties agreed that there would be no separation of merits from quantum. Hence the trial proceeded accordingly.

**Evidence**

[5] It is common cause that at all material times hereto, the plaintiff carried on business as an estate agent, was the holder of a valid fidelity fund certificate issued in terms of s 26(a) of the Estate Agents Act 112 of 1976[1] (the Estate Agents Act), with certificate number 2[...] and held valid fidelity insurance. Further, the sole member of the plaintiff, Cina Gertruida Van Der Vlies (Mrs Van der Vlies), was the holder of a valid fidelity fund certificate, with certificate number 2[...].

[6] It is also common cause that Johanna Susanna Fourie (Mrs Fourie), with a valid fidelity fund certificate, number 2017710743 worked for the plaintiff as an intern under the supervision of Mrs Van der Vlies. On 3 November 2015, the defendant represented by Mrs Valayutham Moodliar (Mrs Moodliar/Radha), gave a verbal mandate to Mrs Fourie to find a tenant for the property for a period of five years, subject to renewal.

[7] It is further common cause that on 26 June 2017, a written mandate was drawn up by Mrs Van der Vlies and was communicated to the defendant for its consideration. Upon its return from the defendant, the document had some comments or annotations added in hand writing, to the effect that commission proposed was to be negotiated. In pursuit thereof, on 25 July 2017, there was a

[1] The Estate Agents Act 112 of 1976 was repealed by the Property Practitioners Act 22 of 2019, which came into effect on 1 February 2022, long after the dispute in this instance materialized.

meeting between Mrs Moodliar; Fourie and Van Der Vlies.

[8] Mrs Fourie testified that in November 2015, she received a mandate from the defendant to find a tenant for the property, at the monthly rental of R170 000 exclusive of VAT. It was on that basis that she introduced Arthur Gray (Mr Gray) of Bearing Man to the defendant, as the potential tenant for the property, and they all met at the property at her instance. She also facilitated discussions between the defendant and Mr Gray on their respective requirements, and the negotiations on the terms of the lease agreement unfolded. Eventually, the rental amount was reduced to R127 500, VAT exclusive. The discussions continued until Mr Gray provided her with a draft lease agreement for the consideration of the defendant. In turn, she forwarded that draft lease agreement to the defendant on 10 August 2017.

[9] Mrs Fourie stated that on 25 July 2017, during the meeting with the defendant, Mrs Van der Vlies accepted the mandate; the commission structure and rates were discussed; and there was also a proposal about the management of the lease. They were prepared to manage it but the defendant would not accept the rate. She also stated that the amount of R6 000 was proposed to also include the commission and the management fees, but the defendant did not revert back to say if they were opposed to that proposal. Yet, in cross-examination, she was initially emphatic that the amount of R6 000 was been agreed on, before the lease was signed.

[10] She also admitted that the plaintiff did not respond to the offer of commission that they received from the defendant, as contained in the email of 25 July 2017. When it was put to her, she admitted that there was no agreement on the commission payable for the services rendered to the defendant. She also conceded that the lease negotiations should not have continued until an agreement on the structure of commission had been reached.

[11] Mrs Fourie confirmed that the plaintiff did not perform the management services on the lease. She opined that if the proposed amount of R6 000 was inclusive of the commission and the management, the plaintiff would only be entitled to the commission. She testified that during the meeting on 25 July 2017, an

agreement on commission was reached. However, in the cross-examination, she stated that there was a mandate but there was no agreement on the structure of the commission.

[12] According to her, on 1 September 2017, she learnt that a written lease agreement, for a renewable five-year term, in respect of the property was concluded on 31 August 2017, between the defendant and Bearing Man, to her exclusion. This prompted an exchange of emails between herself; Mr Gray and the defendant as she was demanding access to the lease agreement. With the assistance of Mrs Van der Vlies, she also sent invoices to the defendant for payment of her commission and on the basis of her role in facilitating the lease agreement. She did not receive payment.

[13] During her subsequent interaction with the defendant, she was also made to believe that the lease agreement concluded had been revised to a period of three years and later, to one year. The explanation proffered by the defendant for these changes was that there were plans to sell the property and the variation of the lease was in anticipation of change of ownership. Tensions developed between her and the defendant and all invoices sent for payment were not honoured

[14] Mrs Van der Vlies testified that as her principal, Mrs Fourie was working under her supervision. When her attention was drawn to the email of 25 July 2017, she denied that she met with the defendant on that day. She stated that she made attempts to reach the defendant but that was in vain. After the court had adjourned, she changed her version to state that she recalled attending the meeting and the subject of discussion was the mandate and the annotations that had been inserted by the defendant on the mandate dated 26 June 2017.

[15] During cross-examination, she testified that the agreement that was reached on 25 July 2017. She further stated that she regarded the letter dated 26 June 2017 as the mandate, upon which the plaintiff claimed its commission and which the defendant accepted in June 2017. She later changed her position and was inclined to accept that the implication of the annotations on the drafted mandate was that the document required further consideration.

[16] Mrs Van der Vlies also testified that in July, the email was sent to Mrs Fourie and not her. She, however, conceded that the contents of the email of 25 July 2017 was not an agreement on commission. According to her, there was a continuous dispute about the commission. She opined that, because there was a mandate, the defendant was indebted to the plaintiff. She changed her stance and contended that the email of 25 July 2017 settled the dispute in regard to the commission and subsequently agreed that there was no express acceptance to the offer in the email of 25 July 2017. She also testified that in September 2017, the issue of the commission had not been resolved and there were still ongoing discussions.

[17] In relation to her experience, she had been in the real estate industry since 1993. She received her first fidelity fund certificate in 1993 and considered herself as an expert in the estate agent industry. She became the sole owner of the plaintiff in 2003. She obtained a certificate of estate agency in 1993; business broking (CBBR qualification); National certificate: Real estate NQF Level 5, SAQA ID 2[...]; certificate of competence-Unit Standard 1[...]; Professional recognition as principal estate agent in 2010 and certified distress property expert in 2011. She also received additional training in real estate where she attended seven training and/or workshops between 1995 and 2015. She also received 18 related awards between 2003 and 2021 and a member of at least four professional bodies.

[18] She sought to testify as an expert and give professional opinion on what was the usual tariff for leasing commissions of commercial properties in the Richards Bay area from the year 2017. Her opinion was based on overall experience in the commercial property estate agency field in the Richards Bay/ Empangeni area since 1993. She had also investigated and knew the commission structures that were endorsed by the South African Property Owners' Association (SAPOA). She had also referred to the guidelines that were applicable to a variety of other commercial properties, as well as her training, knowledge and experience in the field of estate agency.

[19] She submitted that the applicable commission structure that was sanctioned by SAPOA was:

(a) 5% (plus VAT) on the first two years' rental;

(b) 2.25 (plus VAT) on the next three years' rental;

(c) 1.5 (plus VAT) on the next four years' rental;

(d) 1% (plus VAT) on the balance.

**The dispute**

[20] According to the plaintiff, during the meeting held on 25 July 2017 the parties reached a verbal agreement on the commission payable pursuant to the mandate. It was in this meeting that Mrs Van der Vlies accepted the mandate on behalf of the plaintiff; where it was agreed that commission payable for the service rendered by the plaintiff was R6 000 a month, including management fees and the nett rental amount of R127 500 exclusive of VAT for the property was agreed upon.

[21] On the other hand, the defendant denied that an agreement on commission was reached during the said meeting. The defendant contended that the content of the email dated 25 July 2017 was an offer in which defendant proposed that commission would be paid at the rate of R6 000 a month, inclusive of management fees. According to the defendant, this offer was not accepted, and therefore, no agreement was reached on the commission payable to the plaintiff, pursuant to the agreed mandate.

**Issues**

[22] The main questions that arise from the outline above include:

(a) whether the lease agreement entered into between the defendant and Bearing Man was as a direct result of the plaintiff having introduced Bearing Man to the defendant;

(b) whether there was an agreement on the amount of commission due to the plaintiff, either expressly, alternatively;

(c) whether it may be found that a tacit term regarding the usual rate of commission would apply as a direct result of the role of the plaintiff in the introduction of Bearing Man; the subsequent conclusion of the lease agreement and the usual commission structure in the area of Richards Bay;

(d) what the commission structure found application in the instance of the parties;

(e) whether the plaintiff is entitled to any commission, whether in contract, alternatively, in terms of an enrichment action, and if so, the quantum of such commission; and

(f) Whether Mrs. Van der Vlies was an expert witness whose opinion would be admissible.

**Submissions of the plaintiff**

[23] In the main, the argument for the plaintiff was that on 25 July 2017, during a meeting, the plaintiff and the defendant agreed to an amount of R6 000 per month to be the commission payable. Further thereto, the plaintiff was willing to manage the lease in the first year. It was argued that all the essential elements of a mandate of agency were present and that there was an express agreement on the commission that was payable to the plaintiff. In this regard, the plaintiff relied on the judgment in *Gardner and Another v Margo* [2] where the Supreme Court of Appeal held that, where there were oral terms in addition to the written mandate, it had been established on a balance of probabilities that the oral terms formed part of the expressly agreed mandate.

[24] In the alternative, the plaintiff relied on the email that was sent by the defendant to Mrs Fourie on 22 September 2017.[3] It was argued that, although the email related to a different property (ABI Bottling premises), the plaintiff sought to make a point that the defendant was aware of the standard norm in percentages of commission payable to the agents as ranging from 2.5% to 5% on one year's rental. The relevant part of the email reads:

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[2] *Gardner and Another v Margo* 2006 (6) SA 33 (SCA).
[3] Index to plaintiff's trial bundle, exhibit "A", page 79.

‘In view of tenants, the standard norm is your % ranging from 2.5. to 5 % on one year’s rental and this is what we are prepared to pay out.’

[25] The plaintiff referred to *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd*,[4] to the extent that it referred to the law relating to implied contracts in L*awsa*[5] as follows:

‘If there is no express agreement between principal and agent, an implied contract may be inferred under certain circumstances. If a person conducts himself in such a way that from his conduct and from the surrounding circumstances it can be inferred that he is in fact authorising an agent to act on his behalf, then an implied contract of agency comes into being, but one has to be careful to guard against assuming that mere instrumentality in introducing a person who eventually purchases the principal’s property constitutes an implied contract…’[6]

[26] It was also argued that the defendant acted with dishonesty when it sought to exclude the plaintiff from its further dealings with the prospective tenant, Bearing Man in the negotiation of the terms of the lease agreement. The argument continued to contend that Mrs Moodliar also attempted to collude with the tenant by fraudulently representing a one-year long lease, being a shorter term of the lease period, whereas a five-year long lease agreement had already been concluded.

[27] The plaintiff also relied on a second alternative claim of unjust enrichment. In that regard, it was argued that the defendant’s enrichment was at the expense of the plaintiff, who had performed in terms of the defendant’s mandate and in turn, the plaintiff was impoverished in that there was no payment received for the services rendered on the basis of the agreed mandate.

[28] Lastly, on quantum, the plaintiff presented various calculations, based on its main pleaded case of an agreement for commission of R6 000 per month from 1

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[4] *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd* 2001 (1) SA 313 (C) at 323, followed in *Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd* 2002 (6) SA 236 (C).
[5] 9 *Lawsa* first re-issue para 384.
[6] *Muller* above at 319D-F.

January 2018, subject to further renewal. It was argued that the defendant continued to be liable to the plaintiff for the commission as the same tenant remained in occupation of the property, on a month to month basis. In the first alternative, it was argued that the plaintiff was entitled to commission at the usual commission rate. On the question of costs, it was submitted that interest at the legal rate applicable on 1 December 2017, of 10.25% per annum, being the day that the tenant took occupation of the property, should be applied.

**Submissions of the defendant**

[29] On behalf of the defendant, it was submitted that the plaintiff presented no case upon which a judgment could be granted in its favour. The defendant was critical of plaintiff's reliance on *Gardner*, in relation to the legal position in establishing the existence of express terms of an agreement. In turn, it was argued that the plaintiff's evidence failed to establish that there was an express agreement of what was payable commission to the plaintiff, which would be an important essential element in the contract allegedly concluded with the defendant. It was further submitted that the defendant had clearly indicated that the commission was to be negotiated. and that the offer of R6 000 commission, inclusive of management fees, was not accepted.,

[30] The defendant also submitted that the introduction of a new cause of action after the close of the case had no evidential weight, because there was no evidence in its support; and therefore, carried no evidential weight and should be ignored. It was further argued that the court should not come to the assistance of a party that failed to put forward terms of an agreement. On this aspect, the defendant referred to various court decisions, including *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC*,[7] where the court said that "the invalidity of an option to renew a lease agreement that requires the parties to agree on the rental amount payable during the contemplated renewal period is cured only if there is a requisite deadlock breaking mechanism contained in the option."[8]

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[7] *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* [2019] ZASCA 17; 2020 (2) SA 419 (SCA) para 8.

[8] Defendant's Heads of Arguments: Closing legal submissions, page 6, para 14.

[31] The defendant's submissions also included and objection to the expertise of Mrs Van der Vlies as an estate agent. It was contended that Mrs Van der Vlies did not qualify as an expert; that she was inclined to lack objectivity in her opinion and that her testimony contained hearsay evidence that was premised on articles that were sourced from the Google search engine. In order to advance its argument regarding hearsay evidence, reference was made to s 3(1) of the Law of Evidence Amendment Act,[9] and the factors that ought to be considered for purposes of admissibility. [10]

[32] Generous reference was made to decisions from foreign jurisdictions' including *Schneider NO and Others v AA and Another*, where the court referred to *Lord Arbinger v Ashton.*[11] to make a point that, "undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witness, rather consider themselves as the paid agents of the person who employ them."[12]

**Applicable law**

[33] In terms of s 34A of the Estate Agents Act:

'(1) No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act referred to in sub paragraph (i), (ii), (iii) od (iv) of paragraph *(a)* of the definition of "estate agent", unless at the time of the performance of the act a valid fidelity fund certificate has been issued-

*(a)* to such estate agent; and

*(b)* if such estate agent is a company…., to every member of such corporation.

(2) No person referred to in paragraph *(c)* (ii) of the definition of "estate agent", and

[9] Law of Evidence Amendment Act 45 of 1988.
[10] Ibid s 3(1)*(a)-(c)*.
[11] *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC).
[12] Defendant's Heads of Arguments: Closing legal submissions, page 14, para 20.

no estate agent who employs such person, shall be entitled to any remuneration or other payment in respect of or arising from the performance by such person of any act referred to in that paragraph, unless at the time of the performance of the act a valid fidelity fund certificate has been issued to such person.'

[34] In regard to implied contracts, in *Muller*, to the extent that it referred to the law relating to implied contracts in *Lawsa*, it was held that:

'If there is no express agreement between the principal and agent, an implied contract may be inferred under certain circumstances. If a person conducts himself in such a way that from his conduct and from the surrounding circumstances it may be inferred that he is in fact authorising an agent to act on his behalf, then the implied contract of agency comes into being, but one has to be careful to guard against assuming that mere instrumentality in introducing a person who eventually purchases the principal's property constitutes an implied contract. An implied mandate can only be held to exist if the court is able to find that there was consensus between the principal and the agent that the latter should act on behalf of the former. *If it cannot be held from the actions of the principal that he agreed to employ the agent, then the impression and belief of the agent that he was so employed is obviously insufficient to create a binding contractual relationship between the parties*. Where the course of the dealing between the parties is such as to leave it open to doubt whether the principal is employing the agent to act on his behalf, the agent cannot rely on an implied mandate since he could and should have made it clear to the principal that he would expect him to pay commission should the mandate be fulfilled.'[13] (My emphasis.)

[35] The basic principle applicable to the evidence of Mrs Van Der Vlies where she gives an expert opinion, is stated in *Principles of Evidence*,[14] as follows:

'If the issue is of such a nature that the witness is in a better position than the court to form an opinion, the opinion will be admissible on the basis of its relevance. Such an opinion has probative force. The opinion is no longer superfluous because it can

[13] *Muller v Pam Snyman Eiendomskonsultante Pty Ltd* 2001 (1) SA 313 (C) at 319D-H.
[14] Schwikkard et al *Principles of Evidence* 5 ed (2023).

assist the court in determining the issue. This explains why the opinions of lay persons and experts are at times received.'[15]

[36] To the extent that the evidence of Mrs Van der Vlies was challenged as hearsay, its admissibility would depend on one of three instances. Firstly, whether it is through the consent of the opposing party; secondly if the witness on whose credibility the truth and reliability of the evidence depends would testify in court and lastly, where the court considered various factors and established that the interests of justice demand the admissibility of such evidence.

**Evaluation**

***Was an express agreement concluded?***

[37] It is settled that the plaintiff and its employees, Mrs Van der Vlies and Mrs Fourie qualified to receive remuneration in respect of the services they purported to render within the ambit of the Estate Agents Act because the plaintiff duly complied with the registration requirements; and they held the requisite certificates; being the fidelity fund and insurance certificates as required by the empowering legislation.

[38] As a point of departure, it should be noted that the parties agreed that there was a mandate given to the plaintiff, in terms of which the task was to find a tenant for the defendant's property for a five-year lease period, subject to renewal. It also appears to be settled that the plaintiff performed substantially in terms of the mandate, albeit that the lease agreement was signed in the absence of Mrs Fourie, who had always been involved in the discussions.

[39] It has been established that the plaintiff received the mandate that was initially verbal, on 3 November 2015. The same mandate was later confirmed in writing by email dated 26 June 2017. The mandate was also accepted at the meeting that was held on 25 July 2017 as well as the email from the defendant that followed the meeting.

[40] Although Mrs Van der Vlies was at pains to admit that the annotations on the

[15] Ibid at 86.

mandate she drafted implied that the commission had not been expressly agreed the objective facts being the words (“to be negotiated”) in the annotations required no further interpretation, but was an explicit indication that the issue of commission structure payable was still a subject of future discussions. This appears to be what necessitated the subsequent meeting held on 25 July 2017.

[41] Mrs Fourie and Mrs Van der Vlies were confronted about the contention that the commission payable to the plaintiff, pursuant to the mandate was not agreed to between the parties in the letter or mandate dated 26 June 2017 and during the meeting of 25 July 2017. They contradicted each other about what transpired and their individual versions also contained internal contradictions.

[42] The different versions of the plaintiff in this regard were not helpful in the determination of whether an agreement on the commission structure payable was expressly reached during that meeting. However, because this determination depends on the factual matrix of events, it will be apposite to examine these mutually destructive versions and test them against the content of the email of 25 July 2017 and the discussions that continued persisted after the lease agreement was signed and the probabilities.

[43] The version that there was an express agreement is not supported by objective facts, if regard is also had to the wording of the email from the defendant dated 25 July 2017. Among others, it recorded that “the issue of the rental was discussed with the Board”. This implies that after the meeting, the defendant was still to approach the Board for further discussions, hence the communication that followed. If anything, it bears consistency to the defendant’s contention that an agreement had not been concluded, but rather that the email served as an offer, which was never accepted.

[44] In this instance, it must be born in mind that, as was the case in *Gardner*, the written mandate (dated 26 June 2017) did not include an agreement on the payable commission. The question that arises is whether the mandate should be read, ‘by necessary implication’, to include that the outstanding issue of the commission was expressly agreed too. In regards to the oral terms relied on, in addition to the written

mandate by the plaintiff, the SCA concluded that it had been established on a balance of probabilities that, as part of the mandate the parties had an express agreement on the payment that was due in excess of what was contained in the written mandate. In this matter, the facts are distinguishable because there were no additional oral terms in addition to what was contained in the mandate and no additional factors upon which it could be inferred that by 'necessary implication', an express agreement was reached. In the case of the plaintiff and the defendant, there was only a written offer that was not accepted. The approach of the SCA in *Gardner* does not take the plaintiff's case further. Therefore, it is found that there was there was no express agreement reached on the commission structure for the remuneration of the plaintiff for services rendered in terms of the mandate.

***Was it an implied agreement?***

[45] The main questions that arise in this instance would be firstly whether, it could be inferred from the conduct of the defendant towards the plaintiff and to some extent, Mr Gray, that it was authorising the plaintiff to act on its behalf in order to find a tenant for the property. Secondly, a whether there was consensus between the defendant and the plaintiff that the latter should act on behalf of the former. It would also be apposite to consider if in the course of their dealings, the plaintiff had made it clear to the defendant that it would expect the defendant to pay commission should the mandate be fulfilled.

[46] The facts established from the interaction of the defendant and the employees of the plaintiff include that, there was substantial performance by Mrs Fourie, in terms of the mandate. For instance, after she found the potential tenant, she was instrumental in presentation of the property, and she facilitated the meeting of the tenant with the defendant. After Mr Gray from Bearing Man had inspected the property, Mrs Fourie continued to interact with the defendant in communicating the specification and requirements for alterations and other needs of both parties. The role played by Mrs Fourie was therefore not limited to the introduction of Bearing Man who eventually became the tenant.

[47] The initial amount of monthly rent required by the defendant was R170 000, however due to negotiations and concessions made through Mrs Fourie, the amount

was reduced to R127 500 nett, exclusive of VAT. Notably, the same tenant that was introduced by Mrs Fourie, remains in occupation of the same property, even after the lapse of the initial five-year lease period.

[48] On the issue of whether it can be implied that there was a meeting of the minds between the agent and the defendant and if there was an intention to have the plaintiff act as the agent in finding a tenant. This will be made apparent after a close examination of the defendant's conduct from the time Mrs Fourie learnt that the lease agreement had been signed. The exchange of some of the emails and the interaction between the plaintiff, the tenant and the defendant will be of great assistance in order to illustrate what transpired. These emails are as follows:

(a) Starting with the tenant, below is an email he sent to the agent:

'Hi Meisie,

Without prejudice.

This surely is a matter between M3 Holdings and Remax? You gave every reason to believe that you were acting as the introducing agent for your client, M3 Holdings?... Do you not have a signed mandate with M3…? *Remax to let boards are located at the site, along with Fosprop and other agents, further reinforcing a legitimacy that the property was on the open to let market.*

You phoned me yesterday asking for an update, whereby I advised that a lease agreement had been signed. Most surprised that you were not aware given the comments above. With M3's approval I will gladly share the lease detail with you.

At no stage where we under illusion other than that you were acting on the mandate of M3 Holdings.

Whilst you have my name repeatedly, below, in, and out of context, may I assure you that at no time did I wilfully withhold any information from you. At no stage can I recall a missed call or unreturned email…

If you need a reference in your discussions with M3, I would be happy to assist, as you have served us well.

May I reiterate that at no stage did BMG or I having anything but honest and professional intentions in mind. Trusting that your negotiations with M3 work out.[16] (My emphasis.)

(b) An email from the plaintiff to the defendant reads:

'Good day Radha,

Thank you for our appointment yesterday.

Glad we could resolve the misunderstanding between us.

BMG is my client and not my principal's client.

Attached is the *rental commission calculated as requested.*

You confirmed the rental that was agreed by you and the tenant.

Escalation 8%.

R 127 500.00 per month excl vat.

Lease period 5 years.

Would you kindly forward me the lease agreement for my files.

Looking forward to the next deal.'[17] (My emphasis.)

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[16] Index to plaintiff's trial bundle, exhibit "A", page 67.
[17] Ibid page 71.

(c) A further email from the defendant, addressed to the plaintiff reads:

'Good afternoon Meisie.

As advised you were clearly told that this lease has been subsequently changed to 1 year due to the fact of a possible sale as per conditions of loan for the Abi property so why do you again misconstrued the conversation between us?'[18]

(d) Lastly, an email from the defendant to the tenant:

'Good afternoon Richard.

Hope you are well.

After many requests to have a meeting with Meisie she finally pitched yesterday and disputes the "separate deal" and went on about it……. As a matter of fact she was quite surprised when I enquired about the emails she sent to you.

Nonetheless, she just wants to ride the band wagon seeing that we have negotiated a long lease.

At our meeting, I did mention to her that there are matters still pending and we have re-negotiated a lease for one year as we may consider selling and she was ever ready to jump at the opportunity to market this and I said we will see when we get there…

She then sent me an email to day stating that I mentioned 5 years lease signed……

I am really tired of this agent now and have decided that the only way to get her off my back is to get another lease signed-perhaps use our one stating one year and send copy thereof to her….

[18] Ibid page 72.

In view of this scenario, I kindly request your assistance please, because in my opinion she let greed get the better of her.

Kindly confirm if we can go ahead with this please?

NB; Once this is done, I will send you the same lease advising that this is scrapped and the BMG Lease prevails.

I sincerely apologise for this inconvenience.'[19]

[49] From the content of the last email, it can be gathered that the defendant was conscious of its responsibility to the remuneration of the plaintiff for the services they had rendered towards the leasing of its property. It is also interesting to note that in this communication, there was an attempt to misrepresent the period of the lease agreement that had been concluded. Be that as it may, that does not take away the fact that the defendant was always alive to the reality that it was liable to remunerate the plaintiff for the services rendered.

[50] With reference to *Muller*, the plaintiff contended that in the event that an express agreement had not been established, it should be found that there was consensus between the defendant and Mrs Fourie that the latter should act on behalf of the former. Further that, in light of the manner in which the defendant conducted itself and in consideration of the defendant's emails to the tenant after the lease agreement had been signed, in addition to the written mandate dated 26 June 2017, it can be safely inferred that the defendant authorised the plaintiff to act on its behalf, and therefore the implied agreement came into being.

[51] The content and the tone of all the communication above provides conclusive evidence that the defendant; the tenant and the plaintiff had no doubt that the plaintiff was the defendant's agent. They all accepted that the plaintiff had performed in terms of the mandate to find a tenant and facilitated the conclusion of the lease. In addition, the defendant even required the plaintiff to manage the relationship

[19] Ibid page 73.

between itself and the tenant. The conduct of the defendant does not give an impression that at any point it entertained the view that the plaintiff was not entitled to remuneration for the services that had been rendered.

[52] Although the defendant accepted that the plaintiff had the mandate, in terms of which there was substantial performance, it persisted that without an agreement on the commission structure or rate, there was no liability to pay the agency commission. It must also be borne in mind that when Mrs Fourie introduced Mr Gray to the defendant, she had invited them to the inspection of the property to be leased. She allowed them to negotiate and discuss the specifications; alterations and other requirements for their business purposes, and as she explained, she acted in good faith, for which the plaintiff cannot be faulted. In my view the fact that the plaintiff allowed this interaction before the price or rate of the commission payable was concluded remains an unfortunate occurrence. However, it is not without legal precedence upon which the dispute could be justifiably resolved.

[53] For instance, in *Wool Growers Auctions Limited v Elliot Brothers (East London) (Pty) Ltd*,[20] the court held that it sufficed that the existence of the mandate had been proved and also the fulfilment thereof to entitle the agent to the payment of the commission. The glaring similarities to the case at hand included that, firstly the defendant approached the plaintiff because it knew that it carried on business as an estate agent; secondly had authorised the plaintiff to find the tenant, and thirdly, the evidence disclosed no agreement that commission would be paid. An additional factor herein would be that, the defendant was conscious of its responsibility to remunerate the plaintiff for the service, as such is also apparent in the emails and the discussions that unfolded.

[54] There are glaring factors which suggest that some remuneration was intended for the service that the plaintiff was mandated to render to the defendant. Such factors include:

(a) the drafted mandate dated 26 June 2017, to which the defendant added

[20] *Wool Growers Auctions Limited v Elliot Brothers (East London) (Pty) Ltd* 1969 (1) PH A9 (AD).

annotations ("needs to be negotiated") to paragraph 5 that contained the "proposed tariff for leasing commissions";[21] and

(b) the email dated 25 July 2017, from the defendant to the plaintiff, where it reads: 'This means that you must add your commission to this figure which should be in the region of R133 500 excl. vat plus services.'[22]

[55] Furthermore, it is common cause that the plaintiff introduced the tenant, who also continues to be in occupation of the premises. In that regard, it is apposite to refer to *Wakefields Real Estate (Pty) Ltd v Attree and Others*,[23] where the landlord cancelled the initial mandate, in favour of another agent to complete the deal. The court employed the *sine qua non test,* and it held that, if it was not for the introduction by the initial agent, the new agent would not have known about the buyer. It therefore ruled that the initial agent was the effective cause of the sale.

[56] If the same principle is to be applied to the facts at hand, there is no basis upon which it can be said that the plaintiff did not earn its remuneration. Although Mrs Fourie was not present or informed when the lease agreement was signed, after she introduced the tenant, she was always involved and engaged with the parties during the negotiations. Clearly, if it was not for the plaintiff finding the tenant, the defendant would not have known that Bearing Man had an interest in its property. In *Le Grange v Metter*,[24] this argument was taken further to state that even an unempowered agent or an agent without a mandate was entitled to the agent's commission. If that is the position, then how much more to the plaintiff who, in addition to performance, had the mandate and whose remuneration was discussed; negotiated and contemplated by the defendant.

[57] This court has considered the principle espoused to in *Basil Elk Estate (Pty) Ltd v Curzon*[25] that the agent must prove that their efforts were the effective cause

[21] Index to plaintiff's trial bundle, exhibit "A", page 24.
[22] Ibid page 31.
[23] *Wakefields Real Estate (Pty) Ltd v Attree and Others* 2011 (6) SA 557 (SCA).
[24] *Le Grange v Metter* 1925 OPD 76.
[25] *Basil Elk Estates (Pty) Ltd v Curzon* 1990 (2) SA 1 (T).

of the sale in order to successfully claim commission.[26] With the background outlined above, the simplistic approach of the defendant that the absence of the negotiated price or rate should imply that the plaintiff was not entitled to be remunerated for services rendered, respectfully, cannot be sustained.

***Mrs Van der Vlies as an expert witness***

[58] Mrs Van der Vlies testified that she possessed academic qualifications as an estate agent, which she acquired from her experience of over 30 years in the Richards Bay area in commercial property rentals. She also claimed to have received training on a variety of topics within the industry and also keeps abreast with the developments and norms within the industry. These claims and the veracity of her qualifications were not opposed or challenged.

[59] If it is accepted that the subject matter upon which she claimed expertise is relevant, which I find it to be, in my view she has also shown herself to be in a better position than the court to form an opinion on the rate payable on estate agent commission in the Richards Bay area, and her opinion has probative value.

[60] The plaintiff has shown that there could be no valid basis upon which the expert opinion of Mrs Van der Vlies would be disregarded. In light of Mrs Van der Vlies's background highlighted above, the defendant's objection to her evidence, particularly as an expert witness finds no support and cannot stand. If regard is had to the qualifications she possessed; coupled with her extensive experience and exposure in the industry, it would be safe to rely on her opinion in reaching a conclusion on what could be the customary rate applicable to estate agents within the Richards Bay area. This view is supported by *Schwikkard*,[27]

***Admissibility of evidence contained in annexures to Mrs Van der Vlies expert opinion***

[61] Mrs Van der Vlies also referred to various articles which contained the same or similar structure of commission payable to estate agents in more or less similar

[26] S Mtonga 'A look at the effective cause requirement with estate agent commission' *De Rebus* 1 October 2020.
[27] Schwikkard et al *Principles of Evidence* 5 ed (2023) at 86.

circumstances. However, the admissibility of these articles was challenged on the basis that such articles were hearsay evidence. In dealing with this challenge, the following must be given due regard: firstly, it is common cause that the articles were sourced from the online search engine Google; and that, Mrs Van der Vlies was not the author or original source of information contained therein.

[62] Furthermore, because the authors of the information did not testify, their credibility and reliability were not tested, and on this basis, those articles would not pass the test of admissibility. Lastly, there were no factors placed before the court from which the court could decide whether it was in the interests of justice to have the articles admitted into evidence. Therefore, there would be no basis upon which an that hearsay evidence. The contents of these articles were intended to bear a significant role in exhibiting that, although she had an interest in the outcome, there was substantial objectivity in her opinion to corroborate her commission structure of what was a customary applicable rate in the industry.

[63] For reasons outlined above the articles in issue could not be admissible as evidence. They add no value to the opinion of Mrs Van der Vlies, whether by comparison of or for purposes of corroboration and are therefore disregarded.

***Amount of commission payable***

[64] With all said, the question that still remains is whether, in the circumstances and, in the absence of an express agreement on the payable rate, there was an implied consensus on what was due to the plaintiff in lieu of the services rendered. It is imperative at this juncture to note that there were attempts by both parties to agree on some remuneration, as outlined above. Therefore, as there had been no evidence presented to rebut such, it would be permissible to allow a reasonable remuneration.[28]

[65] The determination of reasonable remuneration should also be on the basis that the lease period commenced in December 2017, for a renewable period of five years. It should also be borne in mind that the same tenant, Bearing Man remains in

[28] De Villiers and Macintosh *The Law of Agency in South Africa* 3 ed (1981) at 364.

occupation of the same property. During the trial, it became common cause that the same tenant remained on the property on a month to month basis. However, it was not confirmed whether there were intentions to conclude another lease agreement. If regard be had to the initial mandate upon which the plaintiff began to provide services to the defendant, that initial five-year lease period would be subject to renewal.

[66] In regard to the determination of what amounts to reasonable remuneration, in *Wool Growers*[29] it was held that*, "*as a general rule, where nothing is said about the remuneration an estate agent is to receive there is nonetheless a tacit promise to pay commission at the usual rate."[30] This was reaffirmed in *KDK Investments*[31] where it was further held that "there is a rebuttable presumption that the parties intend the customary rate of commission to be applicable."

[67] There was no contrasting or conflicting opinion to that of Mrs Van der Vlies on the subject. Instead, on behalf of the plaintiff, it was argued that the defendant was also not a stranger to the industry and the community of Richards Bay, where its business operated. It was also submitted that the defendant should be presumed to be aware of what was a reasonable trade usage that found general application in that community. In advancing its argument, the plaintiff referred to the email that was sent by the defendant to the plaintiff, in relation to another property, within the same community. The said email reads, "in view of tenants, *the standard norm* is your % ranging from 2.5 to 5 % on one year's rental and this is what we are prepared to pay."[32] According to the plaintiff, this was conclusive proof of the defendant's familiarity or knowledge of the customary rate in the industry within the Richards Bay area.

[68] The credibility or reliability of the opinion of Mrs Van Der Vlies in regard to what would be reasonable remuneration was also attacked on the basis that she had a vested interest in the subject matter and that such would affect her objectivity.

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[29] *Wool Growers Auctions Limited v Elliot Brothers (East London) (Pty) Ltd* 1969 (1) PH A9 (A); De Villiers and Macintosh ibid at 365.
[30] De Villiers and Macintosh ibid at 365.
[31] *KDK Investments (Pty) Ltd v Investland City and Industrial (Pty) Ltd* 1975 (2) PH A83 (T) at 205; De Villiers and Macintosh ibid at 365, footnote 31.
[32] Index to plaintiff's trial bundle, exhibit "A", page 79.

Hence, a reflection on *Stock v Stock*[33] became imperative. This is where the court emphasised that a witness:

'…must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was.'

[69] A comparison of the figures in Mrs Van der Vlies' opinion and those figures reflected in the defendant's email reveal identical rates of what would be applicable or reasonable in the prices of services rendered by the agents in that area.

[70] Further thereto, what can be gleaned from the initial email dated 26 June 2017, which also contained the written mandate, is that the contentious paragraph about the commission structure, bears similar figures (in particular the 5% or up to 5 % in the first year or first two years of the lease) to the defendant's email dated 22 September 2017. The similarities in the figures proposed by Mrs Van der Vlies and those proposed by the defendant suggest a level of objectivity and unbiased opinion on the part of Mrs Van der Vlies.

[71] Having tested the facts at hand against the principle in *Stock* together with the percentages suggested by the defendant in regard to the ABI Bottling premises, it can be concluded that the reasoning and objectivity of Mrs Van der Vlies cannot be criticised. Her opinion, in my view should be the benchmark in determining the reasonable remuneration, being the customary rate applicable in the Richards Bay area.

[72] The plaintiff has established the claim pleaded in the alternative, to which it is entitled to the reasonable and customary rate applicable in Richards Bay. Therefore, the defendant is liable to pay the remuneration of the plaintiff for the services

[33] *Stock v Stock* 1981 (3) SA 1280 (A) at 1296F-G .

rendered in terms of the mandate, at the customary rate as also considered to be the standard norm by the defendant, and as pleaded by the plaintiff in the alternative.

**Costs**

[73] Initially, the trial was scheduled to proceed over a period of three days, from 11 to 13 March 2024. The evidence was however concluded on 12 March 2024, within two days. Initially, the plaintiff anticipated that it would call three witnesses. However, the plaintiff's case was closed after two witnesses had testified. The defendant had anticipated to call one witness but the defendant's case was closed without calling the said witness. At the close of the plaintiff's case, the plaintiff noted that a substantive application for the amendment of the particulars of claim would be pursued after an indication from the defendant that the amendment sought by the plaintiff would be opposed. This necessitated an exchange of papers between the parties, in the interlocutory application. The parties were not ready to argue or continue with their arguments on 13 March, which would have been the third day of the trial. By consent of the parties and with the involvement of the court, the future conduct of the proceedings in the application and arguments in the trial were agreed upon.

[74] The plaintiff contends that it was inevitable that the court would not sit on 13 March 2024 and that was of no fault of the plaintiff. It submitted that evidence in the trial concluded one day earlier than anticipated and it would not be practically possible to utilise 13 March as the parties were in any event not ready to argue the merits. On the other hand, the defendant argued that the third day could not be utilised due to the introduction of the interlocutory application at an advanced stage of the trial. According to the defendant, these were wasted costs and the plaintiff should be liable. The judgment in the interlocutory application was handed down on 12 April 2024 and the oral arguments in the trial followed on the same day

[75] Upon a reflection of the chronology of the proceedings on the first and second days of the trial and in the exercise of my judicial discretion as to the reserved costs, I am not persuaded that the costs of 13 March 2024 could be classified as wasted costs at the instance of either of the parties.

**Order**

[76] Accordingly, the following order shall issue:

1. Judgment is granted in favour of the plaintiff in the alternative claim, against the defendant as follows:

    1.1 Payment of the sum of R407 402.34, calculated as at March 2024.

    1.2 Further commission calculated for each and every month after March 2024 that Bearing Man continues to remain in occupation of the property.

    1.3. Interest on the amount of R407 402.34 at the legal rate from 1 December 2017 (10.25% per annum) to the date of final payment

    1.4. Interest on further commission calculated for each month that Bearing Man remains in occupation of the property after March 2024 at the legal rate.

    1.5. Costs of suit.

**Sipunzi AJ**

Date of hearing: 12 April 2024
Date of judgment: 10 May 2024

Appearances

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| For the Respondent | : | Ms U Lennard |
| Instructed by | : | Amith Lukan and Company<br>c/o Messenger King<br>6th Floor The Royal Towers<br>30 Dorothy Nyembe Street<br>Durban |