IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No. 19253/2016

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes.
(3)	REVISED: 18 October 2017.

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In the matter between:

DAWN PHYLLIS DORFMAN	First Applicant
ABE FLAX	Second Applicant
and	
KIMBERLEY HOUSE JEWELLERS (PTY) LTD	First Respondent
LAWRENCE ALON BROWN	Second Respondent

Case Summary: **Principal and agent – Claim by estate agent – whether buyer had given mandate to estate agent – whether estate agent who introduces buyer to a property and to the seller, where sale is concluded directly between buyer and seller, is effective cause of the sale and entitled to commission – whether estate agent entitled to the standard or prevailing rate of commission.**

JUDGMENT

MEYER, J

[1] This is an application for estate agent's commission. The question is whether the first and second plaintiffs, Ms Dawn Dorfman and Mr Abe Flax, who conduct the business of an estate agency in a partnership, D and A Properties (D&A), are entitled to recover from the first respondent, Kimberley House Jewellers (Pty) Ltd (Kimberley House) the amount of R1,2 million plus VAT as commission due under an agreement in respect of the sale of an 18 000 square metres property in Park, being Portion 614 (a portion of Portion 1) of the Farm Zandfontein No 42, Registration Division I.R., Province of Gauteng (the property). The second respondent, Mr Lawrence Brown, is the sole shareholder in and director of Kimberley House. D&A no longer claims relief against Mr Brown personally.

[2] Ms Dorfman and Mr Flax are experienced and decorated estate agents. They share over 65 years' experience in the real estate industry and specialise mainly in sales and rentals in the upmarket areas of Hyde Park and Sandhurst. Ms Dorfman had for many years been friends with the late Mr and Mrs Bahlig. The late Mr Bahlig was the previous owner of the property. She had visited the late Mrs Bahlig regularly and became acquainted with the staff at the property, including Mr Michael Xulu, with whom she had a very good rapport. When the late Mr Bahlig passed away, Ms Dorfman took special care and attention to look after Mrs Bahlig, especially at a time when she became ill and fragile before becoming confined to a psychiatric ward in Cape Town. It was during that time that Ms Dorfman had a falling out with Mr Mark Bahlig, the son of the late Mr and Mrs Bahlig, when she had told him to visit his mother. Her implied criticism of Mr Mark Bahlig created a rift between them. Mr Mark Bahlig inherited the property from his late father.

[3] The estate of the late Mr Bahlig, represented by the executrix in the estate at the time, Ms Elisabeth Bahlig, had given D&A a mandate at the beginning of 2013 to find a seller for the property. It found one and a written agreement of sale was concluded at the beginning of March 2013. The sale price was the sum of R41,5

million and the seller was obliged to pay agent's commission in the sum of R1,5 million on transfer of the property. A deposit of R5 million was paid, but the purchaser failed to pay the balance of the purchase price and the sale was accordingly cancelled. D&A waived its entitlement to commission upon cancellation of that sale.

[4] The property remained on the market, but Mr Mark Bahlig, who then was the executor in the estate of the late Mr Bahlig, prohibited D&A from marketing the property. Ms Dorfman, however, had been in contact with the late Mr and Mrs Bahlig's accountant for many years, Mr Walter Bieldt, and also with Ms Wagner, the late Mr and Mrs Bahlig's attorney for many years, who also was appointed as the conveyancing attorney when the property had previously been sold in 2013. Ms Dorfman had conveyed to both Mr Bieldt and Mrs Wagner that she might be able to find a purchaser for the property, but would not be able to deal with Mr Mark Bahlig, whom she did not get on with.

[5] Ms Dorfman and Mr Flax considered that the best way to sell the property would be to subdivide it into eight portions. It was, according to them, difficult to find a buyer for a property the size of that property at an asking price of more than R40 million. Acting without a mandate, D&A appointed a town planner who drew up plans for such sub-division of the property. Ms Dorfman and Mr Flax had a number of contacts who were developers and they were confident that they would be able to put a consortium of buyers together who would buy the subdivided portions. One of the potential buyers they had identified, was a Mr Heinz Rynners. He is active and vastly experienced in the property industry and Ms Dorfman had business dealings with him before.

[6] Ms Dorfman contacted Mr Rynners and told him that she had an excellent opportunity for him to buy 1 800 square meters of land on 4Th Road, Hyde Park, with or without partners. Mr Rynners showed interest and suggested they meet the next day, 24 March 2015, to inspect the property. Ms Dorfman then made arrangements with Mr Xulu (he was also involved in a taxi service) to meet her and potential buyers at the property at 5.00 pm the next day. She confirmed the appointment with Mr Rynners and she further informed him that other prospective buyers would also be attending. Mr Rynners, in turn, contacted Mr Brown, who was known to him, and

informed him that he was aware of an 18 000 square metres property in Hyde Park that was available for sale and that it might be worth considering having the property subdivided and rezoned. Mr Rynners informed him that two other persons had shown interest in purchasing two of the prospective subdivided portions. Mr Brown showed interest and Mr Rynners invited him to the inspection of the property that had been arranged for the next day at 5.00 pm.

[7] As arranged, Ms Dorfman attended at the property at 5.00 pm on 24 March 2015. Mr Rynners, Mr Brown, his brother and other persons interested in purchasing the prospective portions of the property, arrived. Mr Brown met Ms Dorfman and Mr Flax. Mr Brown was informed that they did not have a mandate to market the property and were for some reason strictly prohibited from doing so. Everyone present were waiting on the pavement. Mr Xulu arrived late, at about 6.00 pm. At Ms Dorfman's request, Mr Xulu drove everyone present in his taxi onto the property down a winding path to the house at the bottom of the garden. They all viewed the property for about an hour.

[8] Mr Brown has a different version of the inspection of the property. He says that Ms Dorfman and Mr Flax could not set foot on the property and were therefore unable to arrange for those present to gain access to the property. They suggested that those present 'peep through the gate'. Mr Rynners, according to Mr Brown, then approached a gardener, who worked at the property and who was also a taxi driver, and arranged for him to take those present onto the property in his vehicle. Mr Rynners, Mr Brown, his brother and the other interested persons were then driven towards the house and around the property by the gardener. Ms Dorfman and Mr Flax 'stayed outside hidden in their vehicle prior to and during all of this'.

[9] Mr Brown's version on this disputed issue has been refuted in reply and can, in my view, safely be rejected on the papers. (See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635A-C.) Ms Dorfman knew Mr Xulu for the past 15 years. She was well connected to him and had, as I have mentioned, a very good rapport with him. He deposed to an affidavit, which forms part of the replying affidavit. He confirms Ms Dorfman's version; that she called him on 23 May 2015, that she told him that she had a number of people who might buy the property and that she arranged with him to be present and to give them access

to view the property in the late afternoon on 24 March 2015. He states that he was not contacted by anybody other than Ms Dorfman to open the gate in order to give those present access to the property. He further states that he drove everybody present, including Ms Dorfman, onto the property. He does not know Mr Rynners nor has he ever been in contact with Mr Xulu.

[10] Nothing much, however, turns on this disputed issue, because it is common cause that Mr Brown was shown the property by Ms Dorfman and Mr Flax, whether it be from the pavement or as described by Ms Dorfman, Mr Flax and Mr Xulu. As was said by Marais J in *Aida Real Estate Ltd v Lipshitz* 1971 (3) 871 (W):

'The mere furnishing to the prospective buyer of the principal's address or the location of the property offered may be sufficient to entitle him to claim commission from the seller, provided a line of cause and effect can reasonably be traced from the introduction to the conclusion of the sale.'

[11] Ms Dorfman and Mr Brown discussed the potential purchase by him of the property. Mr Brown was keenly interested to buy the whole property and not as part of a consortium of buyers. He said he would purchase it cash. Ms Dorfman informed Mr Brown that she or Mr Flax could not present his offer to the seller, because they do not have a mandate from the seller. She undertook to furnish Mr Brown with the seller's particulars and a standard form offer to purchase, which he personally would have to submit to the seller. She informed Mr Brown that he would have to offer at least R40 million and 'stick to that price'.

[12] According to Ms Dorfman and Mr Flax, Mr Brown agreed that they would represent him as his agent in acquiring the property for R40 million. They say that Ms Dorfman told him that she wants him to record in writing that he would pay the commission on the property if the seller accepted the offer, and that he agreed. Mr Brown denies this. All he admits is that Ms Dorfman and Mr Flax 'indicated that they wished to be paid an 'introductory fee'.

[13] It is further common cause that the next day, 25 March 2015, D&A provided Mr Brown with D&A's blank standard form offer to purchase and with the contact details of the seller. The email, dated 25 March 2015, which Mr Flax, on behalf of D&A, wrote to Mr Brown, reads as follows:

'Good afternoon Larry

It was a pleasure meeting you yesterday. As discussed, I attach hereto an Agreement of Sale (Offer to Purchase) as between yourself as purchaser and the registered owner of Portion 42 Erf 614, Zandfontein IR which is the property situated at 63 4th Road, Hyde Park measuring 18 233 m2 (site plan enclosed for your reference).

Please complete your offer which you should submit to Mr Walter Bieldt who can be contacted on 012 665 0636. He is the accountant and auditor of World Power Products Pty Ltd where the late Mr Bahlig operated his business and who always put his complete trust in the man.

We have dealt with him in the past and not an easy person to deal with. Please make it clear to him that whatever offer you have made excludes agent's commission and in these circumstances no commissions are payable by them as sellers. The attorney representing the deceased estate is Anna Wagner and she can be contacted on 012 361 0253 or 012 348 6897. As discussed with you, should this deal happen commissions will be due to us and should be agreed upon between us.

Please call me when you receive this document to discuss any other issues that you may have in mind. Please keep me advised of developments.

Best regards

Abe'

[14] Mr Brown did not take issue with any statement in this letter, including the recordal of the discussion with Mr Brown that 'should this deal happen commissions will be due to [D&A]'. Mr Brown, it is common cause, is an experienced businessman and property developer, and firm repudiation on his part of the assertion of the obligation upon him to pay commission should he succeed in purchasing the property, would be the norm, if it was not accepted by him as correct.

[15] In *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E-H, the following was said:

'I accept that "quiescence is not necessarily acquiescence" (see *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation, firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse

inference will more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion.'

[16] Mr Brown completed and signed the standard deed of sale which he then submitted to the seller. Once their negotiations had been finalised, the attorneys acting on behalf of the seller amended the agreement. It is clear from a comparison of the standard form deed of sale, which D&A had furnished to Mr Brown, and the deed of sale that was concluded between the seller and Mr Brown, that the amendments were not substantial and mostly comprised the insertion of paragraph headings. The written agreement of sale was concluded on 31 March 2015, and in terms thereof Mr Brown purchased the property from the 'executor in the estate of the late Horst Peter Bahlig' for a purchase consideration of R40 million. Clause 14 of the agreement reads as follows under the heading 'Agent's Commission':

'The parties place on record that the Purchaser was not introduced to the property by an agent and that no agent was the effective cause of this sale. There will therefore be no commission payable as a result of this sale by any party. *Should an agent claim commission in respect of the transaction which proves to be valid and enforceable, the purchaser will be liable for such commission payable*.'

(Emphasis added.)

[17] On 13 April 2015 at 9.20 am, Mr Flax, on behalf of D&A, wrote an email to Mr Brown, saying:

'Good Morning Larry

Congratulations on your excellent acquisition. I refer to the telephone discussion Dawn [Ms Dorfman] had with you a little while ago when she discussed with you that we need to get together to sort out the commissions due to us as referred to in our email to you of 22 March 2015 (copy attached). You advised Dawn that this matter will be dealt with on return to Johannesburg of your brother who was away for a short while. I trust that you are now in a position to take this matter forward.

Please telephone either Dawn or myself so that we can arrange to meet as soon as possible.

Many thanks for your attention.'

Mr Brown replied at 9.20, thus:

'Thanks Abe. The deal is part of an EL and is subject to approval. I will let you know when transfer has been done and we will meet then.'

Mr Flax replied to Mr Brown's e-mail at 9.53, saying:

'Thanks Larry

We are happy to await the approval of the Master of the High Court. However the commission issue should be settled prior to transfer of the property. In the meantime please be good enough to let us have a copy of the accepted Deed of Sale.

Many Thanks

Abe'

[18] Again, Mr Brown did not repudiate the assertion that the payment by him of commission is due to D&A. On the contrary, and by necessary implication, he acknowledged his obligation to pay commission by stating that they would meet when transfer of the property had been effected, because he was responding to the request that they 'need to get together to sort out the commission due to' D&A. The property was transferred and registered in the name of Kimberley House on 30 June 2015. On 2 July 2015 at 11.21 am, Mr Brown wrote to D&A:

'Dear Dawn and Abe

The sale of the abovementioned property has been approved.

In light of the fact that we happened to meet you outside the property and your involvement in the sale has been minimal we feel that an amount of R200,000 would be more than generous compensation for your time.

Please forward us an invoice with your banking details so that we can arrange the payment.

Kind regards

Larry'

At 11.55 am, Mr Flax replied to Mr Brown, thus:

'Dear Larry

Thank you for your letter below. Your offer is totally unacceptable under any circumstances. Dawn and I will be discussing this issue and we expect to be paid a fair market related commission. We will contact you shortly and forward you an appropriate invoice.

Best regards,

Abe.'

[19] Settlement negotiations followed, but without fruition. In D&A's founding affidavit, Mr Flax states that-

'. . . Mr Brown has adopted the position that because [their] involvement in the sale of the property was in his opinion minimal, [they] are not entitled to the kind of commission usually charged by estate agents who act for the (sic) mandate and are the effective cause of the sale. In this regard Mr Brown is incorrect in his assumption.'

Mr Brown did not take issue with this, save to deny that he is incorrect in his assumption. Mr Brown, however, is incorrect in his assumption. In *Aida*, at 875H, Marais J said that:

'[a] commission agent is paid by results and not by good intentions or even hard work.'

[20] I now turn to the application of the relevant legal principles to the facts of this case. In *Bosch v Flower Box (Pty) Ltd* 1971 (4) SA 640 (E), at 643A-C, Addleson J said the following:

'An estate agent is, in practice, in a somewhat different position from most other persons who render "professional services". He acts sometimes for the buyer and sometimes the seller; unlike most other professional men, he has no professional rules which inhibit him from vigorously soliciting business from both buyer and seller. An owner of property, who has in fact not directed his mind to the sale of his property, may therefore be approached, by an agent who already has a willing buyer for that property; and the "seller" may well not realise that in "allowing" the agent to introduce the buyer, he may lay himself open to the claim that he has employed the professional services of the agent and is liable for the agent's commission. Indeed "both such liability for commission and the *quantum* thereof are almost invariably matters of implication and are seldom brought directly to the notice of the seller until after the "mandate" has been "given".'

[21] In *Webranchek v LK Jacobs & C0, Ltd* 1948 (4) All SA 404 (A), at 406-407, Van den Heever JA said the following about cases such as the present one:

'The difficulty in cases of this kind is to determine what exactly was agreed between the parties. Often the arrangement between the vendor and the commission agent is made orally and without clear definition of its terms. Yet the legal results flowing from the arrangement must necessarily depend on the nature of the particular mandate. In *Luxor Ltd. V. Cooper* (1941 (1), A.E.R. 33, 40), the LORD CHANCELLOR observed:

"There is, I think, considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern, and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms. . . . Each case turns on its own facts and the phrase 'finding a purchaser' is itself not without ambiguity."'

[22] In *Muller v Pam Snyman Eiendomskonsultante (Pty) Ltd* 2001 (1) SA 313 (C), at 319D-H, Comrie J accepted the following statement of the law relating to implied contracts in Joubert (ed) *The Law of South Africa* vol 9 1st re-issue at para 384:

‘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. 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 or 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 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.'

[23] Notwithstanding Mr Brown’s protestations to the contrary, I am of the view, on a conspectus of the facts of this matter, that D&A had an express mandate from Kimberly House, represented by Mr Brown, to bring about a specified event, which was the completion of a binding agreement of sale of the property between the estate of the late Mr Bahlig and Kimberly House. D&A made it clear to the principal, Kimberley House, that it would expect it to pay commission should the mandate be fulfilled. Mr Brown, who acted on behalf of the principal, did not object. But even if I were to accept Mr Brown’s denial that an express oral agreement of mandate was concluded, the ineluctable inference drawn from his conduct and the surrounding circumstances – whether the 'no other reasonable interpretation' test enunciated by Corbett JA in *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A), at 292B–C, is applied, or the 'most plausible probable conclusion' test, also laid down by the same Judge of Appeal in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 165 – is that he in fact authorised D&A as agent to act on behalf of Kimberley House and, therefore, an implied contract of agency came into being. There was consensus between Kimberley House and D&A that the latter should act on behalf of the former.

[24] D&A vigorously solicited business from prospective buyers for the property. The first time Mr Rynners became aware of the property was when Ms Dorfman contacted him telephonically and conveyed to him that she had an excellent opportunity for him to buy an 18 0000 square metres in extent property on 4th Avenue, Hyde Park, with or without partners. D&A invited prospective buyers, including Mr Rynners, who in turn invited Mr Brown, to view the property on 24 March 2015 pm at the inspection of the property which D&A had arranged. The access to and viewing of the property by the prospective purchasers on 24 March 2015 was arranged by Ms Dorfman with Mr Xulu.

[25] D&A facilitated the acquisition of the property by Kimberly House. Ms Dorfman roused Mr Rynners' interest in the property, who in turn roused that of Mr Brown. But for D&A's introduction of the property to Mr Brown, even though indirectly through Mr Rynners, he would not have been aware of the existence of the property. He was invited to inspect the property on 24 March 2014, which inspection was arranged by Ms Dorfman. He was favourably impressed at that inspection of the property. Ms Dorfman and Mr Flax were introduced to him. He knew he was dealing with estate agents and that they had informed Mr Rynners that the property was for sale. Ms Dorfman gave him access to the property. That first introduction of Mr Brown to the seller's property was the decisive factor, as is ordinarily the case 'where nothing intervenes to prevent the introduction from leading straight on to the sale'. (*Barnard & Parry Ltd v Strydom* 1946 AD 931, at 936.)

[26] Mr Brown knew he was dealing with estate agents who did not have a mandate from the seller to find a purchaser for the property. Ms Dorfman told him of the obligation to pay commission to D&A should a valid agreement of sale be concluded with the owner of the property. The parties contemplated 'no sale, no commission'. D&A furnished its standard form deed of sale to Mr Brown, which form he completed, signed and submitted to the seller for acceptance. D&A requested him to make it clear that the offer excludes agent's commission and that no commission is payable by the seller, which is precisely what he and the seller agreed. D&A disclosed to Mr Brown who the seller of the property was. It disclosed the contact details of the seller's representatives whom Mr Brown should approach. Ms Dorfman and Mr Flax, based on their past experience of the property, emphatically advised Mr Brown to offer R40 million for the property, which he would

not have known, but for their advice, and that was precisely what he offered and what was accepted by the seller.

[27] D&A was under no obligation by Mr Brown to conduct the actual negotiations or to oversee the completion of the ultimate contract. That he undertook to do. D&A had brought Kimberly House and the seller together; the one ready to purchase and the other ready to sell at the price which D&A advised Kimberly House to offer. As was stated by Van den Heever JA in *Wesbranchek*, at 403-404:

'Both counsel agreed that if plaintiff had brought defendant and Beretta together and by his efforts rendered the one ready for selling and the other ripe for buying at an agreed price, he cannot be deprived of his commission merely because the actual deed of sale was executed under the aegis of a competitor.'

[28] D&A has produced and introduced the seller who was ready to sell and did sell at a figure acceptable to Kimberley House. Furthermore, this desired result was due to the efforts of D&A, to which I have alluded to above. The introduction to the property and to the seller, albeit indirectly, were the overriding factors inducing the sale. (See *Aida* at 874G-H.) Those efforts were the effective cause of the sale. D&A had discharged its mandate and is entitled to its commission, because the sale went through.

[29] But argues Kimberley House, the agreement relied upon by D&A requires the parties to negotiate the *quantum* of the commission payable and in the result the agreement is either void for vagueness and unenforceable or, if enforceable, precludes the relief sought by D&A in these proceedings since the payment of commission was conditional upon agreement being reached on the *quantum* of the commission, and that condition had not been fulfilled. There can be no room, argues Kimberley House, for a tacit or implied term if it conflicts with the express provisions of the agreement. (See *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA), para 18.)

[30] However, on the totality of the evidence presented in this application I do not think that D&A's statement in its email dated 25 March 2015 – '[a]s discussed with you, should this deal happen commissions will be due to us and should be agreed upon between us' – or the statement in its founding affidavit – '[t]hat a commission was still to be agreed between Mr Brown and ourselves does not render the

agreement invalid' – mean that the consensus of the parties was that the payment of commission was conditional on them reaching consensus on the amount of commission. Mr Flax states in D&A's founding affidavit that the amount of commission was not discussed and that there was 'no doubt in the mind of either Mrs Dorfman nor myself that the usual commission charged normally on a property of this price would apply' and that '[a]lthough the rate of commission was not agreed, both Mrs Dorfman and I believed that our usual commission would apply in the circumstances'. In the answering affidavit Mr Brown 'admitted that [they] did not discuss the amount of the purportedly payable 'commission' or introductory fee'. He also states:

'I acknowledge that the applicants indicated that they wished to be paid an introductory fee. This was however never agreed to in principle as there were no terms defining the introductory fee nor was such fee ascertainable.'

I have rejected Mr Brown's version that it was not agreed that 'commission' would be due to D&A should the deal happen. But I accept that 'there were no terms defining' the commission nor was it 'ascertainable'. Saying to Mr Brown that they should reach agreement on the amount of the commission, was a mere invitation to fix the amount amicably, and not a condition to the payment thereof.

[31] If no rate of commission is agreed at the outset, then the principle is that the estate agent is entitled to a reasonable remuneration, which is the prevailing, or standard or customary rate of commission. (See *LAWSA* Vol 9 2nd Ed para 580.) That principle finds application in this case. In *Muller*, at 323E-H, Comrie J said:

'In this instance no rate of commission was agreed at the outset, and circumstances pre-empted a negotiated commission at a later stage. The principle is then that the estate agent is entitled to a reasonable remuneration in the event of a sale, which is usually taken as the prevailing or standard or 'customary' rate of commission, being in this case 7% plus tax. De Villiers and Macintosh The Law of Agency in South Africa 3rd ed at 362, 365 - 6. It is possible that had events followed a different course, Mrs Swart may have agreed to accept a lower rate, but that is not what happened in fact. Mr Maree argued that the plaintiff should receive the commission which Mrs Swart would probably have agreed to accept, which counsel contended was 6% plus tax. It is not correct, in my view, to approach the plaintiff's claim as though it were a claim for damages. It was a claim for a reasonable remuneration. In the circumstances I have no fault to find with the magistrate's decision to award the

institutionally approved rate of commission, being a rate which is regularly charged by estate agents, albeit not without exception.'

[32] D&A claims commission at a rate of 3% on the purchase price of R40 million plus VAT. That, state Ms Dorfman and Mr Flax, is a reasonable remuneration, and is the standard or prevailing rate of commission. D&A's usual rate for a property of this price 'is somewhere between 3 to 4%. They are both, as I have mentioned, experienced and decorated estate agents. They state that commissions earned by estate agents in Hyde Park and Sandhurst vary from 3 to 6%. They, in this instance, claim 'the minimum [they] would normally charge in regard to a property of this nature'. D&A agreed to a commission of R1,5 million on the sale price of R41,5 million when they previously, in 2013, found a purchaser for the property. The chairman of Seeff, one of this country's most established real estate companies, Mr Samuel Seeff, states that Seeff abides by the 7.5% standard industry commission payable by sellers. The owner and principal agent of Cape Coastal Homes, Mr Benhard Wiese, states that normally sellers can expect to pay between 5 and 7.5% of the selling price plus VAT on commission.

[33] Kimberley House relies on the expert opinions of Mr Rynners and of Mr Jochem Pieter Coetsee. Mr Rynners is active in the real estate market and Mr Coetsee is also an experienced estate agent and conducts commercial enterprises that speculate, develop and invest in real estate nationwide. Their opinions are that D&A is only entitled to an 'introductory fee' of R200 000, which is commensurate with the actual services rendered, as opposed to the usual estate agent's commission. Mr Coetsee is of the opinion that D&A was only involved in the passing of information. D&A's position, in his opinion, is akin to situations where a non-mandated estate agent merely introduced a purchaser to the property and to the mandated estate agent, after which the mandated agent puts the deal into effect. In his experience the usual percentages offered to the non-mandated agent ranges between 10 and 20% of the commission earned by the mandated estate agent. Referral fees, in his experience, also range between 10 to 20%. A referral fee, according to Mr Coetsee, is payable where an estate agent hands over a client to another estate agent to do the work.

[34] The opinions of Mr Rynners and of Mr Coetsee, however, ignore the principle that the legal results flowing from the arrangement between the seller or purchaser

and the estate agent depend on the nature of the particular mandate. In this instance D&A was the commission agent for the buyer, Kimberley House, and, as I have mentioned, such a 'commission agent is paid by results and not by good intentions or even hard work' and, if no rate of commission was agreed at the outset, the estate agent is entitled to a reasonable remuneration, which is the prevailing, or standard or customary rate of commission.

[35] In the result the following order is made:

(a) The first respondent is to pay the sum of R1 200 000.00 plus VAT to the applicant and interest thereon at the rate of 9% per annum from 30 June 2015 until date of payment.

(b) The first respondent is to pay the applicant's costs of suit, including those of two counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	17 May 2017
Date of judgment:	10 October 2017
Counsel for applicant:	Adv DC Mpofu SC (assisted by Adv SS Cohen)
Instructed by:	Tanners & Associates, Sandown, Sandton
Counsel for respondents:	Adv A Sawma SC
Instructed by:	Bruno Simâo Attorneys, Sunninghill C/o Albert Jacobs Inc, Johannesburg