

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 39592/2019

In the matter between:

BLUEGRASS TRADING 1112 CC
t/a **RAWSON PROPERTIES**

Applicant

and

NIVASH RAMSERN
ATLANTA RAMSERN

First Respondent
Second Respondent

Application by estate agent for payment of commission by purchaser following disputed cancellation of sale - legal principles applicable - contractual term requiring notice of default from seller for such claim, notice not given

Motion proceedings - interplay between incident of onus and evaluation of disputes of fact on affidavits where final relief sought - onus not replaced by procedural evaluation of affidavits

JUDGMENT

GRAVES AJ:

[1] This is an opposed application in which the applicant, an estate agent seeks payment from the respondents for commission consequent upon a written sale agreement. The circumstances in which the claim is made are set out below.

[2] On 31 March 2016, the first and second respondents (who are married to each other) signed an offer to purchase an immovable property (titled “Agreement of Sale”) situated at 16 Lily Avenue, Waterstone Park, Greenstone, Greenstone Hills Estate. It subsequently emerged from Deeds Office records that the property at this time was registered in the joint names of Loreen Robinson and (her late husband) John Robinson. Mr Robinson passed away on 26 July 2013.¹ The applicant’s claim against the respondents is for payment of R140 220,00, interest and costs, representing its estate agent’s fee / commission, said to be due under the terms of a written agreement of sale concluded for the sale of the property, which agreement was subsequently cancelled. The respondents dispute liability on grounds detailed below.

[3] On 30 March 2016 Mrs Robinson granted a written exclusive sole mandate to the applicant to sell the above property for the sum of R2 490 000,00 valid until 30 September 2016. The mandate contained the usual clauses imposing a liability on Mrs Robinson for payment of commission on the sale price should the property be sold within the mandate period or thereafter, if the applicant introduced the property

¹ This appears from the Letters of Executorship issued to Mrs Robinson.

to the purchaser during the period of the mandate, regardless of whether this introduction was the effective cause of the sale.

[4] Early in August 2016 the respondents reviewed the property and on 12 August 2016 the second respondent sent an email to the applicant indicating an intention to submit an offer for the property in the sum of R2 050 000,00. The email explained that the reason for the proposed price was that the respondents had noted structural repairs to cracks due to foundation movement throughout the house requiring renovation, the need for damp proofing for the foundation due to exterior paint problems, and other deficits in general appearance requiring attention. On 24 August 2016 the respondents both signed the written offer to purchase offering R2 050 000,00 payable in cash against registration of transfer into their names, to be secured by a bankers' guarantee and conditional upon the grant of a mortgage bond for the full purchase price, to be approved within 30 days from date of acceptance of the offer. On 25 August 2016, Mrs Robinson signed the offer to purchase indicating her acceptance.

[5] From the outset respondents appear to have harboured concerns about the physical status of the property. On 14 November 2020, the first respondent sent an email to Mrs Robinson, the applicant and the conveyancing attorneys appointed to attend to the transfer of the property. The email stated that as the home had not been built according to NHBRC (a reference to the National Home Builders Registration Council) and that there was no evidence of a certificate reflecting registration of the house and that the sale of the property was cancelled. The question of cancellation is dealt with below.

[6] The following features of the sale agreement bear on the applicant's claim:

[6.1] On page 1 of the document the names of each the first and the second respondents and the reference to marriage in community of property are inserted in manuscript. Under the notation "*Seller No. 1*" the name Loreen Robinson is written and beneath that, after the notation "*Spouse*" the words in manuscript: "*Estate late John Joseph Benjamin Robinson*" followed by a reference to an ANC with date 3/7/1990;

[6.2] page 7 of the document makes provision for the signatures and marital status of the purchaser/s and seller/s respectively to be inserted. The signature of first respondent appears followed by that of the second respondent in her capacity as spouse. Mrs Robinson signed twice against the notation "*Seller No. 1*" and below that in the space provided for spousal details wrote "N/A";

[6.3] at the foot of page 7, after the manuscript insertion of "*Bluegrass Trading 1112 CC*" and an indication that this is a franchise of Rawson Properties there appears in printed script "... *and we hereby accept the benefits of the foregoing contract*". Neither this page nor any other page of the document evidences a signature on behalf of the applicant.

[6.4] the property was sold *voetstoots*, with all visible and non-visible defects of which the seller was aware after being advised by the Applicant of the extent of disclosure. The purchasers declared that they had inspected the property and understood that the seller would not be liable for any defects which were not visible at the date of the agreement unless it could be proven

that the seller had misled the purchasers in respect of these defects (clause 18.1);

[6.5] the seller agreed to pay to the Applicant on transfer the agent's fees at 6% plus VAT (presumably on the purchase price), deemed to have been earned upon transfer of the property to the purchaser or upon cancellation of the sale by either party (clause 19);

[6.6] clause 22, which is quoted in full:

*"22. **FORFEITURE:** Should the PURCHASER fail to fulfil, within 7 (seven) days of delivery of written notice from the SELLER, any of his obligations herein, the SELLER and his agent Rawson Properties shall have the right:*

- (i) to hold the PURCHASER to the agreement, or*
- (ii) to cancel the agreement and to retain the amounts paid on account of the purchase price as liquidated damages in respect of the Purchaser's breach contract and/or*
- (iii) to claim fees from the PURCHASER."*

[6.7] The final page of the sale agreement entitled "ADDITIONAL INFORMATION" is in printed format with provision for manuscript details to be inserted concerning the purchasers and the seller. Seller 1 is reflected as "Robinson", below which two identity numbers appear, one of which is that of the late John Joseph Benjamin Robinson and the other that of Mrs Robinson.²

THE APPLICANT'S SUPPLEMENTARY AFFIDAVIT AND THE RESPONDENTS' RULE 30(2) NOTICE

² This appears from the letters of executorship attached to the replying affidavit.

[7] On 14 August 2021 the applicant delivered a supplementary affidavit, after the respondents had delivered their replying affidavit. The purpose of the affidavit was said to be the need to place further evidence before the Court regarding the cancellation of the agreement of sale, which evidence had not previously been available to the applicant. Condonation was sought for the filing of this affidavit and the deponent proceeded to explain the recent discovery of certain additional document concerning NHBRC registration and concerning Mrs Robinson's apparent acceptance of the respondents' repudiation in the cancellation email of 14 November 2016. The respondents promptly delivered a notice in terms of Rule 30(2) contending that the affidavit constituted an irregular step, *inter alia* because the applicant had failed to bring a substantive application for the delivery of this affidavit. The applicant was afforded a period of ten days to withdraw the supplementary affidavit, failing which the respondents would apply to set it aside.

[8] The affidavit was not withdrawn and the respondents duly delivered their application in terms of Rule 30. However, as a precaution, they responded in detail to the substantive allegations made by the applicant. This application / answer was delivered on 22 September 2020 followed on 26 October 2020 by a supplementary replying affidavit from the respondents.

[9] The additional evidence that the applicant seeks to introduce is relevant to the issues for determination. The grounds on which the respondents oppose the introduction do not commend themselves to me. I was first referred to the judgment of the Supreme Court of Appeal in **Hano Trading CC v JR 209 Investments (Pty) Ltd and Another**³ where the court heard an appeal against an order of the High

³ 2013 (1) SA 161 (SCA)

Court refusing to admit further affidavits and documents delivered after the filing of the replying affidavit. Writing the unanimous judgment of the court Erasmus AJA pointed to the limitation of affidavits to three sets and noted that Rule 6(5)(e) permits the filing of further affidavits with the indulgence of the Court where there is good reason for doing so.⁴ No new matter was raised in the replying affidavit and his Lordship emphasised that no reason was placed before the Court for requesting it to exercise its discretion in favour of allowing the further affidavits.⁵ The statement that the filing of further affidavits severely prejudices the party who has to meet a case based on those submissions, is understandable in the light of the facts of that case. The impression created is that a series of affidavits and documents, details of which do not emerge from the report were slipped into the Court file, made more egregious by the fact that the party seeking to introduce these further affidavits (the respondent in the application in the High Court) had not provided any reason for doing so. On my reading, the judgment is not authority for the proposition that the filing of a further affidavit is inevitably prejudicial to the other party; on the facts of that case, the finding was made, but each case depends on its own facts. The respondents' second objection is that the additional evidence takes the matter no further.

[10] The legal requirement that a party seeking to introduce a further affidavit must deliver a substantive application must be read in context and with reference to the need to avoid unnecessary proliferation of affidavits. What I take this reference in **Hano** to convey is that a party seeking to introduce a further affidavit may not simply ask for this informally, from the bar. The clear requirement is that the party must explain in the further affidavit the reasons for seeking to introduce the additional affidavit, and ask for the Court to condone this. I do not believe that the respondents

⁴ At paras [10] and [11]

⁵ Paras [6] and [14]

are legally entitled to call for the applicant to withdraw the further affidavit. The affidavit, once deposed to and delivered constitutes evidence (a combination in motion proceedings with the pleadings) and procedurally, I question whether evidence can be withdrawn. A Court may however accept or strike out the whole or part of the affidavit.

[11] What emerges from the respondents' Rule 30 application (which is not seriously disputed) is that the present application is not the first legal process instituted by the applicant against the respondents. It is common cause that early in 2017 the applicant instituted an action against the respondents in the Kempton Park Magistrate's Court in respect of its fees. Following an exception taken by the respondents, the action was withdrawn. Early in January 2019, an application was launched by the applicant against the respondents seeking payment of its fees arising out of the sale agreement. The applicant was late in delivering an affidavit in that court, leading to an application for condonation, which was opposed by the respondents. The applicant consequently withdrew this application with a tender for costs. Its reasons for doing so are difficult to understand; it says in its founding affidavit in the present matter that because the relief was sought by application and not action, there was a risk of dismissal for lack of jurisdiction; further, that it could not take a risk with its claim, which it regarded as sound, and that the option of transferring the application from the Magistrate's Court to the High Court was not available. These explanations reveal a considerable measure of confusion and misapprehension as to the procedural and legal requirements for a valid claim.

[12] What is more significant is that the respondents say in their main answering affidavit that there is a dispute of fact between them and the applicant, and Robinson

regarding cancellation or termination of the sale agreement. Importantly, they say that the applicant was well aware of this before instituting the application in the Kempton Park Magistrate's Court and also the present application. They also refer to disputes of fact regarding the validity of the agreement of sale because they say Mrs Robinson signed only in her personal capacity and not in her capacity as executor of the estate of her late husband. The applicant's response in reply is unconvincing. It issues a general denial, coupled to the allegation that the only issue for determination in the present application is whether the respondents' cancellation of the sale agreement was valid. It failed to deal issuably with the case made out by the respondents regarding its knowledge of the disputes and particularly that concerning cancellation of the sale agreement. The significance for the Rule 30 application is this: the respondents have been exposed to sequential legal proceedings brought by the applicant for the same claim, now the subject matter of the present application. They have been forced to defend two earlier legal processes and it is unlikely that they have received a full indemnity for their legal expenses through the tenders of costs made by the applicant in the Magistrate's Court. Their opposition to the delivery of the further replying affidavit, somewhat histrionic, must be seen in this light.

[13] The contention on behalf of the respondents that the further evidence takes the matter no further is only partially correct. As I explain below I apprehend that this further information adds the factual matrix surrounding the NHBRC certificate. Although I have misgivings about the reasons advanced by the applicant for seeking leave to deliver a further affidavit and the timing I believe that the interests of justice are served in permitting this. I take into account that the dispute between the parties

concerning liability for agent's commission has a long and undistinguished history and it deserves be resolution. I exercise my discretion in admitting the affidavit.

[14] The following substantive issues require determination in this application:

[14.1] the validity of the sale agreement;

[14.2] whether there were material misrepresentations by Mrs Robinson such as to justify the respondents validly cancelling the sale agreement;

[14.3] *alternatively*, whether Mrs Robinson cancelled the sale agreement;

[14.4] the legal grounds underlying the applicant's claim for commission.

VALIDITY OF THE SALE AGREEMENT

[15] In their answering affidavit the respondents point to the following:

[15.1] the records from the Deeds Office reflect that the property was at all material times owned by both Mrs Robinson and Mr Robinson. Mrs Robinson was apparently married to her late husband by ANC;

[15.2] the sale agreement is not signed by Mr Robinson nor is it signed by Mrs Robinson in her capacity as executor of his estate. No proof of appointment as executrix is annexed to the agreement.

[15.3] the founding affidavit does not disclose the basis on which Mrs Robinson could sell the property where she only owned a half share of the property;

[15.4] the sale agreement is according to the respondents “*void ab origine*”. In its reply the applicant attaches the letters of executorship granted to Mrs Robinson in respect of her late husband’s estate and issues a general denial to the allegation of voidness. In its supplementary affidavit the applicant says that Mrs Robinson entered the agreement in her personal capacity for her half share and in her representative capacity as executrix for the deceased estate of her husband. This is challenged by the respondents in their supplementary answer / Rule 30 application.

[16] In argument Ms Vergano, counsel for the applicant referred me to the SCA judgment in **Brink v Humphries & Jewell (Pty) Ltd**⁶ which accepted the general proposition that where a document (in that case not specifically an agreement under the Alienation Act) makes provision for signature in two capacities (in that case accepting a credit application and signing as personal surety) it is not necessary that the signatory is required to sign the form twice, once in each capacity. In this sense, the signature can be a “*double signature*”.⁷

[17] Mr Hoffman for the respondents countered with reliance upon the Full Court judgment in **Mills NO v Hoosen**⁸ concerning a successful challenge to an agreement for lack of compliance with the Alienation of Land Act, 68 of 1981. The appellant there was the executor of a deceased estate in which one asset was an immovable property in Mayfair. By written power of attorney the appellant appointed

⁶ [2005] 2 All SA 343 (SCA)

⁷ At para [10]

For this proposition, Cloete JA relied upon the judgment of Nicholas J in **Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd & Another** 1979 (3) SA 210 (T), where his Lordship quoted from **Phipson on “Evidence”** (11th ed.), at 714, para 1635, to the effect that where a party executes a document in several different capacities, it is not necessary that he should sign more than once and extrinsic evidence is admissible to show his intention – at 214 H

⁸ 2010 (2) SA 316 (W)

one Kitshoff as his agent to administer and liquidate the deceased estate. Acting under the power of attorney, Kitshoff appointed Cahi Auctioneers to sell the property by public auction and ultimately Mrs Hoosen signed an agreement of sale directed to:

“CAHi Auctioneers of Plot 23 Tygervalley, Pretoria, the auctioneers/ agents duly instructed thereto by: (Seller)

ANDRE KITSHOFF

the Provisional Trustee / Liquidator of / the Executor

THE DECEASED ESTATE ANNA JOHANNA CATHARINA SMITH”

After certain amendments were effected Kitshoff signed the offer to purchase.

[18] Mills subsequently received a higher offer from a third party and repudiated the agreement. Mrs Hoosen did not accept the repudiation and was successfully sued before Geldenhuys J, who granted an order declaring the agreement of sale to be valid and directing Mills to pass transfer. On appeal, Mills persisted with the contention that the agreement with Mrs Hoosen did not comply with Section 2(1) of the Alienation of Land Act because the true seller of the property (Mills in his capacity as executor) was not identified or identifiable by admissible evidence.

[19] Masipa J, writing for the Court analysed the legal nature of a deceased estate and the functions of an executor:

“[12] It has long been recognised in our case law that a deceased estate has no legal personality and consists of an aggregate of assets and obligations. The estate vests in the executor in the sense that dominium of the assets passes to him, and he alone has the power to deal with the totality of the estate’s rights and obligations. Under the provisions of the Administration of Estates Act 66 of 1965 the executor is required to administer and distribute the estate according to law and under letters of executorship granted by the Master of the High Court. As the executor

alone has the power to deal with the assets of the estate, it follows that the executor must be a party to the sale of any immovable property belonging to the estate. The case of **Tabethe and Others v Mtetwa, NO and Others** is particularly instructive. That case concerned the provisions of s 1 of Act 71 of 1969 (the precursor to s 2(1) of the Act) and is authority for the proposition that, in order to avoid invalidity, a deed of sale in respect of estate property must be signed by the duly appointed executor or an agent on the executor's behalf under the terms of a written authority. The respondent's contention, that it matters not whether the agreement of sale was signed by the appellant or Kitshoff, is without merit. The deceased estate per se cannot be regarded as the seller of the property.”⁹

The judgment further pointed out that to comply with the provisions of Section 2(1) of the Act, the identity of the parties / principals must appear *ex facie* the written document. If evidence dehors the agreement is necessary to establish the identity of the seller, the agreement is invalid. For example, when an agreement is signed by an agent with nothing to indicate that he was signing as agent the agreement of sale would be invalid.¹⁰ Consequently the Court found that the appellant, as executor of the estate and true seller of the property should have been identified in the sale agreement. Although Kitshoff was authorised to enter into and sign the agreement of sale on behalf of the appellant he did not disclose the fact of such agency and he should have qualified his signature with reference to his principal's name and to indicate that he was signing as agent. The power of attorney could only be called upon as an aid if this document was incorporated by reference, which was not the case.¹¹ The judgment of the Court *a quo* was consequently overturned.

⁹ Para [12], references omitted

¹⁰ At para [13]

¹¹ At paras [15] and [16]

[20] The Full Court decision in **Mills** is binding on me if it applies to the facts of the instant case. To my mind it is distinguishable and thus not binding. In **Mills** the agreement was signed by the agent of the executor who (erroneously) described himself as provisional trustee, liquidator or executor of the deceased estate; he was none of these. Importantly, the power of attorney which legitimately appointed Kitshoff as agent to administer and liquidate the deceased estate was not attached or incorporated by reference, and consequently it could not be utilised to identify the true seller. In the present case the applicant simply annexed the letters of executorship in the name of Mrs Robinson to its replying affidavit. Importantly, the replying affidavit is supported by an affidavit of Mrs Robinson, which declares that she had read the affidavit of the deponent to the replying affidavit and confirmed the contents in so far as they relate to her.¹²

[21] My own research has led me to a judgment of the SCA which provides further guidance to the application of Section 2(1) of the Alienation of Land Act in the present case. **Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC and Another**¹³ was an appeal against the upholding of an exception to particulars of claim that alleged that the husband of the sole member of Revelas had signed a contract for the sale of immovable property, with Northview. The judgment *a quo* was upheld on the basis that there was no allegation that the husband of the sole member was authorised in writing to act on behalf of the close corporation, and that the written authority should have been annexed to the particulars of claim, together with the contract of sale.¹⁴ On the question of authority

¹² I note that in reply the applicant refers to Mrs Robinson's affidavit which it says confirms the contents of the founding affidavit and the replying affidavit. There is no indication this affidavit by Mrs Robinson that she has had sight of the founding affidavit, nor that she confirms its contents. Her confirmatory affidavit can relate only to the replying affidavit.

¹³ 2010 (3) SA 630 (SCA)

¹⁴ At para [3]

as required by Section 2(1) Lewis JA referred to the separate judgments in **Potchefstroom Dairies and Industries Co. Ltd v Standard Fresh Milk Supply Co.**¹⁵ and particularly to that of Bristowe J dealing with Section 30 of the Transvaal Transfer Duty Proclamation, 8 of 1902. This instrument required a contract of sale, if not signed by the principal, to be signed by his agent duly authorised in writing.¹⁶ Bristowe J started his analysis by emphasising that the principal must be capable of giving the agent the power which he is appointed to exercise; this means that the principal must be capable of exercising those powers himself. But his Lordship explained that (for example) tutors and curators are excluded from the need to provide authority in writing:

*“Tutors and curators are excluded because the acts which they are appointed to perform are ex hypothesi acts which their wards cannot perform ... Tutors and curators are really not agents at all. They are principals, though with limited powers. And if they enter into a contract of sale they do so by virtue of a faculty incidental to their office and not of any power derived from their ward.”*¹⁷

[22] Do these principles find application in the present application? I believe so, albeit partially. There is documentary evidence in the form of letters of executorship attached to the applicant’s replying affidavit. The letters of executorship indicate her appointment as the executrix of the estate of her late husband, John Robinson. Mrs Robinson’s confirmatory affidavit confirms this and there is no reason to doubt that this is the factual and legal position. Mr Robinson self-evidently could not himself perform the act of signing to signify his acceptance of the offer to purchase.

¹⁵ 1913 TPD 506

¹⁶ This provision was carried into s 1(1) of the General Law Amendment Act, 68 of 1957, repeated in s 1(1) of the Formalities in respect of Contracts of Sale of Land Act, 71 of 1969; and repeated again in the Alienation of Land Act – see *Northview*: para [4]

¹⁷ At para [7] of the **Northview** judgment, p. 513 of the **Potchefstroom Dairies** judgment

Mrs Robinson could sign on behalf of his estate by virtue of her office as executrix; whether she did so, is an outstanding question.¹⁸ In argument, Mr Hoffman for the respondents pressed his argument that Section 2(1) of the Alienation of Land Act requires the identity of the parties to appear from the agreement of sale said and that no mention is made in the founding affidavit that Mrs Robinson executed the agreement in her capacity as executor of her late husband's estate. Both of these submissions are correct. However, as counsel fairly conceded there are clear references in the sale agreement to the existence of an estate in the name of the late John Robinson (referred to next to the notation "*Spouse*" on the first page of the agreement, as is there a reference to an antenuptial contract with the date "*3/7/1990*" on the same page. There is however no indication on the printed page for signatures by the purchasers and sellers respectively that the estate late John Robinson is implicated. As I have noted above, Mrs Robinsons signs twice and her signatures are not qualified. But on the final page of the sale agreement (once again signed twice by Mrs Robinson next to the printed words "*Signature of Seller/s*") the surname of the seller is given as "*Robinson*". As I have noted above the identity numbers of both Mrs Robinson and the late Mr Robinson appear on the letters of executorship and accord with what is reflected in the sale agreement. Finally, Mr Hoffman referred me to the sole mandate signed by Mrs Robinson on 30 March 2016. Her signature appears above the printed word "*THE OWNER / SELLER*". Alongside, provision is made for the spouse of the seller to sign, signifying consent; this remains blank. Mr Hoffman submitted that in accordance with the accepted principles of interpretation which take context into account, this document was a strong indicator that Mrs Robinson acted as the sole seller in terms of the sale agreement. I am not convinced that this contextual link is established. Unlike a sale agreement under the

¹⁸ **Potchefstroom Dairies**, at 513

Alienation of Land Act, a sole mandate requires no special formalities regarding the identity of parties to be valid. The absence of any reference to the estate of the late John Robinson in the mandate document is to my mind, inconsequential.

[23] Ms Vergano referred to Section 47 of the Administration of Estates Act in terms of which an executor is expressly authorised, unless it is contrary to the will of the deceased, to sell property in the manner and subject to the conditions which the heirs who have an interest therein, approve in writing. She also submitted that the respondents, despite their feigned ignorance regarding the status of ownership of the property were well aware that the property was part of the deceased estate. In this regard, reference is made to an initial email communication from the second respondent to the agents on 12 August 2016, referring to the timeline for the winding-up of the estate as well as to registration.

[24] However, knowledge of a particular state of affairs regarding the possible involvement of a deceased estate does not assist a party in the position of the applicant when the validity of the agreement of sale is brought into question by the other party, as is the case here. Further, the reference to Section 47 of the Administration of Estates Act highlights a further potential difficulty for the applicant. Aside from the need for the sale agreement to comply with Section 2(1) of the Alienation of Land Act, there is no evidence as to the existence of any heirs (apart from Mrs Robinson) to the estate of the late Mr Robinson, nor as to whether these heirs have given approval to the sale. I hasten to add that I cannot say whether this is a matter which has, or may have a direct bearing on the validity of the sale agreement. But it is a question unanswered and one that called for clarity that was not forthcoming.

[25] The applicant is the estate agent appointed to market the property and not the seller. Save to the limited extent referred to above the applicant's sole member, Ms Cownley, is the sole source of evidence regarding the background and contextual setting to the conclusion of the sale agreement. The applicant has not demonstrated that it has either insight into, nor knowledge of Mrs Robinson's state of mind preceding the conclusion of the sale agreement and particularly regarding Mrs Robinson's double signature at various places on the sale agreement. In **Tabethe v Mtetwa** both the surviving spouse and a daughter of the deceased were both appointed by the deceased as executors and administrators of his estate. The surviving spouse concluded a sale agreement for the sale of an immovable property forming part of the deceased estate. Both the surviving spouse and daughter provided affidavits purporting to confirm their intention that the sale agreement be regarded as valid ¹⁹ and it was (unsuccessfully) argued that oral evidence by the daughter could provide a fuller picture. Notwithstanding this evidence James JP found that the daughter had equal responsibility for administration of the estate and that she was not entitled to relinquish this responsibility without being released by the Master. ²⁰ In **Potchefstroom Dairies** the plaintiff sought judgment against certain defendants alleged to constitute a partnership. Three of the defendants who were alleged to have had been part of the partnership testified in their defence and all denied their personal liability on diverse grounds, including denials having been partners and denials of authority for certain of the defendants to have represented the others. ²¹ Section 30 of the Transfer Duty Proclamation 8 of 1902 provided that no sale of fixed property would be of any force and effect, unless it be in writing and signed by the parties or by the agents duly authorised in writing. De Villiers JP found

¹⁹ At 83 A, 84 E

²⁰ At 84G- 85A

²¹ At 509 - 510. Their evidence was characterised as unreliable and not deserving of any weight.

that the character of the partners was more complex than that of agents and that in the absence of clear language indicating that the legislature required the reply partners provision should be restricted to agents and should not extend to partners, with the result that plaintiff succeeded.²² Bristowe J called upon the principles concerning tutors and curators referred to above in concurring with the judgment of the Judge President.

[26] In the present application I simply do not have any evidence from Mrs Robinson as to whether she indeed intended to conclude the sale agreement in her dual, personal capacity as well as executrix of her late husband's estate. This not a case where a presumption of fact may be drawn such as to justify inferential reasoning. A party that seeks to rely on inferential reasoning must show that this is the most probable inference.²³ Other questions arise: if Mrs Robinson did not apply her mind to this question and she simply filled in the information regarding her late husband for completeness (the reference to his estate, his identity number and – apparently – his income tax number) would this constitute the necessary intention to contract on behalf of the estate? This question cannot be considered without an evidential backing, which is simply lacking.

[27] Counsel for both parties referenced high authority on the circumstances in which motion proceedings are appropriate. Ms Vergano referred to **Fakie NO v CC II Systems (Pty) Ltd**²⁴ where Justice Cameron warned that the virtues of speed and economy inherent in motion proceedings should not be compromised by respondents seeking to shelter behind patently implausible affidavit versions or bold denials.²⁵

²² At 511 - 512

²³ **Schwikkard & van der Merwe**: Principles of Evidence (4th ed) para 30.5.3

²⁴ 2006 (4) SA 326 (SCA)

²⁵ At 347 G

Mr Hoffman called upon the joint judgment of Howie P and Cloete JA in **Transnet Ltd t/a Metrorail v Rail Commuters Action Group**²⁶ which repeated the well-known principles in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**;²⁷ in motion proceedings a court decides the matter on the facts of the respondent, together with such facts set out by the applicant which cannot be contradicted.²⁸ To this counsel added the submission that a court is not entitled to take new facts set up by the applicant in the replying affidavit to determine whether there is a dispute of fact.²⁹ The caution sounded in **Fakie** relies upon the *dictum* from **Plascon-Evans** to the effect that a denial by the respondent of facts alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. I must confess that on my reading of **Transnet** I cannot find (either in the majority judgment to Howie P and Cloete JA, or in the concurring judgment of Streicher JA) support for Mr Hoffman's invocation of a prohibition against looking at new facts set up in the replying affidavit to determine whether there is a dispute of fact. It strikes me that if this were the case the benefit would wrongly fall to the applicant by excluding additional disputes of fact would make the matter less capable of resolution on paper. And despite some misgivings that I have regarding the respondents' version I cannot describe it as implausible or bald.

[28] The relief sought by the applicant flows directly from the sale agreement (although not precisely on the grounds set out in the applicant's affidavits, as I explain below). The true legal basis of the applicant's claim against the respondents was only clarified in its reply where it referred to the legal principle of *stipulatio alteri*

²⁶ 2003 (6) SA 349 (SCA)

²⁷ 1984 (3) SA 623 (A)

²⁸ At 634 E - 635 C

²⁹ Counsel referred to paragraphs [22], [52] and [61] of the **Transnet** judgment

which was said to link to specific clauses of the sale agreement. A clear statement of what constituted a *stipulatio alteri* is found in the minority judgment of Schreiner JA in **Crooks, NO and Another v Watson and Others**³⁰, describing this not simply a contract designed to benefit a third person, but “... a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two”.³¹ This statement was unanimously endorsed in **Joel Melamed & Hurwitz v Vornier Investments**³² which added that the question in each case is whether there is an intention that the third party can, by adoption of the promise, become a party to the contract in which this promise is embodied.³³

[29] Despite the apparent lack of a signature by the applicant I find that the sale agreement adequately reflects that the applicant accepted the benefits of that agreement. It is axiomatic that such benefits as may be recorded in such agreement can only accrue to the applicant if the sale agreement itself is valid. A further consequence is that the applicant must discharge the *onus* of proving that the sale agreement is valid. In **Fikre v Minister of Home Affairs and Others**³⁴ it was said that the onus of proof of demonstrating the existence of facts which will be accepted as evidence on a balance of probabilities is replaced in motion proceedings for final relief, by the application of the **Plascon-Evans** principles – at para [19].

[30] In my respectful view the onus of proof is not replaced, but rather becomes part of the assessment of the applicant’s case. In **Plascon-Evans** Corbett JA referred to the court being satisfied as to the inherent credibility of the applicant’s

³⁰ 1956 (1) SA 277 (A)

³¹ At 291 C

³² 1984 (3) SA 155 (A) at 172 A-F

³³ At 172 E-F

³⁴ 2012 (4) SA 348 (GSJ)

factual averments, which then permits it to proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to final relief – at 635 A-B. His Lordship referred with approval to the judgment in **Rikhoto v East Rand Administration Board**³⁵ where O’Donovan J found that the evidence of the applicant, together with another witness should be accepted in the absence of positive evidence to the contrary as sufficient proof of the applicant’s averments – at 283 G-H. These *dicta* to my mind indicate that the onus of proof remains a factor in motion proceedings and is not replaced

[31] For the above reasons the applicant has failed to demonstrate satisfactorily that the sale agreement is valid. Without having done so it cannot rely upon any stipulation in its favour and its claim must fail.

[32] This is essentially the end of the matter. However, in the event that I am wrong concerning the validity of the sale agreement I deal briefly with the further issues mentioned above.

THE ACTIONABLE MISREPRESENTATION RELIED ON BY THE RESPONDENTS

[33] The misrepresentation relied on by the respondents concerns the failure of the builder not to register the house as required by the Housing Consumers’ Protection Measures Act, 95 of 1998 (*“the Housing Consumers’ Act”*). This Act provisions imposes a number of important obligations on a home builder.³⁶ No person is entitled to carry on the business of a home builder or to receive consideration in respect of the sale or construction of a home unless that person is a registered

³⁵ 1983 (4) SA 278 (W)

³⁶ Defined in Section 1 as a person who carries on the business of a home builder, or an owner-builder who has not applied for exemption in terms of Section 10A

builder (Section 10(1)). A home is defined in Section 1 essentially as any dwelling unit constructed for residential purposes or partially for residential purposes. A home builder is further prohibited from commencing with the construction of a home unless, *inter alia*, the Council (the National Home Builders' Registration Council, established by Section 2) has issued a certificate of proof of enrolment (Section 14(1)(c)). Enrolment is defined as the submission by a home builder of a request for a particular home to be entered into the records of the Council and the completed acceptance thereof by the Council in terms of Section 14(1) or (2).

[34] The long title of the Housing Consumers' Act is: ***"To Make Provision for the Protection of Housing Consumers; and to Provide for the Establishment and Functions of the National Home Builders Registration Council; and to Provide for Matters Connected therewith"***. In the majority judgment of the Constitutional Court in **Cool Ideas 1186 CC v Hubbard and Another**³⁷ the Housing Consumers' Act was subjected to careful scrutiny, with particular reference to Section 10 dealing with registration of home builders. Majiedt AJ said the following regarding the objects of the Council:

*"The ultimate objective is the regulation of the building industry through, amongst other things, the protection of the housing consumer and maintaining minimum standards for house builders. The protection is optimally achieved in requiring the registration of home builders upfront and not during the course of or at the end of construction."*³⁸

After referring to a number of sections, the learned judge continued:

"These provisions lead one to the ineluctable conclusion that the statute envisions registration of a home builder before construction commences."

³⁷ 2014 (4) SA 474 (CC), Moseneke ACJ, Skweyiya ADCJ, Kampepe J and Madlanga J concurring

³⁸ Para [30]

*Moreover, the relevant section itself [a reference to Section 10(1) and (2)] itself says so in plain language. These prohibitions are stark and explicit. Equally clear is the purpose of these provisions (as is the case with the statute as a whole), namely the protection of housing consumers.”*³⁹

[35] In the present context it is relevant that the definition of a housing consumer in Section 1 means a person who is in the process of acquiring or has acquired a home and includes such person’s successor in title. Mrs Robinson, together with her late husband would (at the material time) have fallen within the definition of persons who are housing consumers. But would the respondents, who had contracted to purchase the property and who would in due course, but for the termination of the sale agreement have acquired title, also fall within this definition? It would appear so: in **National Home Builders Registrations Council and Another v Xantha Properties 18 (Pty) Ltd**⁴⁰ found that the word “*acquire*” is not restricted to the concept of becoming an owner, but in terms of the CONCISE OXFORD ENGLISH DICTIONARY (12th ed., 2011) the primary meaning is to “*come to possess (something)*”.⁴¹ Once they had taken physical possession of the property in terms of the sale agreement and even before registration of transfer into their name, they would have acquired the property.

[36] The respondents make the following allegations in their answering affidavit:

³⁹ Para [33]

⁴⁰ 2019 (5) SA 424 (SCA)

⁴¹ At para [12]

The case turned on whether a home builder who constructed a home solely for the purposes of leasing or renting out (as opposed to selling it) was subject to the restrictions in Section 14 of the Housing Consumers’ Act. The SCA found affirmatively

[36.1] Mrs Robinson had not told them that the house had been built by a builder who was not registered as a home builder in terms of the Housing Consumers' Act and therefore had no NHBRC certificate;

[36.2] had they known of the lack of the NHBRC certificate, the respondents would never have concluded the agreement;

[36.3] at a round table meeting held "*between the relevant parties*" (which appears to refer to at least representatives of the applicant) at which meeting it was confirmed that no NHBRC certificates was available for the "property" (which must be taken to be a reference to the house);

[36.4] the respondents were subsequently advised that the failure to disclose the lack of an NHBRC certificate constituted a material representation, resulting in a lack of consensus, with the consequence that the agreement was void *ab origine*;

[36.5] in any event, the agreement was cancelled by the respondents on 14 November 2016 and from that date was of no force and effect.

[37] In its reply the applicant said that the absence of an NHBRC certificate was not a bar to selling the property and that the property (sale) was not subject to any such condition. It was further said that if a property is older than five years, there is no requirement for a certificate; no substantiation for this proposition was furnished. Because the property was built in 2007, the applicant said that the certificate was no longer applicable.

[38] In written argument on behalf of the respondents it was contended that Mrs Robinson knew that the house had not been registered and that no certificate had been issued. I can find no allegation in the respondents' affidavits to support this proposition. But the respondent's answering affidavit contains this important contention: the certificate and the registration of the builder with the NHBRC was of importance to them because they had witnessed certain defects to the house and they would have been comfortable with the structural integrity of the house if there had been a certificate. When they discovered that there was no such certificate, the structural defects which they had witnessed (and referred to in the email of 12 August 2016) created significant concern about the entire structural integrity of the house. The effect of this, said counsel, was that the respondents were not concerned about the NHBRC certificate because they wished to rely on it as a remedy; it was that its existence would substantially have allayed their concerns.

[39] I accept that parties in the position of the respondents would regard the registration of the builder of the house and the enrolment of the house with the NHBRC as important features as housing consumers. I also accept, although with some uncertainty as to the timing of the causal connection, that the observable signs of structural problems would have been a cause of concern. There is no evidence that the respondents asked for a record of enrolment of the house with the NHBRC before they submitted the offer to purchase. Why they would have taken this risk- in the light of their subsequent concern about this – was not revealed. The legal position is that a party induced to enter into a contract by the other party's misrepresentation is entitled to rescind the contract, provided the misrepresentation was material, that it was intended to induce the person to whom it was made to enter

into the contract and did so induce the person.⁴² While a misrepresentation does not have to be made by express words, it does require some positive action or activity which is capable of conveying a message from one party to the other.⁴³

[40] What the respondents seek to rely upon is better categorised as a non-disclosure or a misrepresentation by silence. Silence by misrepresentation may be found to exist where, for example, part of the truth has been told, but the omission of the remainder gives a misleading impression.⁴⁴ The misrepresentation (whether actual or through silence) must generally be made by a party to the contract.⁴⁵ The inference is that where conduct takes the form of an omission, such conduct is *prima facie* lawful. This inference is displaced when the party is expected to speak because the information he should impart falls within his exclusive knowledge, in the sense that the other party has the first party as his only source and the information is such that the right to have it communicated to him would be mutually recognised by honest people in the circumstances.⁴⁶ If the party bound to disclose is possessed of exclusive knowledge which is inaccessible to the point that inaccessibility produces an involuntary reliance on the party possessing the information, then *a fortiori* disclosure is required.⁴⁷ A person who induces another to enter into a contract by making a negligent misrepresentation (or who misrepresents by silence in the circumstances referred to above) may face the avoidance of the contract.⁴⁸

⁴² See CHRISTIE'S Law of Contract in SA (7th ed, 2016), para 7.1

⁴³ *Id*: para 7.2.2 *in fin*

⁴⁴ **Marais v Eldman** 1934 CPD 212, at 214-215

⁴⁵ The case of a misrepresentation made by a third party is dealt with in CHRISTIE'S, para 7.1.2. This does not arise in the present application

⁴⁶ **ABSA Bank v Fouche** 2003 (1) SA 176 (SCA), para [5], majority judgment

⁴⁷ *Id*: para [8]

⁴⁸ **Bayer SA (Pty) Ltd v Frost** 1991 (4) SA 559 (A), at 568 A-G, 569 B-E

[41] The submission by counsel for the respondents was that where a seller fails to tell a potential purchaser that the house was not built by a NHBRC registered builder, he has made an intentional and material misrepresentation to the purchaser. On the authority of **Absa Bank v Fouche** this proposition only holds true where it is demonstrated that the information was in fact within the knowledge of the party who is said to be under a duty to disclose. No liability can arise where it is not shown that the party under such a duty was in fact possessed of this knowledge. There is no *a priori* inference that a party who does not disclose, had the requisite knowledge. In the present application the respondents say that Mrs Robinson had not told them that the house had been built by a builder not registered in terms of the Housing Consumers' Act. This is not enough. The respondents' position cannot be rescued by reference to the **Plascon-Evans** test: what is plain from the judgment of Corbett JA is that it is the facts averred by the respondents, together with the admitted facts in the applicant's affidavit, which determine whether final relief can be granted.⁴⁹ The fact necessary to anchor the respondents' reliance on the misrepresentation by silence, namely that Mrs Robinson knew that the house had not been registered, is absent. The applicant's supplementary affidavit which I have admitted, sought to refute the suggestion that the house was never enrolled in terms of Section 14 of the Housing Consumers' Act and also to refute that the builder was not registered in terms of Section 10 thereof. Documents attached to this affidavit included a certificate of occupancy issued by the City of Johannesburg in July 2010, a certificate by a registered person dated June 2008 in terms of the National Building Regulations and Building Standards Act. Finally, an NHBRC certificate issued on 8 May 2007 valid for a period of one year and issued to Umthala Trading (Pty)

⁴⁹ **Plascon-Evans**, at 634 G – 635 C
Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd 1982 (1) SA 398 (A), at 430 G – 431 A

Limited t/a Umthala Construction (Pty) Limited, was produced. Leaving aside the obvious proposition that one limited liability company cannot trade as another limited liability company, there is no credible evidence that any entity by the name of Umthala Trading was the builder of the house on the property, nor that the registration of the builder had occurred before construction had commenced, this being the requirement of the Housing Protection Act as interpreted by the Constitutional Court in **Cool Ideas**.⁵⁰ The other documents deal with matters extraneous to the enrolment and certification in terms of the Housing Consumers' Act.

[42] The applicant's supplementary affidavit also sought to explain the late emergence of these documents. It is said that prior to the applicant's relocation to new premises prior to the lockdown period, difficulties with its filing system had been experienced. After the move and following engagement with Mrs Robinson's attorney (the affidavit says that) a search was conducted of the applicant's reorganised filing system which then revealed, in the words of the applicant's deponent, "*certain compliance documents, including the occupancy certificate which I was not aware that I was in possession of, until now ...*". There is no explanation of how the applicant, an estate agent, came to be in possession of these documents nor how they were serendipitously located after a considerable period of litigation between the parties, including the abortive Magistrate's Court proceedings. The supplementary affidavit attaches a standard form typed confirmatory affidavit bearing the name of Mrs Robinson dated July 2020. This affidavit was not signed by Mrs Robinson and is consequently disregarded.

⁵⁰ Para [33]

[43] I am not satisfied that the respondents have established the elements of an actionable non-disclosure or silence by representation. I thus do not need to resolve the dispute about whether there was valid certificate of registration of the home builder or enrolment of the house on the property. The further evidence from the applicant raises more questions than it provides answers.

CANCELLATION OF THE SALE AGREEMENT: BY WHOM?

[44] The email sent by the first respondent to Mrs Robinson and to the applicant on 14 November 2016 notified these parties that the respondents thereby cancelled the sale for the property because there was no certificate of registration for the house. In its founding affidavit the applicant contended that the email of 14 November 2016 constituted a repudiation of the sale agreement “... which repudiation the Applicant accepted ...”. In its supplementary affidavit the applicant shifted its stance regarding its purported acceptance of the repudiation. Reference was made to a letter dated 3 April 2017 from Mrs Robinson’s attorney to the respondents’ attorney of record which characterised the respondents’ email of 14 November 2016 as a repudiation, accepted by Mrs Robinson. I turn to examine these contentions.

[45] I have found that the respondents have failed to demonstrate a material misrepresentation / non-disclosure on the part of Mrs Robinson sufficient to render the sale agreement void *ab origine*, or to permit them to cancel that agreement. Consequently, the communication of 14 November 2016 must be examined to determine whether it constituted a repudiation in the sense of exhibiting a deliberate and unequivocal intention not to be bound.⁵¹ The notion that the applicant was entitled to accept the repudiation and cancel the sale agreement can immediately be

⁵¹ CHRISTIE, para 13.3.3 and cases cited in footnote 226

disposed of. To the extent that the applicant acquired any rights in terms of the sale agreement, it did so *qua* agent and only, concerning the respondents, to the limited extent concerning commission. There can be no question of the applicant in this capacity having acquired the substantive rights and obligations of the principals to the sale agreement, being Mrs Robinson and the first and second respondents, respectively.

[46] In **Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd**⁵² Nienaber JA said that repudiation is not a matter of intention, but a matter of perception. The test is whether a reasonable person would conclude that proper performance in accordance with a true interpretation of the agreement would not be forthcoming. It is difficult to see the notification of 14 November 2016 as anything but conduct falling within this definition. But once again there is no direct evidence from Mrs Robinson on how she perceived the repudiation and consequently I must look at the collateral evidence.

[46.1] On 21 November 2016 the conveyancing attorneys nominated in the sale agreement responded to the respondent's email of 14 November 2016, and rejected the contended cancellation. The respondents were notified that the obligations of the parties were being fulfilled, the transfer was in the Deeds Office and that the attorneys had been instructed by Mrs Robinson to proceed with registration.

[46.2] The respondents then referred to an email from the transferring attorneys to their attorney dated 5 December 2016 attaching an account for wasted costs. The narrative of the attached statement of account reflects an

⁵² 2001 (2) SA 282 (SCA), at para [16]

amount received (presumably from the respondents) on 6 October 2016 in the sum of R98 335,84, which appears to have included R60 000,00 for transfer duty paid to SARS. A series of charges against the amount received are reflected, including a fee for wasted costs calculated at 90% of the tariff according to the Law Society in the sum of R15 197,37, plus VAT. Notably the narrative of the account reflects that a refund of the transfer duty paid to SARS would be applied for once an agreement of cancellation was signed by all parties according to SARS' requirements.

[46.3] The respondents say that the account for wasted costs constitutes a concession by Mrs Robinson that the agreement was of no force and effect due to her non-disclosure for the lack of NHBRC certificate. I find no express concession *ex facie* this document and Mrs Robinson said in her confirmatory affidavit attached to the applicant's reply that she made no such concession. She did not however explain what conclusion or inference should be drawn.

[46.4] There is no explanation on the papers on whether a cancellation agreement was in fact signed. The respondents say, insouciantly that the attorneys refunded some of the costs paid.

[47] The paucity of evidence is largely a consequence of the applicant's confusion as to the facts and the legal implications of those facts preceding the conclusion of the sale agreement and thereafter, confusion as to the rights conferred on it by the sale agreement and further confusion as to the correct legal basis of its claim. Most significantly it has failed to appreciate and to delineate the clear differences between its own legal position as agent and that of Mrs Robinson, the seller. It has continually

shifted ground and adapted its position according to the exigencies of the case. All of this creates a palimpsest on which the background is murky and indistinct.

[48] I find it difficult to regard the objective evidence in the form of the account from the transferring attorneys as anything other than acknowledgement by Mrs Robinson that, to put it neutrally, the sale agreement had by 5 December 2016 come to an end. The contention in the replying affidavit that Mrs Robinson (who confirmed this) made no concession at any stage that the agreement was of no force and effect, conflicts with the phrasing of the attorneys' account which reflects that the sale would not proceed; fees charged for wasted costs must surely mean that the transfer will not proceed. The reference to a refund of transfer duty depended upon an agreement of cancellation indicates the termination of the underlying sale agreement, or at least the intention to terminate. On this slim evidential basis I am left to decide the status of the sale agreement in December 2016. I find that on 5 December 2016 or within a short period thereafter, the sale agreement was brought to an end.

[49] This brings me to the letter of 3 April 2017 written by Mrs Robinson's attorneys to the respondents' attorney of record. It is said to respond to a letter dated 28 November 2016 from the respondents' attorneys; this letter from the respondents' attorneys is not provided and I am left to speculate on what was said there. The letter written on behalf of Mrs Robinson purports to accept the repudiation in the email of 14 November 2016. It is difficult to accept that the letter of 3 April 2017 can in law be regarded as notification of Mrs Robinson's acceptance of the respondents' repudiation, which occurred when the email of 14 November 2016 was sent, some four and a half months earlier. I regard this contention as contrived and improbable. By April 2017 and approximately four months after the transferring notified the

respondents that the transfer would not continue, the sale agreement had ceased to have legal effect and this had been the situation for a considerable period of time. I am unable to determine the exact mechanism by which this came to be, but where both the seller and the purchasers, possibly for different reasons, regard the agreement as terminated I am satisfied that the law will accept their joint conclusion of termination, irrespective of the divergent reasons for this. If I am wrong in failing to reach any conclusion as to whether the respondents repudiated the agreement then the fault is that of the applicant, who has failed to put up a coherent and comprehensive narrative. This is a further instance where the applicant has failed adequately to prove a jurisdictional fact essential to its claim.

[50] My finding is that at some time after 5 December 2016 and probably before the end of January 2017, the sale agreement came to an end through the express or implied joint intention of Mrs Robinson and the respondents.

THE LEGAL BASIS OF THE APPLICANT'S CLAIM FOR COMMISSION

[51] During argument the applicant's legal grounds for its claim against the respondents were outlined. It was said that the payment of commission is based on common law where the agent has performed the mandate, which in turn requires proof that the estate agent was the effective cause of the transaction. It was also submitted that the applicant's claim is not a damages claim, but a contractual claim (this being made in response to the respondents having pointed out that the Deeds Office printout for the property reflected that it had been sold for an amount of some R375 000,00 more than offered in terms of the disputed sale agreement). I deal with these two contentions below.

[52] There was a marked degree of confusion in the applicant's characterisation of its claim. In written argument it was initially said that the applicant had fulfilled the requirements of its mandate in sourcing a willing and able purchaser for the property who entered into an agreement of sale. In later written argument it was said that an estate agent mandated to find a buyer earns commission payable in respect of the mandate only if it is the effective cause of the sale concluded between the seller and the purchaser. The problem with these contentions is first, that to the extent that these principles are applicable, at common law they apply only between the seller and the agent.⁵³ Second, and following from this any claim that the applicant may seek to enforce against the respondents as sellers can only arise from the terms of the sale agreement and by the accession of the applicant to this agreement. The misapprehensions on the part of the applicant which has seen a lengthy traverse in three consecutive claims in different courts, presages the determination of this question.

[53] At common law the contract of mandate comes into place when the principal promises to pay the agent a sum of money upon the happening of a specified event which involves the rendering of some service by the agent. Two events which commonly arise. The first is where the commission is promised if the agent succeeds in introducing the principal to a person who makes an adequate offer; the second is where the agent is promised his commission only upon completion of the transaction which he is endeavouring to bring about.⁵⁴ The applicant grounds its submissions on the second event. But as noted above any legal basis for a claim by the applicant does not arise from the performance of its mandate. It must be founded

⁵³ The applicant and Mrs Robinson concluded the sole mandate document which in any event set out the express terms governing how the applicant could earn its commission and be paid by Mrs Robinson

⁵⁴ **Gluckman v Landau & Co.** 1944 TPD 261, at 267

on clause 22, which is quoted in the introduction to this judgment. This clause gives the right to Mrs Robinson and to the applicant (i) to hold the respondents to the agreement, or (ii) to cancel the agreement and to retain the amounts paid on account of the purchase price as liquidated damages on account of the respondents' breach, or (iii) to claim fees from the purchaser. Plainly, (i) and (ii) are options that can accrue only to Mrs Robinson. Option (iii) can accrue to Mrs Robinson, or to the applicant. If Mrs Robinson were to pay commission to the applicant on cancellation (being one of the events contemplated in clause 19 of the sale agreement) then she would probably be entitled to seek to recover this from the respondents. If she had not taken this step it would be a contractual option for the applicant. But any right of action, either by Mrs Robinson or by the applicant is conditional upon proof of the introductory portion to clause 22, the failure by the respondents to fulfil any of their obligations within seven days of delivery of a written notice from Mrs Robinson. This is the contractual and consequently the jurisdictional condition for any claim by the applicant against the respondents as the putative purchasers.

[54] It is common ground before me that no such notice was issued by or on behalf of Mrs Robinson. This point was directly raised by the respondents in their answering affidavit. The applicant referred to a letter from its erstwhile attorneys written on 6 December 2016 and calling upon the respondents to make payment of the sum of R140 220,00 for agent fees as a consequence of the cancellation of transfer. This letter does not constitute compliance with clause 22 because it is not written by or on behalf of Mrs Robinson. In argument counsel for the applicant said that as the sale agreement had been cancelled by the respondents it was not necessary to put them on terms in accordance with clause 22. Partly arising from this contention, I raised with both counsel the possible application the judgment

written by Schutz J with whom Leveson J concurred, in **Taggart v Green**.⁵⁵ There, a sale of an immovable property had been concluded, subsequently repudiated by the defendant and consequently cancelled by the plaintiff. The claim for damages representing the difference between the original sale price and the price on resale was upheld by the Magistrate.⁵⁶ One of the issues considered on appeal was the failure of the plaintiff to comply with a clause in the sale agreement making it a precondition of any action for damages as a consequence of breach unless the plaintiff had by letter notified the purchaser of the breach and made demand that this breach be rectified within not less than 30 days, and the defendant had not complied.⁵⁷ No such notice was sent, but Schutz J said that this would have been an exercise in futility as the defendant had previously repudiated the contract by making it clear that he would not perform.⁵⁸ For this reason, his Lordship found that the lack of notice was not a bar to the claim in these circumstances.

[55] Before me counsel for the respective parties obviously took opposite stances on the applicability of this judgment, which, if applicable, clearly binds me.⁵⁹ In **Hano Trading**⁶⁰ which also involved the sale of immovable property and the failure of the seller to comply with the contract requiring a written notice calling for remedy of the breach within 14 days. It was found that non-compliance precluded the seller from relying on any of the breaches to cancel the agreement.⁶¹

⁵⁵ 1991 (4) SA 121 (W)

⁵⁶ At 122 E-F; 122 I-J

⁵⁷ At 124 H - 125 D

⁵⁸ At 125 E-G

⁵⁹ The findings in this judgment were referred to with approval in **South African Forestry Co. Ltd v York Timbers Ltd** 2005 (3) SA 323 (SCA), at para [37], where it said that notice was not required where the breach complained of was anticipatory breach or repudiation

⁶⁰ See above

⁶¹ Para [35], read with para [3]

[56] The judgment of the SCA in **Hano Trading** provides support for the general principle that a party seeking to rely upon a breach for which notice is a prerequisite to a claim, must give the notice contractually required. The judgments in **Taggart v Green** and in **South African Forestry Co.** are in my view distinguishable. In the present application there is an insufficient basis to find that Mrs Robinson cancelled the sale agreement as a consequence of repudiation by the respondents. An additional factor is that the applicant, in its position as estate agent, is not the *alter ego* of Mrs Robinson, the seller. The requirement that the seller must give notice in terms of clause 22 to a defaulting purchaser serves a potentially important function when the agent seeks to recover commission; for example the seller may have re-sold the property elected not to enforce the sale, both of which I have found occurred here. In these circumstances the decision of the seller is material, hence the requirement of notice. There are no doubt other reasons. I have already dealt with the difficulties for the applicant arising from the lack of evidence from Mrs Robinson. Once again this lack of evidence, coupled with the absence of the requisite notice from Mrs Robinson calling for the respondents to fulfil their obligations precludes any sustainable finding that the applicant is entitled to claim fees from the respondents in terms of clause 22.⁶²

[57] The above finding essentially renders any further examination of the nature of the applicant's claim, otiose.

⁶² The unreported judgment of the Gauteng Division, Pretoria, in **Lab-Cor Trading (Pty) Ltd v Hendrik Fouche Blignaut** A643/2014 (judgment of Strauss J, concurred with by De Vos J, is distinguishable on the basis that the trigger for agents' commission was the cancellation of the sale for default. This is not the present situation

[58] In **Watson v Fintrust Properties (Pty) Ltd**⁶³ Baker J closely examined the nature of commission claims, depending on how the claim was pleaded.⁶⁴ His Lordship characterised a pleading that the agent was instructed to bring about a valid and binding contract and did so, but before the time came for implementing the contract, the seller withdrew the property from the market and thereby caused the agent damage in the amount of the commission he would have received had the property changed hands. This was characterised as a claim for damages equivalent to the commission that the agent would have received but for the seller's default.⁶⁵ It seems to me that the same position obtains in the present application; Mrs Robinson and the respondents mutually terminated the sale agreement. In response to the respondents' contention that Mrs Robinson's property had been resold for a higher purchase price, the applicant in reply said that this was irrelevant for the following reason: if, it was postulated, the sale agreement with the respondents had not been cancelled and the respondents had purchased the property and thereafter sold the property to another purchaser, the applicant would have been entitled to commission under the original agreement of sale. This is factually correct but misses the point: if the transaction involving the respondents had proceeded Mrs Robinson would have been liable to the applicant for payment of commission in terms of clause 19 of the sale agreement. This is quite different to the present instance where the applicant seeks to recover commission from the respondents where the sale was mutually terminated. The applicant has failed to dispute the facts alleged by the respondents concerning the second sale.

⁶³ 1987 (2) SA 739 (C)

⁶⁴ The case considered an exception to particulars of claim

⁶⁵ At 746 G - 747 B

[59] What the applicant seeks to do is to recover commission from the aborted sale with the respondents, as well as for the second sale, which sale I accept to have been concluded on the basis alleged by the respondents in their answering affidavit. Despite the advent of the Constitutional era the law of contract does not seek to regulate the inherent morality of the conduct of contracting parties. If the applicant's claim is legally justified under the terms of the sale agreement, then it is entitled to its contractual bargain. But if the true nature of the applicant's claim is one for damages for lost commission, then it must prove its damages. Contractual damages aim to place an innocent party in the position he would have been if the contract had been properly performed.⁶⁶ In the present case the applicant has been placed in (apparently) a better position than it would have been had the sale agreement with the respondents been performed. An agent in the position of the applicant is not compensated based upon the *quantum* of effort or time expended; the reward is expressed as a percentage of the selling price on a completed sale. On the limited evidence available to me I find that the applicant's claim is in fact one for damages and that it has been adequately compensated for any loss that it could claim to have been sustained, had it demonstrated an entitlement to a claim against the respondent. It has in any event not shown such an entitlement. Consequently, even if I am wrong in my finding that the applicant has failed to establish the validity of the sale agreement, no legitimate claim for any compensation lies against the respondents.

[60] The applicant and the respondents characterised the conduct of the other party/ies as deserving of a punitive costs order. The applicant said that this was justified from its perspective because there was no dispute of fact on the papers and

⁶⁶ CHRISTIE, para 14.6.2 and cases there cited

that it had been forced to institute this application to vindicate its rights. It is wrong on both counts. The respondents pointed to the sequential legal proceedings to which they have been subjected on a claim they regard as wholly unmeritorious. There is some justification for this stance, although the respondents failed to establish their reliance upon invalidity of the agreement due to the alleged misrepresentation. They have however successfully warded off the applicant's claim and they are entitled to their costs.

[61] The majority judgment of the Constitutional Court in **Public Protector v SARB**⁶⁷ noted the circumstances in which a court in the exercise of its discretion and wishing to mark its disapproval of the conduct of a litigant can order costs on the attorney and client scale: fraudulent, dishonest or male fide conduct; vexatious conduct; and conduct that amounts to an abuse of the processes of court. Whilst I regard the applicant's claim to have been ill-considered I cannot say that it falls within the categorisation of a case meriting a punitive costs order. A further factor that I take into account is the suspicion that the respondents were opportunistic in making a reduced offer when alerted to visible, potential structural defects in the building. There was no evidence of a misrepresentation by Mrs Robinson as asserted by them. Also, there is a discernible whiff of buyer's remorse that may have influenced their purported cancellation of the sale agreement. In the exercise of my discretion I decline to make an award of costs against the applicant on the attorney and client scale

[62] In the result I make the following order:

The application is dismissed with costs.

⁶⁷ 2019 (6) SA 253 (CC) at paras [223] - [224]

N.J. GRAVES

Acting Judge of the High Court of
South Africa
Gauteng Local Division
Johannesburg

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