

## PERSONALISED LEGAL ASSISTANCE

Professional legal and property consulting

### **SONNENBERG & ASSOCIATES PROPERTY AND LEGAL ADVICE NEWSLETTER # 9**

#### **1. Legal Quotes**

"A lawyer with a briefcase can steal more than a thousand men with guns." [Mario Puzo]

"Lawyers should never marry other lawyers. This is called 'in-breeding', from which comes idiot children and more lawyers." [Kip Lurie]

"If you can't convince them, confuse them." [Harry S Truman]

#### **2. Legal short**

It was so cold last month that I saw a lawyer walking down the street with his hands in his own pockets.

#### **3. Facts of the day**

Superstar athlete Usain Bolt has denied labeling the Commonwealth Games as "a bit shit", dismissing quotes in a newspaper report as nonsense.

#### **4. Inspiring quotes**

"Dream big and dare to fail." [Norman Vaughan]

"We are still the masters of our fate. We are still captains of our souls." [Winston Churchill]

"Nothing great was ever achieved without enthusiasm." [Ralph Waldo Emerson]

#### **5. South African quotes**

"We must take a stand, those of us who can afford to buy from Woolworths to say we are no longer buying." [Julius Malema, alleging in parliament on 26 July 2014 that Woolworths was importing products from Israel]

"Mr President, be careful of your deputy president who sleeps with white monopoly capital." [Julu again, in parliament on 24 July 2014]

Home Affairs Minister Malusi Gigaba after being interrupted in parliament by the EFF: "The ANC will not be lectured about their commitment to the poor "by those who recently traded in their Gucci watches for overalls."

#### **6. Effective Cause v Active Negotiation: an ethical dilemma for Agents?**

Most Agents are aware that open mandates can lead to a situation where different agencies introduce the same Purchaser to a property. This can, in turn, result in the Seller being faced with multiple commission claims. It is then up to the court to decide, at great expense to all concerned, which Agent was the "effective cause" of the transaction.

The courts have recognised the difficulty in determining "effective cause." The judge in *Webranck v L K Jacobs & Co Ltd 1948 (4) SA 671 (A)* stated as follows: "Situations are conceivable in which it is impossible to distinguish between the efforts of one Agent and another in terms of causality or degrees of causation. In such a situation it may well be that the principal may owe commission to both Agents and that he only has himself to blame for his predicament, for he should protect himself against that risk."

**How does a Seller protect himself from this "predicament?"**

- By awarding a sole or joint sole mandate to (a) reputable agency/agencies of his choice;
- By asking to see the Agent's/Agents' valid fidelity fund certificates;
- By insisting on the Agents presenting him with a list of all prospective purchasers introduced to the property.

**Where multiple agencies are involved, the Seller should**

- **Insist on a clause in the mandate agreement which provides for the sharing of the**

commission in instances where more than one commission claim arises from the sale of the property. (In the case of multiple commission claims, the commission is not divided: each agency can claim the full commission!);

- Request a copy of the commission split agreement between the various agencies before signing the Offer to Purchase;
- Make sure that the sale agreement contains an indemnity protecting him against multiple commission claims, such as the one following here: "The parties acknowledge that this agreement has been concluded by X agency and the Purchaser warrants that he was not introduced to the Seller for the purposes of this sale by any other Agent and the Purchaser hereby indemnifies the Seller against any claims for brokerage that may be made by any other Agent arising out of this sale."

Note, that despite the above, an indemnity is only as strong as the agency giving it and it doesn't prevent the Seller from having to go to court to defend the double commission claim (the Seller could, however, join the agency in the lawsuit as a co-defendant with him). The indemnity would only also be effective if given by the Agent/agency who was the "effective cause."

The Purchaser, similarly, should carefully check all warranties and indemnities given by him.

Where more than one agency is involved, the Agents are obliged in terms of the Estate Agents Code of Conduct to enter into a written agreement as to the division of the commission (this is ordinarily done at the time of the signature of the mandate; either a winner takes all or an 80/20 split or another split as agreed). Failure to do so could expose the Seller to multiple commission claims, as described above. The Agents could also then face claims of contravening the Code and may be subject to disciplinary action by the Estate Agency Affairs Board.

### **So what is "effective cause?"**

The entitlement to commission depends on

#### **1. The existence of a mandate**

An Agent may be the "effective cause" of the transaction, but will be disqualified from claiming commission from the Seller in the absence of a mandate.

#### **2. Performance in terms of the mandate**

The Agent must introduce a willing and able Purchaser to the property, which introduction results in a written deed of sale being entered into between the parties.

In this regard, an Agent "is paid by results and not by good intentions, or even hard work." (*Aida Real Estate Ltd v Lipschitz 1971 (3) SA 871 (W)*).

#### **3. Effective Cause**

a) The Agent must be "the decisive factor" or major cause ("causa causans") of the transaction. A mere introduction to the property is not enough.

b) The Agent's actions must result in the Seller being willing to sell the property at the agreed price and the Purchaser ready and able to buy the property.

c) The Agent's introduction of the Purchaser must remain "overridingly operative", which is indicative of an on-going and active involvement of the Agent with the Purchaser.

d) The Agent's actions must be seen as sufficiently important in achieving the result for which the Seller has agreed to pay him.

Professor Henk Delpont, in his article on the *Gordon v Slater case 1973 (3) SA 765* sums up effective cause by stating: "The heart of the matter is that an Agent will be regarded as the effective cause of a transaction if he can show that it was his introduction which resulted in the sale being concluded. Notwithstanding other factors which also played a role such as the intervention of other Agents, the persuasiveness of the Seller himself or that a complete outsider financed the transaction. To put it differently, the Agent must be able to prove that it was his introduction which operated to influence the Buyer to buy the property."

It follows that whilst the introduction of the Purchaser to the property is a very important factor, it is not necessarily decisive in determining "effective cause." There may be other intervening factors which may outweigh the introduction, and these factors could be the "effective cause." Commission will only be earned if, upon consideration of all the facts and circumstances, it can be shown that the introduction constituted the main driving force that triggered the sale.

Whether or not an Agent is the "effective cause" of a sale is a question of fact. Each case will have to be evaluated on its own to determine same.

Notwithstanding the legal position pertaining to "effective cause" as described above, the Ethical

Standards Committee ("ESC") of the Institute of Estate Agents of South Africa suggests that the ethical standard of "**Active Negotiation**" should be used in determining whether commission should be due or not.

"Active negotiation", the ESC states, is "**substantial contact**" with the Purchaser, where "*the stage has been reached in the relationship between the Agent and the Purchaser, where the latter, as a result of being placed in possession of adequate information, has, by his words and actions, indicated a continual interest as a potential purchaser and a preparedness to pursue the matter.*"

If, at a later stage, the prospective purchaser is abandoned by the Agent, the active negotiation would have ceased. The Agent then must show, should that Purchaser then purchase the property, that despite the aforementioned, he remained "active" with the Purchaser.

As a result of this new measure of determining whether commission is due or not, the ESC believes that a higher standard of participation between the Agent and the Purchaser is required, for example: a purchaser must have physically inspected a property. Even if access can't be arranged by the Agent, the Purchaser must have been physically taken onto the property and shown the area and the outside of the dwelling. To be an accepted introduction, it is not sufficient to sit outside the property in a car and merely discuss it.

Further to this, a purchaser who merely visits a showhouse, leaving his details, does not necessarily constitute the commencement of active negotiation. It must be shown that the prospective purchaser has shown a continued interest in the property. It is therefore critical for the Agent, according to the measures proposed by the ESC, to follow up with all prospective prospects.

It is not clear if the ESC expects Agents to show active negotiation in addition to effective cause, but what is certain is that there may be instances where the Agent is legally entitled to commission as he, on the balance of probabilities can show he was the effective cause of the transaction, but at the same time his conduct may fall short of active negotiation. This may result in an ethical dilemma.

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