/bh

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 27784/2006

5 February 2010

IN THE MATTER OF:

STEPHANUS JACOBUS NAUDE	**PLAINTIFF**
AND	
AUCOR (SANDTON) PTY LTD	**DEFENDANT**

JUDGMENT

Prinsloo, J

[1] In this trial which came before me the plaintiff claims some R375 000-00 from the defendant auctioneering company as his alleged share in commission flowing from a property transaction. Mr Van der Walt

appeared for the plaintiff and Mr Den Hartog appeared for the defendant.

SUMMARY OF THE PLEADINGS

[2] The plaintiff alleges that during or about March or April 2006 and in Rustenburg he entered into a verbal agreement with the defendant, represented by Mr Brian Holburn, the said Holburn having been duly authorised by the defendant to enter into such agreement on behalf of the defendant.

[3] The plaintiff alleges that the defendant undertook to pay him the amount of R375 000-00 if he divulged information and particulars to the defendant regarding the identity of a possible purchaser of a commercial property situated at 2 Ferro Street, Rustenburg ("the property") belonging at the time to Micawber 321 (Pty) Ltd ("the owner").

The plaintiff further alleges that he thereafter assisted the defendant, which acted as property agent in terms of a mandate received from the

owner, to bring about the conclusion of an agreement of sale of the property to a willing and able purchaser. It was agreed, so it is alleged by the plaintiff, that the amount of R375 000-00 would be payable upon receipt by the defendant of its agent's commission from the owner, following the successful sale to the purchaser.

It is alleged that the plaintiff fulfilled all his obligations in terms of the agreement, that the property was duly registered in the name of the purchaser introduced by the plaintiff, that the owner paid the commission to the defendant, but that the latter has failed to pay the plaintiff's share as agreed.

[4] The defendant pleads that indeed, it did receive a written mandate from the owner to sell the property at a price of some R8,5 million whereupon commission of some 10% would be payable in the event of the defendant finding a willing and able buyer. The mandate agreement, dated 20 January 2006, forms part of the pleadings and part of a document bundle, exhibit A, handed in during the trial. It is common cause that Mr Brian Holburn ("Holburn") signed the mandate agreement on behalf of the defendant.

[5] The defendant pleads further that in January 2006 it gave Holburn, "an independent estate agent practising for his own account", a mandate to find a purchaser for the property.

The defendant pleads that in terms of this mandate, it was agreed that should the defendant sell the property to a purchaser introduced by Holburn (my emphasis) then Holburn would be entitled to the payment of commission by the defendant on the basis that the defendant's commission, after expenses, would be divided between the defendant (60%) and Holburn (40%).

The defendant pleads that on or about 23 February 2006 the defendant sold the property to Savcio Holdings (Pty) Ltd ("the buyer") "who had been introduced to the defendant by Holburn" (my emphasis) for the purchase price of R8 250 000-00 which included the defendant's commission in an amount of R750 000-00.

[6] In the alternative, so the defendant pleads, and in the event of a finding that the alleged agreement between the parties was concluded, the

defendant pleads that Holburn was not authorised to represent the defendant in the conclusion of the agreement as alleged.

[7] In response to this plea the plaintiff filed a reply to the effect that the defendant is legally estopped from alleging that Holburn was not duly entitled, mandated or authorised to act as the defendant's agent in concluding the agreement relied upon by the plaintiff and that the defendant is also estopped from alleging that Holburn did not in fact represent the defendant when the agreement was concluded, acting as the defendant's duly mandated and authorised agent and representative.

[8] The defendant then filed a notice in terms of Rule 30, alleging that the reply constituted an irregular step, firstly because it was not signed by an advocate as required by the provisions of rule 18 and secondly because it was filed out of time.

[9] It was common cause, in the proceedings before me, that the plaintiff abandoned the reliance on estoppel in view of the defendant's objection aforementioned. The plaintiff conducted the case on the basis that the facts demonstrated, on the probabilities, that Holburn in fact had the

necessary authority, or at least the necessary implied authority, to bind the defendant when entering into the agreement relied upon by the plaintiff.

THE EVIDENCE

[10] The plaintiff, Stephanus Jacobus Naude, is a businessman in Rustenburg. He is also a qualified optician or optometrist.

[11] In 2006 he owned business premises in Ferro street where the property, forming the subject of this case, was also situated.

[12] On driving past the property, he saw a sign that the property will go on auction on 16 February 2006. A replica of this sign is exhibit "A2". It contains the defendant's "Aucor" logo at the top and the name of the defendant, Aucor (Sandton) (Pty) Ltd at the bottom. There is a photograph of the warehouse situated on the property, and interested parties are notified that the property can be viewed by appointment and that they must contact "Brian – 082 254 1192". This is Mr Brian Holburn.

[13] The plaintiff took down the details and telephoned Holburn for more information. The latter caused exhibit "A1", "A2" and "A3" to be telefaxed to the plaintiff. "A1" is a covering letter by a lady from "Aucor, Midrand", "A2" is the notice referred to and "A3" is a notice bearing the Aucor logo, referring to the "Rustenburg warehouse", and supplying details of the property and the improvements thereon. On the bottom it also has the website printed namely: www.aucor.com. The property would be sold as a "letting enterprise" because it housed a long term tenant, namely Metcash Trading Africa (Pty) Ltd, which was paying a monthly rental of some R125 000-00 at the time, which would escalate annually at 10%.

[14] Initially the plaintiff intended buying the property himself, but later he spoke to a friend, Mrs. Elmari Vogel, of a company called Tenso, a subsidiary of the eventual purchaser Savcio Holdings (Pty) Ltd ("Savcio").

[15] The plaintiff then contacted Holburn again for yet more detail whereupon the latter telefaxed the draft conditions of sale in terms of

which the seller (Micawber 321 (Pty) Ltd) would dispose of the property as a "letting enterprise". These are exhibits "A4-A12".

[16] Exhibit A4 is the covering letter and it reads as follows:

> "Dear Jaco,
>
> Please find attached conditions of sale.
>
> Below are our bank details:
>
> Aucor Trust Account
>
> FNB Sandcom Branch
>
> Branch Code: 260950
>
> Account number: 61049073713
>
> I will forward my agreement letter to you when I return to the office this afternoon.
>
> Best regards
>
> Brian Holburn

Aucor (Sandton) (Pty) Ltd

Tel: (011) 237 4402

Fax: (011) 237 4418"

It is common cause that Holburn, at all relevant times, had an office in the defendant's premises and that he had free access to the defendant's telephone and telefax facilities and made use of the defendant's administrative staff.

[17] On 17 February 2006, the day after the scheduled auction sale, the plaintiff phoned Holburn and asked him whether the property had been sold. He was told that there was no sale because the amount offered was too low.

[18] The plaintiff then contacted people at Temso to find out if that company would be interested in letting the property from him if he were to purchase same. The Temso people said they would rather buy the property themselves.

[19] Later the plaintiff received the following note from Holburn to which an addendum to the conditions of sale was attached. (Exhibits A13 and 14):

> "Dear Jaco,
>
> Please find attached addendum to the conditions of sale.
>
> Best regards
>
> Brian Holburn
> Aucor (Sandton) (Pty) Ltd
> Tel: (011) 237 4402
> Fax: (011) 237 4418."

Holburn's fax is dated 17 February 2006.

[20] On the same day Temso wrote to the plaintiff confirming an interest in buying the property for R8,47 million. Temso found the purchase more attractive because the tenant, Metcash, or "Cash 'n Carry" was

prepared to buy themselves out of the long term lease for some R2 million. This would be payable to the prospective purchaser (Temso or Savcio).

[21] Thereupon the plaintiff negotiated the "buying out" of the lease between Metcash and Savcio and confirmed, in a letter to Medcash, that the latter would address a written offer to Savcio in terms of which they would buy themselves out of the lease for R1,5 million payable over eighteen months.

It is common cause that this arrangement was duly concluded between Metcash and Savcio and that the plaintiff was the effective cause in bringing about this transaction. In the absence of the transaction between Metcash and Savcio, it is improbable that the latter would have ultimately bought the property. In any event, it is also not disputed that the plaintiff was the effective cause of the eventual successful transaction between Savcio and the seller. The plaintiff introduced Savcio to the defendant who was acting as the agent of the seller. This is not disputed. The allegation in the plea that the property was sold to

Savcio "who had been introduced to the defendant by Holburn" is untrue. It is also not in line with Holburn's own evidence.

[22] During the course of negotiating the transaction, Savcio asked for more details of the property, including plans and the like. The plaintiff conveyed this request to Holburn, who, on 17 February 2006, telefaxed the following message to the plaintiff:

> "Dear Jaco,
>
> The seller has no plans of the Rustenburg warehouse. Herewith some details for your information.
>
> Regards
> Brian."

This message was faxed on a "fax transmission" containing the Aucor logo and details of all the Aucor branches all over the country. Attached to this telefax were municipal accounts showing details of

rates and taxes, as well as a so-called "sub-divisional diagram". These are exhibits A18-A21.

[23] As a result of the plaintiff's involvement in the transaction, as described, it was arranged that Savcio would hold a board meeting on 22 February to make a final decision as to whether or not it would buy the property. The plaintiff conveyed this information to Holburn who, on 17 February 2006, sent the following telefax message to the plaintiff, also on the official fax transmission sheet carrying the Aucor label and all the other Aucor details:

> "Dear Jaco,
>
> This confirms that Aucor and yourself will receive 10% each of the net commission each plus VAT paid by the buyer as introduced by yourself. I will supply you with a more formal letter next week. Hoping all goes well on 22 February.
>
> Regards
>
> Brian"

This telefax, exhibit A22, received a great deal of attention during the trial before me. It is also common cause that Holburn never wrote the "more formal letter" the following week. Holburn never managed to explain why he did not do so.

[24] There is no evidence, of any nature, that Holburn, or anyone else on behalf of the defendant for that matter, ever told the plaintiff that Holburn was a so-called "independent estate agent practicing for his own account" as alleged in the plea and that he could not bind the defendant with regard to commission matters.

[25] The plaintiff testified that the message contained in A22 is in line with a discussion he had had earlier with Holburn, namely that each would receive 10% commission. Under "each" the plaintiff, understandably, understood Aucor and himself. No one informed him about the alleged separate arrangement between Holburn and Aucor. The 10% was understood by the plaintiff to mean 10% of the purchase price.

[26] On 23 February 2006 Mr Liebenberg of Savcio telefaxed a letter to the plaintiff confirming that the decision to purchase had been taken, and sending the plaintiff a copy of the written offer to purchase (exhibits "A23" –"A31").

"A32" is the written confirmation by Metcash addressed to Savcio about the buying out of the lease as arranged and negotiated by the plaintiff.

[27] Thereupon the plaintiff informed Holburn of the written offer and the written agreement between Savcio and Metcash and supplied Holburn with copies. The plaintiff also supplied the seller, represented by one Mr Steven Herring, with copies of these documents.

[28] It is common cause that Savcio then bought the property from Micawber for R8 250 000,00. This included an agreed commission amount of R750 000-00 which the seller then duly paid over to the defendant.

[29] On 24 March 2006 the seller, represented by Mr Herring, sent the plaintiff a letter to which an "agreement" between the seller and the defendant was attached. It is a short agreement between the seller represented by Steven Herring and the defendant, represented by James Dall. It is exhibit "A34" and "A35". It reads as follows:

> "Whereas, an Agreement of Sale of a Letting Enterprise has been concluded between Micawber 321 (Pty) Ltd and Savcio Holdings (Pty) Ltd 'Savcio' in respect of portion 1, erf 2283, Rustenburg extension 9 ('the Property') being 2 Ferro Street, Rustenburg,.
>
> Whereas further, Micawber undertakes to pay Aucor the sum or R750 000-00 excluding VAT as commission on registration of transfer of 'the Property' into the name of Savcio.
>
> Whereas further Aucor accepts that the commission of R750 000-00 is in full and final settlement of all commissions payable by Micawber to Aucor.

Whereas further Aucor undertakes to settle and pay any and all claims of commissions Mr. Jaco Naudé may have in respect of the sale of the property.

Whereas further, Aucor indemnifies Micawber of any and all claims of commission Mr Jaco Naudé may have as against Micawber." (Emphasis added.)

This agreement is dated 24 February 2006.

[30] Upon receipt of this agreement from the seller, the plaintiff, still under the impression that he and the defendant would each receive 10% of the purchase price as commission, telephoned Holburn to complain because there was only one amount of R750 000-00 payable as commission. He also enquired about the "indemnity" included in the agreement. The plaintiff then, clearly and unambiguously, testified as follows:

Holburn said that they couldn't do better than negotiating a total commission of R750 000-00. The plaintiff needn't be concerned, because the "50/50" arrangement was still in place and the

plaintiff would get his 50% upon registration of the property in the name of the buyer.

The plaintiff asked Holburn to put this in writing. The plaintiff clearly testified then that when Holburn told him that he would get 50% as explained, it was acceptable to him. He testified that he conveyed his acceptance to Holburn.

[31] The plaintiff never received the written confirmation from Holburn. He telephoned Holburn repeatedly. The latter would put the telephone down in his ear and later refused to talk to him any further.

[32] Eventually, and on 7 July 2006, almost five months after the transaction had been concluded, Holburn wrote the following note (exhibit "A36") to the plaintiff and telefaxed same to the latter on the 12th of July 2006.

"Dear Jaco,

Herewith calculations relative to property sold in Rustenburg.

Selling price (below mandate) R7 500 000-00

Aucor commission only 5% R375 000-00

Advertising costs	R88 059-56
Brian % commission	15%
	R43 041-07
Due to you (agent structure)	
20% of Brian commission	
	R8 608-21

All prices exclusive of VAT

I will phone you Tuesday 11 July 2006.

Regards

Brian Holburn

This time he did not write the note under the official Aucor logo but only on a blank piece of paper.

[33] Of course, exhibit "A36" contains false and misleading information in many respects: the purchase price was R8 250 000-00 and not R7 500 000-00, although it included the commission of R750 000-00. Aucor got 10% of the commission and not 5%. There was no evidence about the alleged "advertising costs" neither was the deduction of such costs

ever negotiated with the plaintiff as is evidenced by exhibit "A22". The whole "structure" of 15% for Holburn and 20% of that for the plaintiff was never negotiated with the plaintiff. Nothing in this document corresponds with the defendant's plea, referring to 60% for the defendant and 40% for Holburn.

[34] In discussions with Holburn, the latter often referred to Mr James Dall of Aucor as "his boss" ("sy baas"). This evidence of the plaintiff was never disputed when he was cross examined or when the other witnesses on behalf of the defendant testified. Because of this information, the plaintiff telephoned Dall and explained his dilemma to him. Dall also put down the telephone in his ear. The plaintiff thereafter repeatedly tried to get hold of Dall who ultimately said: "Stop phoning me because you are fucking annoying me." This evidence I find convincing. It has a ring of truth. In my view it is inherently improbable that the plaintiff, as I summed him up in the witness box, would have sucked this type of evidence out of his thumb. When Dall was confronted with this evidence he admitted that he was annoyed but denied having used the particular words.

[35] It was after this that the plaintiff consulted his attorney and took legal action. The plaintiff emphatically denied that there was any question of Holburn not having represented Aucor. He referred to the Aucor letterheads, telephone numbers and other detail already mentioned.

[36] The plaintiff was subjected to extensive cross-examination. In my view he was not discredited in any way whatsoever. He stuck to his evidence and made a particularly good impression as a witness. He knew nothing about the alleged "60/40%" arrangement between the defendant and Holburn. For him Holburn was Aucor and Aucor was Holburn. The significance of "A22" was that he and the defendant would each get the same percentage of the commission. This was afterwards confirmed in his verbal arrangement, *supra,* with Holburn.

[37] When it was put to the plaintiff that there was an arrangement whereby Holburn could share the latter's commission with the plaintiff, the plaintiff respondent by pointing out that if this was so, Holburn should have specified it in "A22" when he had the opportunity to do so. The plaintiff reiterated that he had made all the arrangements to make the

transaction a reality and he trusted Holburn throughout. He confirmed that Holburn never sent the "formal letter" as he promised in "A22".

He was emphatic when testifying about the agreement of "50/50" with regard to the commission of R750 000-00. About this "50/50" conversation, it was put in cross-examination that: "Holburn ontken dit". His answer was "dit het wel plaasgevind". When Holburn testified, he admitted the conversation but disputed the contents.

[38] A somewhat nonsensical proposition was also put to the plaintiff to the effect that Holburn, after all, was not convinced that the plaintiff had found and introduced the buyer. The incorrectness of this proposal was later conceded by Holburn himself. Of course, this proposition was not pleaded either. It was common cause throughout that the plaintiff had found and introduced the buyer.

[39] The interesting proposition was also put to the plaintiff that Holburn would say that he wrote "A36" "om van u ontslae te raak". My overall impression is that both Dall and Holburn tried to "get rid of the

plaintiff" after they had received the benefit of the plaintiff's introduction of the buyer.

[40] When it was put to the plaintiff in cross-examination that Holburn had no authority to bind the defendant he gave the following significant answer (paraphrased from my notes):

> "Ek stem nie saam nie. Brian Holburn was Aucor. Sy naam was op die advertensie. Ek praat met hom op Aucor se landlyn in Sandton. Alles was op Aucor briefhoofde behalwe "A36" wat lank daarna getuur is. Ek glo met opset want hulle weet hulle is verkeerd om my nie te betaal nie."

[41] After the plaintiff's case was closed, there was an application for absolution from the instance, which I refused.

[42] James Dall, was the first of the two defence witnesses. In February 2006 he was employed "at the defendant" with a title "Chief Executive – Property Division". He managed the Sandton property division.

Amongst his activities was included: "recruiting agents, finding properties for auction and doing the whole procedure."

The agent would interview the purchaser, give information and ultimately the auction would take place. The standard commission was 10% which was paid by the purchaser and not the seller. He worked on a commission basis for the defendant. When asked if he was employed by the defendant he said he was "appointed" by them. He said the agents were not employed by the defendant. Holburn was an independent "commission only" agent. If Holburn introduced a buyer, he would get 40% of the commission if he handled the sale. (But under the direction of this witness)

[43] The witness also referred to "A65" which is a calling card. It bears the Aucor logo and particulars and contains the inscription "Brian Holburn Real Estate Specialist". This visiting card also contains the Aucor telephone number and fax number. The witness testified that the agents had no authority to commit Aucor to pay commission.

[44] Significantly, when the witness testified about the written mandate, *supra*, which the defendant obtained from the seller (also exhibit "A66" – "A67") he said that it was his job to sign this mandate and "the agent has no role in this. Strangely though, it became common cause that Holburn in fact signed this particular mandate. The witness said: "This mandate may have been signed by Brian". In fact, the evidence showed that it was Holburn who signed it.

[45] The evidence of this witness about exhibits "A34" and "A35" the "written indemnity" (in favour of the seller in respect of the plaintiff's commission) was totally unsatisfactory. He said that when he signed this agreement on behalf of the defendant, Mr Herring told him that the plaintiff might bring a claim for commission. The seller did not want to pay this commission. He told the seller that he knew of no commission claim and therefore he was quite happy to accept the wording as quoted, *supra*. Holburn had not told him of any claim or any commission arrangement.

It is convenient to re-visit the essential wording of this indemnity which this witness signed on behalf of Aucor:

"Aucor undertakes to settle and pay any and all claims of commissions Mr Jaco Naudé may have in respect of the sale of the property.

Aucor indemnifies Micawber of any and all claims of commission Mr Jaco Naudé may have against Micawber."

This is in clear conflict with what was pleaded and what this witness tried to testify, namely that the Aucor commission stands untouched, and the "agent" can share his commission with a third party who may introduce a buyer but without binding Aucor in any way whatsoever.

I add that it also appears from the written mandate that it would lapse by 17:00 on 16 February 2006, so that Dall and Holburn were in a race against time to get the transaction concluded. They testified as much. Even though there was a "window" period, of seven days for the seller to accept the offer, it is clear that Dall and Holburn were in a hurry to conclude the deal. These circumstances may also have inspired Holburn to write "A22" and Dall to sign the indemnity.

[46] Dall's performance under cross-examination, particularly with regard to the indemnity, was wholly unsatisfactory. He testified that he was very closely involved with this particular transaction. He liaised with the agent and visited the seller with Holburn before they got the mandate. He looked at the figures and the reserved price. Yet, when the mandate lapsed, and Holburn came the next day to tell him that he had a buyer, he can't even remember asking Holburn how this came about. He can't remember whether he asked Holburn where he got the buyer. When Herring confronted him about the possible claim for commission he did not bother to check the origin of such commission with Holburn before signing the indemnity. If his evidence (and the plea) is to be believed that Holburn would be liable for the commission of a third party who introduced a buyer there was no logical explanation for this witness to bind Aucor to pay such commission. This question he could not answer satisfactorily. I had to caution him to stop giving a different answer every time. Thereupon he gave the following strange answer which I paraphrase from my notes:

"In a case like that, if there had been a claim where Brian Holburn had agreed to give away a share of his commission, Aucor would have paid that agent and paid the balance of 40% to Brian Holburn."

This, again, flies in the face of the plea and main version that the Aucor commission stands untouched and the agent must pay the third party from his own share.

Against this background, the witness could not or would not explain why he signed the indemnity, or, at least why he did so before establishing the true details from Holburn.

The witness was so uncooperative that I had to record that he would not answer the questions.

[47] As far as "A22" is concerned, the witness could do no better than to say that it was obviously wrong. When asked whether he had confronted Holburn with the document he said: "Yes he does not quite know why he wrote it like that". It was put to him that "A22" was used as a red

herring to get the plaintiff to divulge his information without any serious intention to compensate him afterwards. He said that he knew nothing about this document or the negotiations leading up thereto. I find this strange in the light of his earlier evidence that he was deeply involved with the whole transaction.

[48] His evidence about "A22" was completely unsatisfactory and unimpressive. The same applies to "A36". He said that he had never seen it before and that it did not make sense. He had to agree that it contained a series of false allegations. This I have dealt with.

[49] As to "A65" (the visiting card) he confirmed that Holburn was an agent of Aucor and that Holburn had access to the Aucor fax machine. He tried to draw an artificial distinction between the telefax "letterhead" and other letterheads. He tried to play down the fact that Holburn always wrote his messages to the plaintiff on the official Aucor stationery.

[50] This witness also attempted to discredit the plaintiff's evidence about the "50/50" arrangement with Holburn. He did so on the grounds that

such an arrangement would mean the Holburn would get no commission. I disagree. The fact is that on the plaintiff's version the defendant would still get R375 000-00, which it would have lost altogether, but for the effort of the plaintiff. There appears to be no reason, on the probabilities, why the defendant could not have shared this amount with Holburn, if indeed there was such a sharing arrangement in existence.

[51] For all the reasons mentioned, I found this witness to be particularly unsatisfactory and evasive. It was clear to me that he failed to take the court into his confidence.

[52] The second and last defence witness was Brian Holburn. In February 2006 he worked with Aucor (the defendant) to get properties for auction. He was paid on a "structured commission basis". In his own words, he was "employed" by Aucor for approximately eight years and the commission structure changed from time to time. In 2006 he would get 40% of the nett commission.

[53] He confirmed that he had an office in the Aucor building in Midrand at 562, 15th road. He had the facilities including the telephone, a desk and the administrative staff at his disposal. He also worked from home for his own account.

He said he never negotiated in terms of the Aucor commission share of 60%.

In my view this makes nonsense of exhibit "A22" where he wrote, in his own words:

> "Dear Jaco,
>
> This confirms that Aucor and yourself will receive 10% each of the net commission each plus Vat paid by the buyer as introduced by yourself."

Of course, he was confronted with "A22" in cross-examination and it was pointed out to him that "A22" makes no mention of the fact that he (Holburn) must pay the plaintiff's commission out of his share. His answer was:

"Yes, I wrote it in haste."

He was asked, with reference to the "60/40%" arrangement pleaded and testified about, why this was not mentioned in "A22" and where the 10% referred to by himself in "A22" came from. He gave a vague and unsatisfactory answer, referring to clause 11 of the conditions of sale which, in my view, has no bearing on the issue in question. It was put to him that he was avoiding the question. He ended up reverting to the "60/40%" arrangement and he said that he would have been obliged to give the plaintiff 10% of his share, which, according to him, would be R75 000-00. Added mathematically, this makes no sense: even if he was entitled to 40% of the gross commission of R750 000-00 (which, according to him he wasn't as it should have been the nett commission) his share would have been R300 000-00, 10% of which would have been R30 000-00.

It is fair to say that Holburn's evidence was vague, confusing and utterly unconvincing.

When he was asked what he meant by the 10% that Aucor would receive when he wrote "A22", he said that it was "badly worded".

[54] Not surprisingly, he was then confronted with exhibit "A36", which I quoted, and in respect of which I pointed out that it has no bearing whatsoever with reality neither does it accord with the pleadings or other evidence offered on behalf of the defendant. I have also pointed out that Dall had to concede that "A36" was nonsensical. Holburn said:

> "I am not 100% sure what my thinking was. The detail I cannot explain."

When it was pointed out that his statement, in "A36", that the Aucor commission was "only 5%" was a lie, he said "it was a mistake; it should read "10%".

When it was pointed out to him that his own statement that "Brian percentage commission 15%" was a lie, he said that he could not remember the structure, it was five months after the event. The 5% was

a mistake and the rest he could not remember. He was an utterly unconvincing and, in my view, an untruthful witness.

[55] At times, during cross-examination, he tried to suggest that the plaintiff did not actually introduce the buyer. Eventually he conceded that the plaintiff did exactly that.

[56] He also could not explain the indemnity signed by Dall in the agreement, exhibit "A34" and "A35". He said by then he was no longer involved in the proceedings. This, in my view, does not correspond with the general impression left by Dall, in his testimony, namely that they conducted the proceedings together.

[57] He was confronted with his repeated evidence that the plaintiff's share would have been R75 000-00, as explained, *supra,* and he was asked to explain the discrepancy between this figure and the amount of R8 608,21 which he offered the plaintiff in "A36". His answer, paraphrased from my notes what that he "was a little under duress" and that "he did not want to repeat".

[58] It was put to him that "A36" was an attempt by him to fob off the plaintiff and get rid of him. To this proposition he would not comment. In my view, this is exactly what happened. In a way, it corresponds with the evidence of Dall who said that when the plaintiff kept on trying to elicit an explanation, he, Dall, spoke to Holburn who said that he would "sort Naudé out".

[59] In cross-examination, Holburn was confronted with the evidence of the plaintiff about the actual agreement, *supra*, that the plaintiff and Aucor would each get 50% or R375 000-00 of the commission. In his evidence in chief, Holburn was silent on this issue but it was put to him in cross-examination. Paraphrased from my notes, he acknowledged the "telephone call mentioned". He said "I did not have the documents. It would have been an absurd commission. Not in terms of the telephone conversation."

It was put to him that according to his counsel he would deny that any conversation took place with the plaintiff after the latter had received "A34" and "A35". His answer was that he was "unsure". He was asked whether he had written letters of appointment from Aucor to

illustrate the commission structure of, for example, "60/40%". He confirmed that he indeed had such letters, and that the details changed from time to time over the eight year period. New documents would replace the old ones. He agreed that it would have been a simple matter to refer to those documents to support his case about the commission structure. No such documents were ever disclosed by the defendant.

[60] For the reasons I have mentioned, I considered Holburn to be a particularly unsatisfactory and evasive witness.

BRIEF REMARKS ABOUT THE LEGAL POSITION

[61] In is necessary to consider the defendant's plea to the effect that Holburn had no authority to bind the defendant company. This must be done against the background of the legal principles applicable.

[62] In support of his argument that the plaintiff had failed to prove that Holburn had the necessary authority, Mr Den Hartog referred me to *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 TPD. I was referred to the following passage at 15A-C:

"In contracting with a company the following categories of person or persons acting or purporting to act on its behalf may be encountered:

(a) The Board of Directors;

(b) The Managing Director of Chairman of the Board of Directors;

(c) Any other person or persons such as an ordinary Director or Branch Manager or Secretary."

In terms of the judgment, where someone contracts with a company through the medium of the persons referred to in (a) and (b), the company will usually be bound because these persons or bodies, will, unless the articles of association decree otherwise, be taken to have authority in one form or another to bind the company in all matters affecting it.

It was testified on behalf of the defendant that Holburn was not a director. There was no evidence in rebuttal available to the plaintiff. No argument was advanced about whether or not Holburn was authorised by the defendant company's articles of association to bind the company in this regard.

The main thrust of Mr Den Hartog's argument, if I understood it correctly, was that the position is different when one is contracting with someone falling in category (c), *supra*. The relevant passage at 15D-F reads as follows:

> "The same does not apply where the company is represented by the category of person referred to in paragraph 4(c) above. Here a third party is not automatically entitled to assume that such person has authority and the company is not precluded from repudiating liability on the ground that he had no authority to bind it."

It is stated in the judgment, at 15F-H, that the plaintiff, in a case involving category (c), must prove that the "director or other person

purporting to represent the company had authority". It was argued on behalf of the defendant that the plaintiff had failed to discharge this *onus.*

[63] Mr Van der Walt, in his closing address, relied on the case of *Wolpert v Uitzigt Properties (Pty) Ltd and Others* 1961 (2) SA 257 WLD.

In that case, the learned judge also dealt with the categories or "agencies" of the company which a party generally deals with when contracting with a company. The third category is described as follows at 266D-H which is the passage relied upon by Mr Van der Walt:

> "(3) Any person or persons such as an ordinary Director, a Branch Manager, a Secretary, a Committee of Directors or a combination of a Director or Secretary, who have express or implied authority. Such implied authority can be inferred, when the official acting in behalf of the company purports to exercise an authority which that type of official usually has, even thought the official is

exceeding his actual authority (*Halsbury* 3rd ed., vol. 6 page 431) but the company would not be bound:

> (i) if the person so acting acted beyond their usual authority. If they did, the third party may still be protected under (4) below. (my note: (4) refers to the category ostensible authority flowing from estoppel as a result of representations made by the company. As indicated, *supra,* a reply based on estoppel was abandoned by the plaintiff. It should also be borne in mind that the estoppel generally comes into play when the plaintiff relies on representations made by the company that the agent had authority, whereas, in the present instance, the case is based more on the conduct of Holburn and the plaintiff relies, not on ostensible authority, but on express or implied authority.)
>
> (ii) if the party knew that the official was acting beyond his actual authority …

(iii) if the circumstances are such as to put him on enquiry;

(iv) if the registered documents of the company make it clear that the official concerned has not actual authority.

Under this heading, it would, in my opinion be irrelevant whether the third party knew the contents of the registered documents of the company or not. See *Gower* 2nd ed. Pages 146 and 151, and Palmer *Company Law* 17th ed. page 37.)"

[64] It may be noted that *Wolpert* was quoted with approval and discussed in *Tuckers* at 14B-15H. *Wolpert* was discussed with other relevant decisions on the subject.

[65] In *Tuckers*, at 14D-E, the learned judge also referred to section 69 of the Companies Act, No 61 of 1973 which reads as follows:

"69(1) Contracts on behalf of a company may be made as follows:

(a) any contract which if made between individual persons would by law be required to be in writing …

(b) any contract which, if made between individual persons would by law be valid though made orally only and not reduced to writing, may be made orally on behalf of the company by any person acting under its authority, express or implied, and may in the same manner be varied or discharged." (Emphasis added.)

[66] It therefore appears from section 69 that the company may be bound by a person with express authority or implied authority or in a case of ostensible authority. The latter (estoppel) situation no longer applies and the question of express authority does not appear to apply because

express authority "may be given by a company's articles of association or by resolution of the members or board of directors" – *Tuckers* at 14F. No evidence in this regard is available. That leaves only the question of implied authority. In *Tuckers* at 14F-H, the learned judge, referring to *Wolpert* at 266, the passage relied upon by Mr. Van der Walt, said the following:

> "(b) Implied authority exists 'when the official acting on behalf of the company purports to exercise an authority which that type of official usually has, even though the official is exceeding his actual authority'. (Per Claasen, J in *Wolpert's* case, *supra* at 266.)

To the same effect is the following statement by De Villiers J in *Broderick Motors Distributors (Pty) Ltd v Beyers* 1968 (2) SA 1 (O) at 4, where the following is stated:

> 'The rule applicable is set out in the *Law of Agency in South Africa* by De Villiers and Macintosh, 2nd ed. page 56: 'where an agent is employed to act in the course of his

trade, business or profession as agent, he has implied authority to bind his principal in regard to matters which are necessary to enable him to perform the ordinary duties incidental to his position as agent, or which form part of the ordinary course of business transacted by that agent.' '

(See, too *Smith v Mouton* 1977 (3) SA 9 W at 18) or it may be inferred from the acquiescence of the directors in a course of dealing inside the company itself ..."

[67] In *Smith v Mouton*, *supra,* at 18F, the following passage is also quoted with approval from McKenzie, The Law of Building Contracts and Arbitration in South Africa, 2nd ed. page 67:

"In addition to any express authority which an architect may have been given by his employer, he has implied authority to do whatever is normally and reasonably incidental to the performance of any act which he has been employed to do in the course of his profession."

I am alive to the fact that this example of implied authority may not necessarily involve someone acting on behalf of a company as such.

CONCLUSIONARY REMARKS

[68] It appears that the evidence offered on behalf of the defendant is not in line with the defendant's plea in the following respects:

Holburn was not "an independent estate agent practising for his own account". On his own evidence he was "employed" by the defendant. The undisputed evidence is that he described Dall as his boss ("sy baas"). He said he had letters of appointment covering the eight year period and illustrating his commission structure. The defendant failed to make discovery of these letters. Dall could also not explain why these letters were not disclosed although he testified that they existed.

The purchaser, Savcio, was also not introduced to the defendant by Holburn as pleaded. It is quite clear from the evidence, and was conceded in cross-examination, that the buyer was introduced by the plaintiff, and that the latter was the effective cause of the whole

transaction including the arrangements to buy out the Metcash lease, which, in itself, facilitated the eventual purchase of the property.

[69] I am of the view that the plaintiff succeeded to prove, on a balance of probabilities, that implied authority on the part of Holburn existed as the facts correspond with the example quoted in *Tuckers* at 14H:

> "Where an agent is employed to act in the course of his trade, business or profession as agent, he has implied authority to bind his principal in regard to matters which are necessary to enable him to perform the ordinary duties incidental to his position as agent, or which form part of the ordinary course of business transacted by that agent":
>
> 1. The company may be bound by statute in the case of implied authority on the strength of the provisions of section 69(1)(b), *supra;*
>
> 2. Holburn stated that he had been employed by the company for eight years.

3. He had a visiting card, disclosed by the defendant, describing him as "real estate specialist" under the Aucor logo with the Aucor telephone numbers and address particulars.

4. His name appeared on the advertisement outside the premises to be auctioned as the contact person. The advertisement is emblazoned with the Aucor logo and also carries the name of the defendant company at the bottom.

5. When contacted by the plaintiff as a result of the advertisement he wrote to the plaintiff:

> "Dear Jaco,
>
> … Below are our bank details, I will forward my agreement letter to you when I return to the office this afternoon.

Best regards

Brian Holburn

Aucor (Sandton) Pty Ltd …" (See exhibit "A4".)

6. He corresponded with the plaintiff on a number of occasions, already described earlier in this judgment, under the Aucor logo.

7. He was "employed to act in the course of his trade, business or profession as agent …" in the words of the learned author quoted in the example in *Tuckers* at 14H *supra* and this is confirmed by the evidence of Dall, *supra*. It also appears from the visiting card, "A65".

8. Without question, in dealing with the plaintiff, he busied himself "in regard to matters which are necessary to enable him to perform the ordinary duties incidental to his position as agent, or which form part of the ordinary

course of business transacted by that agent." - see the example quoted earlier.

[70] In his own handwriting, he emphatically wrote on "A22" on the Aucor logo that the plaintiff and Aucor would each receive the same percentage commission. He never testified that he was not authorised to make that statement. Dall did not testify to that effect either.

[71] He signed the written mandate in terms of which the seller authorised the defendant company to sell the property – exhibit "A67".

[72] Where he was intimately involved in the transaction with Dall, the latter was prepared to sign the indemnity, "A34" and "A35", undertaking to pay the plaintiff's commission, if any.

Indeed, in the light of this indemnity signed by Dall, one may well be justified in concluding that Holburn had express authority to bind the company rather than merely implied authority. Nevertheless, on the acceptance that the former may not have been proved on a balance of

probabilities, I am of the view that the latter, namely implied authority, was proved, for all the reasons mentioned.

[73] The agreement relied upon by the plaintiff was proved on the strength on the plaintiff's clear and impressive evidence. The evidence offered in rebuttal was vague and unsatisfactory. The reasons for this conclusion have been illustrated.

[74] The version of the plaintiff is supported by the probabilities: he is an experienced businessman who went to great lengths to put this transaction together in order to earn a substantial amount in commission. He would not have disclosed the necessary details to the defendant without a firm undertaking that he would earn the money. There is nothing improbable in the agreement relied upon as it was formulated during the final telephonic discussion with Holburn: Holburn and Dall still managed to earn an amount of R375 000-00 without effectively lifting a finger. On the probabilities, they would have been happy to enter into such an agreement, particularly in view of the fact that the seven day window period was about to expire.

FOR THE PLAINTIFF: ADV. P J VAN DER WALT
INSTRUCTED BY: F&F VAN DER WALT INC
FOR THE DEFENDANT: ADV DEN HARTOG
INSTRUCTED BY: HARVEY NOSSEL