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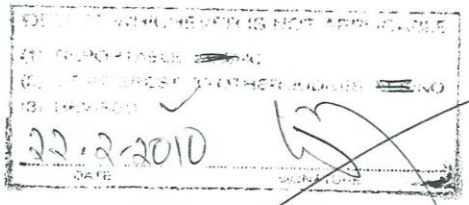
IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)



22/02/2010

CASE NO: 845/06

In the matter between

JH1 REAL ESTATE LIMITED PLAINTIFF

And

GROUP 6 PROPERTY HOLDINGS (PTY) LTD DEFENDANT

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The Plaintiff, an estate agent, instituted an action against the Defendant, a property owning company, for payment of the sum of R169 684.66 for commission that it earned when the Defendant and Nanoteq (Pty) Ltd ("Nanoteq) concluded a written agreement of lease ("the lease") on or about 10 June 2005. The Plaintiff, in the action, also claimed interest and costs of suit.

[2] The Defendant on various grounds, denied liability. The Defendant denied that the Plaintiff had introduced 1 Peter Street, Highveld Techno Park, Centurion ("the property") to Mr Marais ("Marais") of Nanoteq and that the Plaintiff had been the effective cause of the conclusion of the lease.

THE FACTS

[3] The Facts of the case are embodied in the evidence of Ms Azley Loots ("Loots"), Mr Eugene Van Niekerk ("Van Niekerk"), Mr Allan Rodney Luntz ("Luntz"), Ms Corney Van Niekerk ("Corney") and Ms Avril Avant (" Avant") who testified on behalf of the Plaintiff and Mr Russell Eagan ("Eagan") and Mr Marais ("Marais") who testified on behalf for the Defendant.

THE DISPUTES

[4] Having regard to the admissions, the evidence of Luntz, the concessions of Eagan and the common cause facts, the remaining disputes are whether the Plaintiff

introduced Nanoteq to the Defendant's property and whether the Plaintiff was the effective cause of the lease.

COMMON CAUSING FACTS

[5] The common cause Facts are the following:

5.1 That the Plaintiff is an estate agent which, at all relevant times hereto, was the holder of a valid fidelity fund certificate issued in terms of section 26 (a) of Act 112 of 1976 and which had fidelity insurance in terms of section 26 (b) of Act 112 of 1976.

5.2 That the Defendant mandated the Plaintiff to find a tenant for the property.

5.3 That the lease was concluded between Nanoteq and the Defendant on 10 June 2005.

5.4 The citation of the parties.

5.5 That the court has jurisdiction.

5.6 That the Plaintiff successfully faxed the office accommodation form on page 9 of Bundle C to Nanoteq

5.7 That the Plaintiff successfully faxed the Plaintiffs letter of introduction dated 14 April 2005 to the Defendant

5.8 That the Defendant received the Plaintiffs letter of 17 May 2005

5.9 That the e-mail addressed to Marais appearing on page 13 of Bundle C was received by Nanoteq

5.10 That the representatives of Nanoteq including Marais signed the Plaintiff's offer to lease appearing on pages 59-63 of Bundle C

5.11 That at all relevant times Eagan represented the Defendant.

5.13 That the Plaintiff's letters dated 17 May 2005, 1, 3 and 6 June 2005 were received by the Defendant.

PLAINTIFF'S CASE

[6] In supporting its case, 5 witnesses testified on behalf of the Plaintiff.

6.1 MS AZLEY LOOTS

She has been employed as an estate agent by the Plaintiff for more than 5 years. She leases and sells industrial and commercial properties. She represented Plaintiff when she was mandated to find a tenant for the Defendant's property by Eagan who, at the time, represented the Defendant. She viewed the property and listed it on the Plaintiff's database. She met Eagan about three times. The

Plaintiff's standard terms of commission were not discussed with Eagan. She assumed that Eagan was well aware of them. She took two potential clients to view the property but this did not result in the conclusion of any lease. Eagan made arrangements to provide her with a copy of the floor plans for the property. He did not accept Kagisano Financial Services (Pty) Ltd ("Kagisano")'s offer to lease the property as Avant's client (which she later discovered was Nanoteq) had wanted to sign a 3 year lease.

6.2 MR EUGENE VAN NIEKERK

He is the CEO of Credit U (Pty) Ltd and was at the time employed by Kagisano. He dealt with Loots when Kagisano made an offer to lease the Defendant's property which Egan did not accept. He was at a meeting which was attended by Loots and Eagan. Eagan, at the meeting, never showed any

difficulty with clause 14 of the offer to lease, which concerned the Plaintiff's commission.

6.3 MR ALLAN RODNEY LUNTZ

His evidence is not controverted. He is an attorney by profession working as a commercial property consultant with 17 years experience. He has worked for a number of companies, *inter alia,* the Plaintiff. He is currently working for the Alliance Group where he regards himself as an expert in their leasing division. He testified about what estate agents do upon receiving verbal and written mandates. He testified that there is no difference between the commission structure of the Institute of Realtors of South Africa and SAPOA. He regarded the commission claimed by the Plaintiff in

paragraph 10 of the particulars of claim as fair, reasonable and market related.

6.3 MS CORNEY VAN NIEKERK

She, during 2005, was employed by the Plaintiff as personal assistant to Avant, Loots and Mr Moletsane. She sent and received the Plaintiff's faxes and e-mails. On 14 April 2005 she successfully faxed an accommodation form appearing on page 9 of Bundle C to Nanoteq. She again, on 14 April 2005 successfully faxed a letter of introduction to the Defendant appearing on page 7 of Bundle C.

She successfully faxed the Plaintiff's letters dated 17 May 2005, 1, 3 and 6 June 2005 to the Defendant. She, at the request of Avant, on 26 May 2005, successfully sent an e-mail appearing on page 13 of Bundle C to Marais. The Plaintiff's offer to lease on page 14 of Bundle C was an attachment to the e-mail.

6.4 MS AVRIL AVANT

She is a commercial property broker in the employ of the Plaintiff since 1 May 2001. She confirms that the Defendant, represented by Eagan, mandated the Plaintiff to find a tenant for its property. Eagan, on 29 April 2005, telephonically, requested her to find a tenant for the same property giving her the relevant information and his cellular phone number. The Plaintiff's data base also had the required information as the listing had been done by Loots. She started dealing with Marais on 13 or 14 April 2005. She faxed to him an office accommodation form appearing on page 9 of bundle C. Marais represented Nanoteq. The Defendant's property is the second on the office accommodation form. Marais never indicated to her that he had been familiar with the Defendant's property on the form or that Eagan had been interested in the property.

Marais, at the time, never told her that he had known Eagan or that he had spoken to Eagan about the property. She determined Nanoteq's interest in the three properties and then caused letters of introduction to be sent out to the lessors of the buildings. A letter of introduction on page 7 of Bundle C was sent to the Defendant by Corne. She took Marais, Mr Mike Venter and Mr Pieter Steenkamp to view Regency Court, the first property on the office accommodation form. No lease was concluded. She took Marais to view the property on 13 May 2005 after the Regency Court deal had fallen through. She testified that she had seven or eight telephone conversations with Eagan after the letter of introduction had been faxed to the Defendant. Eagan neither commented on the letter of introduction nor disputed its contents. He did not respond to the letter in writing either. Directed by Eagan,

and at her request, she fetched the floor plans of the property from Mr Hein Viviers ("Viviers") in Pretoria North and handed them to Marais for purposes of performing a space planning exercise which was done. Eagan specifically asked her to submit Nanoteq's offer to lease before 27 May 2005 as another offer to lease, already submitted, would expire on 27 May 2005. Eagan was referring to the Kagisano offer to lease. A letter, addressed to Eagan, on page 11 of Bundle C was successfully faxed to the Defendant on 17 May 2005. The letter reads:

"With reference to our correspondence dated 14 April 2005 we hereby confirm that our client, Nanoteq represented by Mr Mike Venter (CEO) and Mr Johan Marais, are seriously considering occupying the above premises.

They wish to view the building this afternoon again. As soon as a (sic) time has been confirmed, we will let you know."

She testified that Eagan, during the telephone conversations she had with him, never disputed that Nanoteq was the Plaintiff's client or that Plaintiff had introduced Natoteq to the Defendant's property. She confirmed that an offer to lease the Defendant's property was successfully faxed to Marais on 26 May 2005. This had been pursuant to Marais' request for such an offer to lease made by him on 24 May 2005. The offer to lease is on page 14 of Bundle C. Nanoteq, duly represented, signed the offer to lease seen on pages 59 – 63 of Bundle C. The Defendant's acceptance of offer on pages 113 and 49 of Bundle C, according to her, was signed by Eagan and Marais a day after Nanoteq signed the Plaintiff's offer to lease. The lease concluded by the Defendant

and Nanoteq appears on pages 64 – 80 of Bundle C. Before signing, Marais asked her if he could and she told him that he could, on condition that the Plaintiff still would receive the commission to which it was entitled. This, according to her, occurs where parties amend some of the terms and conditions of the offer to lease. She specifically testified that at no stage, when she dealt with Marais and Eagan, did Marais speak about Eagan and vice versa.

[7] Marais and Eagan were the only witnesses who testified on behalf of the Defendant.

7.1 MR R. EAGAN

He represented the Defendant. He testified that he had never seen the letter of introduction dated 14 April 2005. It was not denied that such letter had been successfully faxed to the Defendant. The Defendant, according to him, had in the past had

very little problems in not receiving faxes sent through to the Defendant's offices. It is common cause that the Defendant received Plaintiff's letter dated 17 May 2005. The letter confirms that:

7.1.1 the letter of introduction had been faxed to the Defendant on 14 April 2005

7.1.2 Nanoteq is Plaintiff's client

7.1.3 Nanoteq, at the time, had been seriously considering occupying the Defendant's property.

7.1.4 Nanoteq's representatives had viewed the property

7.1.5 they again had wanted to view the property

Eagan orally disputed the contents of the letter of introduction and did not do so in writing. He conceded that the Defendant would be liable to pay the Plaintiff's commission if it was found that the Plaintiff had in fact introduced Nanoteq to the Defendant's property. This, notwithstanding, Eagan never disputed the contents of

the letter of 17 May 2005 in writing. The Defendant did not respond in writing to the Plaintiff's letters of 1 and 3 June 2005. In cross examination, Eagan testified that once the name of the property, address of the property, the size of the property and the rental per square metre are provided to the prospective tenant the introduction is successful. He regarded the introduction as valid even if half the information referred to above was provided. Eagan testified that he had provided the relevant information to Marais of Nanoteq on 11 or 12 May 2005. Eagan testified that Nanoteq accepted the Defendant's offer to lease on 27 May 2005. The relevant document is found on page 49 of Bundle C. Shown that the first sentence thereof made no sense unless it referred to the offer to lease prepared by the Plaintiff, Eagan furnished unsatisfactory answers ending up contradicting himself. He was shown that he could not have accepted 'our offer to lease' as that would not make sense either. He conceded that the tariffs of SAPOA constituted fair, reasonable and market related commission.

He could not explain why the services of an estate agent were necessary if the Defendant's property 'sold itself'. He further conceded that if Marais had read the Plaintiff's office accommodation form, then and in that event, the Plaintiff had in fact introduced the Defendant's property to Nanoteq. He changed his testimony to say that even if that was the case, that would not amount to a valid introduction without him having been notified of the contents of the document. This, according to Mr Du Plessis, could not hold any water as Eagan on 3 or 4 April 2005 had specifically mandated the Plaintiff to find a tenant for the Defendant's property. He later conceded that, in that event, it was unnecessary for the Plaintiff to notify him regarding all of the information that the Plaintiff had provided to the potential tenants. This would also include the time when Avant provided the necessary information of the Defendant's property to Nanoteq. Mr Du Plessis's submission, in my view, has merit. Eagan testified that he had introduced the property to Nanoteq on 11 or 12 May 2005. Forgetting about this piece of

evidence, he, in cross examination conceded that Nanoteq's representatives had not yet had access to the Defendant's property on 11 or 12 May 2005. This means that they had not yet viewed the property. Mr Du Plessis validly asked how Eagan could have introduced the Defendant's property to Nanoteq which had not even viewed the property. Eagan conceded that he had not even informed Marais about the unrestricted access which Nanoteq was said to have to the Defendant's property. On his version, he had never accompanied any of Nanoteq's representative to the Defendant's property until after 27 May 2005 which was after the Defendant's said offer of acceptance was signed. Eagan admitted knowing most of the estate agents in the area of the Defendant's property. Eagan testified that the Plaintiff had never forwarded its commission structure to him. This led to Mr Du Plessis wanting to know why he had not then made a follow up. This, according to Mr Du Plessis, was because the Plaintiff had already sent its commission structure to the Defendant on 14 April 2005.

One may not blame him for asking such a question. Eagan, according to his testimony, knew Nanoteq through an estate agent who called and gave him Nanoteq's details. The fact that this estate agent was not called as a witness by the Defendant, according to Mr Du Plessis, is indicative of the fact that he, in fact, had obtained Nanoteq's details from the letter of introduction that was faxed to the Defendant on 14 April 2005. Mr Du Plessis found Eagan's conduct a little surprising when he, after the Plaintiff's letter of introduction together with other documents had been resent to the Defendant's offices, did not enquire from the Defendant's personnel whether or not they had seen the Plaintiff's letter of introduction before. One would, in deed, expect Eagan to do that. Eagan confirmed the collection of the floor plans from Viviers. It was Eagan's testimony that he had not looked at the offer to lease prepared by the Plaintiff. This, Mr Du Plessis, found highly improbable. This is, in fact, so if one has regard to the fact that the Defendant's offer to lease in Bundle C on page 49 is drafted in the same

sequence as the offer to lease that the Plaintiff prepared. I find it strange that Marais would provide Eagan with the offer to lease prepared by the Plaintiff which Eagan would not be eager to look at. It is important to remember that Eagan, on his version, took Nanoteq's representatives to view the Defendant's property after acceptance of the offer to lease on page 49 of Bundle C was signed. Incidentally that happened after the offer to lease prepared by the Plaintiff was signed by the representatives of Nanoteq.

[8] MR MARAIS

His testimony is briefly that he was introduced to the Defendant's property by Eagan and not by the Plaintiff. The Plaintiff was, therefore, not, entitled to any estate agent's commission. Marais testified that he would not sign a document which contained incorrect information. He would also not sign a document unless Nanoteq was

bound thereby. This, according to Mr Du Plessis, begs the questions:

1. Why Avant would accompany him to the Defendant's property if the Plaintiff was not entitled to its commission.

2. Why Nanoteq would sign the offer to lease prepared by the Plaintiff which embodied clause 14 which deals with Plaintiff's commission if the Defendant was not liable to pay the Plaintiff's commission which the Plaintiff is entitled to. These questions, in the circumstances of the present matter, are valid and justified.

He, like Eagan, experienced problems when referred to the Defendant's acceptance of offer to lease appearing on page 49. This resulted from his testimony that the Defendant and Nanoteq had concluded the lease without signing an offer to lease. He, as a result, testified that the reference to 'your offer to lease' had been incorporated due to an oversight. He testified that he did not know

how estate agents operated. He changed the version and testified that he was able to testify in great detail about the operation of the estate agent's database systems because he knew how estate agents operated and functioned thereby contradicting himself. Marais was unable to dispute that he might have read the Plaintiff's office accommodation form on 14 April 2005 which, according to Mr Du Plessis, meant that the information on the form could have been provided to Nanoteq by the Plaintiff on 14 April 2005. This reasoning is sound.

THE LAW

[9] Usually the parties determine their duties and obligations, as well as their entitlements in their written agreements. There are, of course, instances, where their agreements are oral in nature. For the estate agent to be entitled to a commission the following requirements must be met;

1. There must exist a mandate for the estate agent to conclude transactions on behalf of the principal.
2. The estate agent must act according to the terms and conditions of the mandate to be entitled to the commission.
3. The action of the estate agent must result in a binding agreement between the parties in question.
4. The estate agent must be the effective cause of the transaction. (See in this regard *Mackie v Whyte and Turpin Ltd 1923 TPD 347 at 348*)

Should a new factor which is not of the making of the Agent intervene and contribute to the conclusion of the lease the question that should be asked in determining whether the agent should be entitled to the commission is whether or not the new factor outweighed the effect of the introduction in bringing about the lease. If the introduction was overridingly effective then the agent is

entitled to the commission (See *Aida Real Estate Ltd v Lipschitz 1971 (3) S A 871 (W) at 874*).

The estate agent bears the onus throughout to prove that he was the effective cause of the agreement (See *Wakefield & Sons (Pty) Ltd v Anderson 1965 (4) S A 453 (N) at 455; Barnard & Parry Ltd v Strydom 1946 AD 931 and Lombard v Reed 1948 (1) S A 30 (T).)*

[10] Reverting to the facts of the case in an endeavour to resolve the disputes, one needs to have regard to what Nienaber JA, said in *Stellenbosch Farmers' Winery Group Ltd & Another v Martel ET CIE & Others 2003 (1) S A 11 (SCA).* To come to a conclusion on the disputed issues, he said,

"a court must make findings on

(a) the credibility of the various factual witnesses,

(b) *their reliability, and*

(c) *the probabilities."*

Proceeding, Nienaber J A said:

"As to (a), the courts' finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v), on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this

necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

Coming to the Plaintiff's and the Defendant's witnesses, the following is noteworthy. The evidence needs to be considered in its entirety for the court to arrive at a balanced and a value judgment.

PLAINTIFF'S WITNESSES

[11] They testified basing their testimony on the documents that the court had been furnished with. These are:

11.1 the letter of introduction

11.2 the office accommodation form

11.3 the Plaintiff's letter addressed to the Defendant dated 17 May 2005

11.4 the e-mail dated 26 May 2007 addressed to Marais by Corne van Niekerk appearing on page 13 of Bundle C.

11.5 the unsigned Plaintiff's offer to lease on pages 14 – 18 of Bundle C, and

11.6 the Plaintiff's letters to the Defendant dated 1 and 3 June 2005

11.7 the offer to lease prepared by the Plaintiff found on pages 59 – 63 of Bundle C

11.8 the Defendant's acceptance of the offer to lease found on pages 49 of Bundle C

11.9 Marais' e-mail statement on page 52 of Bundle C

11.10 the signed lease agreement concluded between the Defendant and Nanoteq on pages 64 – 80 of Bundle C

THE DOCUMENTS AND WITNESSES

[12]

12.1 Avant testified about the lease that Eagan told her was due to expire on 26 May 2005. This is the Kagisano lease which expired on 26 May 2005

12.2 The office accommodation form that Avant testified about that she said was sent to Marais early in April 2005 is found on page 9

of Bundle C. This is the document that is said to have been successfully faxed to Marais.

12.3 The document that was successfully faxed to the respective landlords is the letter of introduction on page 7 of Bundle C.

12.4 Avant further testified about Nanoteq's interest in the Defendant's property which she telephonically discussed with Eagan. The letter to the Defendant dated 17 May 2005 supports this. The document has already been referred to. The letter was received by the Defendant.

12.5 The letter of 17 May 2005, the letter of introduction and the office accommodation form were drafted in the normal course of business when, according to Mr Du Plessis, no litigation between the parties was anticipated. This appears to be correct. No ulterior motive was shown or proved in the writing of the documents.

12.6 The document that Avant said was requested by Marais exists and was signed by him representing Nanoteq. Marais confirms this. The e-mail on page 13 of Bundle C also confirms this.

12.7 That Avant played a major role in this matter, according to Mr Du Plessis, is borne out by Marais signing the offer to lease, prepared by the Plaintiff. He signed, according to Mr Du Plessis, accepting the contents of clause 14 which reads:

"On acceptance of this offer, JHI Real Estate Limited shall be deemed to have earned commission in accordance with the tariff recommended from time to time by the South African Property Owners Association (SAPOA). Such commission becomes payable by the Landlord on signature of the Lease Agreement

by the parties hereto, or occupation of the Premises being given to the Tenant, whichever is the earlier".

12.8 Mr Du Plessis submitted that Marais would not have signed the offer to lease, if indeed, the Plaintiff had not been entitled to its commission.

THE DEFENDATS CASE

[13] Mr Clavier, on behalf of the Defendant, submitted that Eagan had not received the Plaintiffs letter of introduction. The difficulty with the submission, as Mr Du Plessis correctly pointed out, is that this appears to be the only document that the Defendant never received as all the others were received. The other problem is that it is not denied that the document was successfully faxed to the Defendant's offices as shown by the fax activity

report on page 8 of Bundle C. the allegations of the Plaintiff's letter faxed to the Defendant dated 17 May 2005 were never disputed in writing when one would have expected Eagan to have done so. This, notwithstanding the fact that Eagan was aware that the Defendant would have to pay the Plaintiff's commission in the event that it was found that the Plaintiff had, in fact, introduced Nanoteq to the Defendant's property. Eagan's concessions in no way help the Defendant as they instead bolster the Plaintiff's case. This has been demonstrated above. Clearly Eagan contradicted himself to a point where it became clear that his version was improbable. He, when in a tight corner, under cross examination produced absurd answers. The aspect of the Defendant's acceptance of Nanoteq's offer to lease and the problems that it created for Egan when trying to give meaning thereto is one example. He claims to have introduced Nanoteq to the Defendant's property on 11 or 12 May 2005 when, on his own version that cannot be correct. He obviously contradicted himself on this aspect

as well. Having regard to the fact that, he testified that Nanoteq's representatives, at the time, had not even viewed the property and that they were not even aware that they at the time, had had unrestricted access to the Defendant's property, his version of introducing Nanoteq to the property, cannot be correct.

Marais and Eagan contradicted each other very badly. Eagan testified that Marais had told him that the Plaintiff had not introduced Nanoteq to the Defendant's property and that it had been Eagan who, in fact, had done the introduction. Marais disagreed adding that Eagan had only provided him with information about the Defendant's property when they discussed telephonically on 17 May 2005. This is a very serious contradiction. Eagan testified that Marais had told him that Nanoteq had not been interested in the Regency Court building. This, Marais denied adding that Eagan's testimony that Nanoteq had deliberately put in a low offer had been incorrect.

Eagan, under cross examination, testified that the offer to lease referred to in the document on page 49 of Bundle C was not the offer to lease prepared by the Plaintiff. Marais, instead, under cross examination conceded that the document referred to therein was, in fact the offer to lease prepared by the Plaintiff. Asked by the court, Eagan testified that the Defendant and not Nanoteq, had presented the offer to lease to Nanoteq. Marais did not agree that Nanoteq knew by 17 May 2005 that it would lease the Defendant's property.

Marais testified that during his first conversation with Egan, Eagan only gave him the size of the property thereby contradicting Eagan who had testified that he had given Marais all the relevant information of the Defendant's property. Marais, at the time, had not been given any other details of the property as Nanoteq had still been interested in the Regency Court Building.

What is particularly strange and intriguing is that Eagan testified that Marais had told him during their telephone

discussion of 17 May 2005 that he (Eagan) had introduced Nanoteq to the Defendant's property and that Avant had introduced him to the Regency Court building. Marais further told Eagan that he had told Avant not to show him any further buildings as Eagan had introduced him to the Defendant's property. Marais denied this and said that Eagan had never discussed the Plaintiff's involvement with him. Marais only became aware of the dispute between the Plaintiff and the Defendant on or about 9 June 2005.

CREDIBILITY

[14] In cross examination, Mr Marais conceded that Eagan had discussed some of the testimony that he (Eagan) had tendered with him. He stopped Eagan who had intended discussing about the telephone discussion that they had had. This did not go down well with Mr Du Plessis who correctly pointed out that one would never know what Egan and Marais had, in fact, discussed. This, according

to Mr Du Plessis, placed the evidence of the two in doubt. This kind of behaviour is indeed, worrisome.

Mr Du Plessis found some of the testimony of Eagan and Marais unsatisfactory. Mr Du Plessis submitted that Egan and Marais could not give direct and definite answers to questions. Evidence has demonstrated this. It is, indeed, not clear how and why Eagan would receive all the other relevant documents but not the Plaintiff's letter of introduction of 14 April 2005. He provided no acceptable answer to the questions. Marais's testimony is that he may and may not have read the Plaintiff's office accommodation form on 14 April 2005. Marais could not explain why the offer to lease prepared by the Plaintiff was used without removing the Plaintiff's logo, Plaintiff's name, Avant's name and clause 14 which deals with the Plaintiff's commission. He ended up giving absurd and ridiculous answers. There was no acceptable answer forthcoming to the question why they could sign the offer to lease well aware of what it said especially while the

offer to lease dealt with the commission which they knew the Plaintiff had not been entitled to.

Eagan could not tell the court why he did not respond in writing to the serious allegations relating to the involvement of the Plaintiff in the introduction of Nanoteq to the Defendant's property. The Plaintiff's letter of 17 May 2005 to the Defendant specifically stated that Nanoteq had been the Plaintiff's client. The answer was, in deed, not helpful. Both Eagan and Marais could not give a plausible answer to what the first sentence of the document on page 49 of Bundle C meant. They substituted words ending up telling the court that the document was what it looked like because of an oversight. Aside the fact that the answers were intriguing they were also absurd and unhelpful.

[15] Mr Du Plessis submitted that the Defendant's case is tainted with improbabilities. This seems to be the case.

Having regard to the fact that the Defendant received the other documents, it is highly unlikely and improbable that it did not receive the letter of introduction of 14 April 2005 as well as the office accommodation form. It is, as Mr Du Plessis correctly submitted, highly unlikely and improbable that the offer to lease referred to in the first sentence of the Defendant's acceptance of offer to lease on page 49 of Bundle C is not the Plaintiff's offer to lease that was sent to Marais. Marais and Eagan tried to run away from the fact that the offer to lease therein referred to is the offer to lease prepared by the Plaintiff. They, however, failed dismally ending up entangled in a web of untruths. Eagan testified that he could not pick up the so-called mistake. Indeed, the discrepancy has left behind traces of incredibility. As Mr Du Plessis correctly submitted, it is highly improbable that both Egan and Marais could have missed such a glaring mistake. The information listed in the document follows the sequence of the information in the offer to lease prepared by the Plaintiff. This, according to Mr Du Plessis, confirms that

the offer to lease referred to in the document on pages 49 and 59 of Bundle C is the offer to lease that the Plaintiff prepared. Told that this is in fact the case Marais testified that they had merely used the offer to lease as a pro forma document. Mr Du Plessis submitted that that could not be right considering the fact that information such as the Plaintiff's logo; Avant's name; the Plaintiff's address and telephone numbers as well as clause 14 dealing with the Plaintiff's commission had not been deleted. The submission has merit.

It is understandable why Marais would, all of a sudden, want to be sympathetic towards Avant talking of 'striking a deal' with Eagan regarding commission when the Plaintiff, according to him and Marais, had not earned the commission which Marais would, in any event, not share with the state agent who had not earned it. Having regard to the contradictory evidence of Marais and Eagan it is highly unlikely and improbable that Marais would have considered and taken their conversation of 17 May 2005 as the introduction to the Defendant's property.

Nanoteq accepted the Defendant's offer to lease on 27 May 2005. Eagan under cross examination testified that he had taken Marais to the Defendant's property after 27 May 2005. This is, indeed, absurd in that Nanoteq could not have accepted the Defendant's offer to lease and viewed the property thereafter. This, in itself, is highly improbable.

Having regard to the evidence in its entirety, Mr Du Plessis asked himself why Marais and Eagan could behave in the manner that they did. He then submitted that the Defendant would eventually not pay the Plaintiff's commission while Nanoteq would also benefit in that the deposit payable would be less by R 16.000.00. Mr Clavier submitted that it could hardly be said that the Plaintiff had made out a proper case for the relief that it seeks. He submitted that Avant was a poor witness while Loot's evidence was in no way helpful. Having regard to the issues to be resolved which in the end, were

narrowed down to two issues, and the kind of evidence that the Plaintiff produced through its witnesses as well as the detrimental concessions and admissions that the Defendant's witnesses made as the trial proceeded, I find it difficult to agree with Mr Clavier. Evidence, on the contrary, has demonstrated that the Plaintiff's witnesses were reliable and credible. The same, according to Mr Du Plessis, cannot be said of the Defendant's witnesses. There is merit in the submission. Mr Du Plessis seemed to rely on Marais's admission that Nanoteq faced the downscaling of its staff from 100 to 50 when he correctly submitted that Nanoteq, at the time, must have encountered financial problems. The R16.000.00, in cash flow to Nanoteq as Mr Du Plessis pointed out 'would come in handy'. This, in my view, cannot be denied.

[16] Mr Du Plessis submitted that Eagan and Marais were, indeed, poor, unreliable and incredible witnesses. He is correct. Their evidence is clearly unacceptable.

[17] Having regard to the evidence in its entirety, the established facts, in respect of the introduction, are as follows:

17.1 The Plaintiff successfully faxed the letter of introduction to the Defendant;

17.2 The Defendant received the letter which came to the attention of Eagan;

17.3 Marais received the letter that was sent to him on 14 April 2005. He read its contents and was as at 11 or 12 May 2005 still aware of its content;

17.3 The Plaintiff duly introduced Nanoteq to the Defendant and its property;

17.4 Marais was never introduced to the Defendant's property by Eagan;

17.5 The Plaintiff has, accordingly, earned its commission which the Defendant is liable to pay to the Plaintiff;

17.6 The Plaintiff has made out a proper case for the relief that it seeks.

[18] In the result, the order I make is as follows:

1. The Defendant is ordered to pay the Plaintiff

(a) the sum of R 169 684.66;

(b) Interest on the said sum calculated at the rate of 15.5 % per annum calculated from the date of the order to the date of final payment.

2. Costs of suit.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

Heard on: 03 December 2008
For the Applicant: Adv. J. A. Du Plessis
Instructed by: G. J. Smit Attorneys
For the Defendant: Adv. E. B. Clavier
Instructed by: Brazington Shepperson McConnel