Document 1 of 1

Source:
South African Law Reports, The (1947 to date)/CHRONOLOGICAL LISTING OF CASES – January 1947 to May 2015/1948/Volume 4: 657 - 998 (December)/WEBRANCHEK v L K JACOBS & CO, LTD 1948 (4) SA 671 (A)

WEBRANCHEK v L K JACOBS & CO, LTD 1948 (4) SA 671 (A)

1948 (4) SA p671

Citation	1948 (4) SA 671 (A)
Court	Appellate Division
Judge	Watermeyer CJ, Centlivres JA and van Den Heever JA
Heard	September 23, 1948; September 24, 1948
Judgment	October 14, 1948
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Principal and agent - Claim for commission - When agent entitled thereto - Evidence - Failure to call witnesses - Effect. - When Court justified in drawing inference that such witness hostile to party.

Headnote : Kopnota

In an appeal from a decision of a trial Court which had awarded the plaintiff, an estate agent, commission on the sale of certain immovable property of the defendant, in respect of which the defendant had given a number of estate agents a general mandate to sell, it appeared that the plaintiff had contacted the purchaser; that he had aroused the latter's interest in the proposition; that he had brought the purchaser to inspect the property - in fact as the result of his efforts the situation was ripe to crystallise into a sale. The final bargaining between the defendant and the purchaser had however taken place in the office of another estate agent, S., where the deed of sale was ultimately signed, on S. having agreed to waive a percentage of his commission and to indemnify the defendant against any claim for commission by plaintiff. Neither party had called the purchaser as a witness though he was available to both.

Held, dismissing the appeal, that the trial Court had been correct in holding that the sale had been clearly attributable to the efforts of the plaintiff - they had constituted the dominant or effective cause of the sale.

Held, further, that in the circumstances an inference should not be drawn against the plaintiff for failing to have called the purchaser as a witness.

The decision in the Witwatersrand Local Division in *L. K. Jacobs & Co. Ltd v Webranchek*, confirmed.

Case Information

Appeal from a decision in the Witwatersrand Local Division (ROPER, J.). The facts appear from the judgment of VAN DEN HEEVER, J.A.

B. A. Ettlinger, K.C. (with him *I. Isaacs)* for the appellant: The respondent did not show that its efforts were the effective cause of the sale; the *onus* of proof lay upon the respondent; *cf. Eschini v Jones* (1929 CPD 18); *Niemand v Rood* (T.P.D. 1941, not

reported); *Babb v Cromberge* (T.P.D. 1942, not reported). Respondent had to show that its introduction of the property to the purchaser operated right up to the execution of the deed of sale, and was its effective cause; *cf. Barnard & Parry, Ltd v Strydom* (1946 AD 931 at pp. 937 - 8). The only person who could have explained what induced the buyer to come up to £39,000 was the

---

1948 (4) SA p672

WATERMEYER CJ

buyer himself, and he was not called by respondent although he had been subpoenaed by respondent and had given respondent a statement; *cf. Eschini v Jones (supra*, at p. 29). In any event, the buyer only agreed to pay £39,500 on the Monday afternoon when he signed the offer and this offer was obtained by Seeff & Co.; *cf. Gluckman v Landau & Co.* (1944 TPD 261 at p. 267). The evidence discloses that the effective cause of the sale was the efforts of Seeff & Co.; in any event these efforts were a new effective cause intervening between the original introduction of the buyer to the property and the concluded contract of sale; *cf. Machonochie's Executor v Bidewell Edwards* (9 S.C. 204).

I. A. Maisels, K.C. (with him *George Colman)* for the respondent: The *onus* on respondent to prove that the agreement to buy was caused by the introduction, to the seller, of the buyer by it, consisted in proving that this introduction was the effective cause of the buyer's preparedness to enter into the contract; *cf. Eschini v Jones (supra*, at p. 25); *Gluckman v Landau (supra*, at p. 293); *Barnard & Parry, Ltd v Strydom (supra);* Halsbury's *Laws of England* (2nd ed., vol. 1, para. 434); *Doyle v Gibbon* (1919 TPD 220 at pp. 223 - 4). Respondent's agent and the prospective buyer had reached the stage where the agent thought the buyer a likely buyer but the buyer was unwilling to close the deal until his wife had seen and approved of the property; once the parties have reached such a stage and a sale results within a short time thereafter the activities of the agent would normally be the effective cause of the sale, despite the fact that other causative factors might play their part, e.g., a concession by one party or another with regard to price or other terms of the contract, or information reaching the one party or the other from an outside source or the persuasions of a third party. The question whether another agent may be entitled to remuneration for his services depends upon the terms of his employment, but is quite irrelevant to the question whether the original agent is the effective cause of the sale; *cf. Halsbury (supra*, vol. 1, para. 434); Bowstead, *Agency* (10th ed., art. 65); *Restatement of the Law (Agency*, vol. 2, para. 448; comment *(a)*, p. 1050, comment *(c)*, p. 1051, comment *(e)* p. 1053, Illustrations 6 and 7, p. 1054); *Le Grange v Metter* (1925 OPD 76 at p. 80); *Smith Hogg & Co., Ltd v Black Sea & Baltic General Assurance Co.* (1940, A.C. 997 at p. 1003 - 4); *Yorkshire Dale Steamship Co v Minister of War Transport* (1942, A.C. 691 at p. 706); *Lotz v Davidson* (1928 CPD 514); *Burchell v Gowrie &*

1948 (4) SA p673

VAN DEN HEEVER JA

Blockhouse Collieries (1910, A.C. 614 at pp. 624 - 5); *Van Rooyen's Ltd v Cartter* (1928 OPD 32 at pp. 36 - 7); *Woolly v Hunt* (7 H.C.G. 110); the *Leyland* case (1918, A.C. 350 at p. 363); an appreciable interval of time between the efforts of the agent and the conclusion of the bargain may or may not point to a *novus actus interveniens. Cf. Kreser v Rosen* (1938 TPD at p. 407). As to respondent's failure to call the buyer, see *Barnard & Parry v Strydom (supra*, at p. 936); *Eschini v Jones (supra*, at p. 29). In a case such as the present where a large sum of money is involved and the field from which buyers can be drawn is necessarily limited the most important part of the agent's function is to procure a person from this limited field and place him in negotiation with the seller; *cf. Burchell v Gowrie & Blockhouse Collierles, Ltd. (supra*, at pp. 624 - 5). 'Willingness to buy' is not meaningless except in relation to a precise figure; there is such a thing as willingness to buy within a certain price range, the ultimate figure to depend upon the results of hard bargaining.

Ettlinger, K.C., in reply.

Cur. adv. vult.

Postea (October 14th).

Judgment

VAN DEN HEEVER, J.A.: The question in this case is whether the respondent is entitled to recover from appellant the amount of £987 10s. 0d. as commission due under an agreement in respect of the sale of a property known as 'Hadar Court', situated on Stand No. 374, 122 Plein Street, Johannesburg. Respondent instituted an action against appellant in the Witwatersrand Local Division to recover that amount. The issue was tried before ROPER, J., who granted judgment for plaintiff (now respondent) as prayed with costs; hence the present appeal. For the sake of convenience I shall continue to refer to the parties as plaintiff and defendant respectively.

The defendant is a landed proprietor and builder and was the owner, *inter alia*, of a block of flats known as 'Hadar Court', which he desired to sell. The plaintiff company carries on business as property salesmen and estate and commission agents. On the pleadings plaintiff's case is as follows:

On or about the 24th March, 1947, and at Johannesburg, defendant gave the plaintiff, represented by one of its directors, Samuel

---

1948 (4) SA p674

VAN DEN HEEVER JA

Marcus, a verbal mandate to sell 'Hadar Court' for £45,000, but intimated that he was prepared to consider an offer of £42,000. Thereafter on 12th November, 1947, the defendant verbally amended the mandate by reducing his selling price to £40,000. Plaintiff accepted the mandate. It was an express or implied term of the mandate that defendant was to pay plaintiff, in the event of a sale being concluded as a result of the latter's efforts, the usual commission of 21/2 per cent. of the total purchase price. Alternatively it was an express or implied term of the mandate that the defendant was to pay to plaintiff, in the event of a sale being concluded as a result of its efforts, a reasonable remuneration for its services, namely 21/2 per cent. of the total purchase price. In pursuance of the mandate plaintiff acting through Marcus on or about the 9th April, 1947, introduced 'Hadar Court' to one Beretta and subsequently on or about the 13th November, 1947, introduced the defendant to the said Beretta. In consequence of these introductions and as a result thereof the defendant on or about the 17th November, 1947, sold the said property for the sum of £39,500 to Beretta and consequently plaintiff is entitled to his commission of 21/2 per cent. on that amount, to wit, £987 10s. 0d.

In his plea defendant admitted that the usual commission payable to estate agents in Johannesburg for bringing about sales of property is 21/2 per cent. of the total purchase price of the property and that 21/2 per cent. of such price is a reasonable remuneration for bringing about a sale. For the rest he denied the alleged mandate to sell the property, and further denied that he had agreed either expressly or impliedly to pay plaintiff any commission; that he sold the property through plaintiff's instrumentality or that plaintiff introduced Beretta to the property. The sale of the property and its price are admitted.

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

> 'There is, I think, considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern, and the primary necessity in each instance is to ascertain with precision what are the express terms

---

1948 (4) SA p675

VAN DEN HEEVER, J.A.

> of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms. . . . Each case turns on its own facts and the phrase 'finding a purchaser' is itself not without ambiguity.'

In the present case the issues between the parties were not as wide as the pleadings

suggest; Mr. *Williamson*, who appeared for the defendant at the trial, admitted that there was a 'mandate' to find a buyer.

As was pointed out in the *Luxor* case, contracts under which an agent may be occupied in endeavouring to dispose of the property of a principal fall into several obvious classes. The distinction depends upon the condition subject to which the commission is promised; where it is, 'if you succeed in introducing a person who makes an offer of not less than £x', the agent has earned his commission when the condition has been satisfied irrespective of whether the principal accepts the offer and carries through the bargain or not. On the other hand the promise may be conditional upon the 'completion of the transaction which he is endeavouring to bring about between the offeror and his principal'. In that event the commission agent has no remedy if the principal refuses to accept the offer; it is a risk which the agent assumed. This conclusion is not in conflict with our doctrine in regard to the fictional fulfilment of potestative conditions, as was suggested in argument; it has nothing in common with that doctrine. Where I promise to pay a certain amount as pre-estimated damages if I do certain things or refrain from doing so, I surely cannot be held liable if I see to it that the condition is not fulfilled. It will depend upon the contract into which the parties entered, its object and what they must be deemed to have had in contemplation when concluding it.

In the pleadings the expression 'mandate' was used in a loose and inexact sense, and it is clear from the manner in which the issues were canvassed at the trial that the parties did not adhere strictly to the pleadings or interpret the expression 'mandate' in any technical sense. Even so, it is difficult to determine the exact terms, express or implied, of the arrangements to which the parties came. Marcus stated in evidence that the defendant called on him, eulogised the property at great length and said that he was anxious to sell because he wanted to buy land in Palestine under offer to him. After discussing the current expenditure upon and revenue of the property, Marcus said he would do his best. At the conclusion of the discussion he definitely understood that he was given

---

a mandate to sell the property for £45,000. At a subsequent discussion defendant intimated that he would be interested in an offer of £42,000 which figure he later moderated to £40,000 gross or £39,000 nett. Plaintiff denies all knowledge of the fact that defendant had listed the property also with a number of other agents, but admitted that it was a common practice to do so; consequently he never regarded himself as sole agent for negotiating the sale. Nor is the defendant more explicit about the agreement. Early in 1947, he says, he wished to sell the property and listed it with a number of commission agency firms including the plaintiff. The character of his evidence appears from the following passage in the record:

> 'Q.: What was your intention as far as L. K. Jacobs were concerned; were they to try and sell this property for you?
>
> A.: Well, I don't know, but I considered L. K. Jacobs a big firm in the town and my statement (of expenditure and revenue) was taken round to everybody and it was only right to take it to them too. . . .
>
> Q.: What did you want them to do about it?
>
> A.: To sell the property.'

Cross-examination elicited a few additional clues as to the nature of the agreement:

> 'Q.: Did Mr. Marcus have a mandate to sell this property?
>
> A.: Anyone had a mandate to sell the property.
>
> Q.: Anybody?
>
> A.: I never bind myself to anybody.
>
> Q.: Did you ever authorise Mr. Marcus to try and sell your property for you?
>
> A.: Yes.
>
> Q.: At what price?
>
> A.: £40,000.
>
> Q.: £40,000.

A.: Sometimes it can be £45,000 and then £40,000.

Q.: Now what did you have in mind, gross or nett?

A.: I didn't have in mind anything. . . . I consider the commission as part of the deal and must come in the very, very closing stages in the bargaining, about signing or not signing, about buying or not buying the property, because the commission is always the obstacle between the buyer and the seller.'

The defendant admits that although the 'asking price' was £45,000, he considered selling the property for £40,000; he does not remember mentioning a lesser figure to Mr. Marcus but conceded that he might have thought of taking £39,000 nett.

The learned trial Judge relied upon the admission made by Mr. *Williamson* that 'there was a mandate to find a buyer' and proceeded to inquire whether plaintiff had carried out the mandate

---

without recording a specific finding as to the terms of the agreement.

The *onus* to prove the agreement lay upon the plaintiff. He has succeeded in proving that some agreement was concluded between himself and defendant, but its terms and conditions were not discussed by the parties, who assumed that these were imported into the contract by the customs which ordinarily regulate such transactions. The terms of the agreement must therefore be pieced together from the scanty materials supplied. If we do so the following picture emerges. Plaintiff was not 'employed' by the defendant in the sense that the former was contractually bound to perform any particular services or could be held liable for failing to do so; nor was it contemplated by the parties that plaintiff was in any sense a sole agent to bring about a sale. The arrangement was more in the nature of a promise to pay money upon a potestative condition being fulfilled. The promise must in the circumstances be regarded as one to pay the customary commission, 21/2 per cent. of the gross purchase price; defendant's intention to beat the agent down at the final negotiations was a mental reservation on his part. The condition was, I think,

'if you find and introduce a purchaser who is ready and able to complete the contract of sale at £45,000 or such lesser sum as I may find acceptable and a sale results.'

That the parties contemplated 'no sale, no commission' is clear from the evidence of Marcus. After defendant had expressed his readiness to accept £39,000 and the parties thought that the prospective purchaser was prepared to buy at that figure, defendant suddenly raised his price to £40,000. Plaintiff's reaction was not that in that event he had earned his commission, sale or no sale, but said that it now became his duty to contact the prospective purchaser afresh.

The property was actually sold to one Beretta on the 17th November, 1947, for £39,500, a rival firm of estate agents, Seeff & Co., negotiating the concrete contract of sale. The purchase price has been paid and the property has been transferred to Beretta.

This being the contract between the parties and its results, the question arises whether the plaintiff has earned his commission. Plaintiff has produced and introduced a person who was ready to buy and did buy at a figure acceptable to defendant.

The only question which remains, therefore, is whether this desired result was due to the efforts of the plaintiff or not. To

---

answer it the learned Judge in the Court below correctly applied the test whether plaintiff's introduction of Beretta to defendant and to the property and the negotiations which followed were the effective cause of the sale. On behalf of appellant it was contended that during a certain stage of the negotiations with Beretta, Marcus either became supine or relied upon his notions of psychology to bring about a sale rather than upon his own efforts to break down sales resistance; that at this stage the intervention of Seef & Co. was a *novus casus interveniens* which brought about the sale; that the sale was ultimately concluded only because Seef persuaded the seller to come down in his price, the buyer to increase his offer and because Seef himself was prepared to sacrifice a portion of the

customary commission.

It would be wrong to approach the problem from the point of view that because two estate agents claim commission in respect of the same sale of the same property, the subject-matter of the claims must necessarily be the same. 'Here the claims were not adverse, in the sense of being claims to the same money, but were entirely different claims.' (*Greatorex v Shackle* (1895 (2) Q.B. 249, 252).)

There was no real dispute between counsel who addressed us as to the law applicable to this case. It was common cause that where a property is listed with several agents and they compete in trying to conclude a sale by the principal to a particular third party, it is not necessarily the agent who first introduces the purchaser who is entitled to remuneration but the agent who is the effective cause of the transaction being completed. To my mind the question is not 'who fulfilled the condition', but 'did plaintiff fulfil the condition'? 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 (it is not necessary to decide the point) that the principal may owe commission to both agents and that he has only himself to blame for his predicament; for he should protect himself against that risk.

The dispute really turned upon the application of the law to the facts of this case. Both counsel agreed that if plaintiff had brought defendant and Beretta together and by his efforts rendered the one ready for selling and the other ripe for buying at an agreed price, he cannot be deprived of his commission merely because the actual deed of sale was executed under the aegis of a competitor.

1948 (4) SA p679

VAN DEN HEEVER JA

It was agreed therefore that 'effective cause' means something more than that which causes in a mechanical sense. If I may use a figure: counsel were at one that if plaintiff brought about a super-saturated solution and a stranger merely jarred it into crystallisation, defendant could not lawfully withhold plaintiff's commission. That admission immediately brings into play moral causes and moral effects, and it is difficult, if not impossible, to track and define causation in such a transcendental field. Accordingly a Judge who has to try the issue must needs decide the matter by applying the common sense standards and not according to the notions in regard to the operation of causation which 'might satisfy the metaphysician' (*Yorkshire Dale Steamship Co v Minister of War Transport* (1942, A.C. (H.L.) 691, 706)). The distinction between the concepts *causa sine qua non* and *causa causans* is not as crisp and clear as the frequent use of these phrases would suggest; they are relative concepts. Where a *causa sine qua non* emerges as the only known causative factor, one is easily persuaded that it was also the *causa causans*.

> 'Often the first introduction of the seller's property to the purchaser will be the decisive factor; this will be so in the ordinary case where nothing intervenes to prevent the introduction from leading straight on to the sale,'

(*Barnard & Parry Ltd v Strydom* (1946 AD 931, 936)). It is only where a number of causes compete for recognition as the effective cause that the distinction has any meaning. It stands to reason, therefore, that the cumulative importance of a number of causes attributable to one agent may be such that, although each in itself might have been described as a *causa sine qua non*, the sum of efforts of that agent may be said to have been the effective cause of the sale.

During April, 1947, Marcus wrote to Beretta, who lived at Pilgrim's Rest, telling him of 'Hadar Court' and the revenue it could produce. Beretta became interested and further correspondence followed. On the 25th April, 1947, Beretta wrote that he was coming to Johannesburg in May and would inspect the property if still in the market. Actually he made his appearance only on the 12th November, 1947, and enquired whether the property was still for sale. At this stage defendant's price was £40,000 gross or £39,000 nett, according to the evidence of Marcus which the learned Judge accepted. The next morning Marcus - by arrangement - took Beretta and his son to the property, which they inspected, and there introduced them to defendant. At the inspection

---

1948 (4) SA p680

VAN DEN HEEVER JA

defendant took a prominent part in the 'sales talk', pointing out the attractions of 'Hadar Court' as a sound building as well as a sound investment. The Berettas were obviously interested and promised to think the matter over and let Marcus know their decision.

On the following day, Friday the 14th November, Beretta came to plaintiff's office and offered £38,000 for the property. Defendant's memory fails him on this point, but Marcus states that the defendant came down to £39,000 - whether gross or nett is not quite clear. By arrangement again Beretta and his wife, as well as defendant and his wife, came to plaintiff's office on the morning of Saturday the 15th and the price was discussed in the presence of Marcus. The finding of the learned trial Judge as to the upshot of this conference is stated as follows:

> 'At the conclusion of this meeting the parties were within measurable distance of arriving at an agreement. The Berettas were willing to pay a sum which would have resulted in the defendant receiving a sum of £39,000 nett provided that Mrs. Beretta saw the property and approved of it and the price which was to be paid for it.'

The evidence on which this finding is based is not very clear; there is a possibility that Beretta and Marcus were thinking of the gross purchase price, whereas defendant thought of the nett sum he was to receive. But I do not think it probable that there was a real misunderstanding between the parties, for on the Monday when the defendant unexpectedly called on Marcus, he said: 'I am just coming to tell you I don't want to sell for £39,000, I want £40,000.' At that stage of the negotiations he could hardly have meant £40,000 nett. However that may be, when Beretta heard of the advance in price over the week-end he did not break off negotiations; he was still interested: he again went into the revenue produced by the building and told defendant that he would discuss the matter with Marcus and let defendant know. It is clear therefore that at this stage Beretta was reduced to a state of preparedness to pay some figure between £39,000 and £40,000.

After Beretta had inspected the property he made contact with Seef & Co, on the 13th November, and this firm 'worked on him' with great intensity for the next few days, but without much success, for on Sunday the 16th at noon Beretta still wavered and mentioned £38,000 as a possible offer. On Monday the 17th the three Berettas visited the property and saw the defendant and Marcus there. At this stage the Berettas, though still hesitant, expressed their willingness to pay £39,000 and perhaps more.

Defendant was eager to use pressure, but ultimately fell in line with Marcus' suggestion to 'let psychology work'. During the afternoon the Berettas called at Seef's office; bargaining commenced and ultimately, upon Seef waiving £250 of his commission, the sale was concluded for the sum of £39,500 gross.

It is clear that many causes contributed towards this desired result: *i.e.* defendant's assiduity in crying his wares; the favourable impression made upon Mrs. Beretta at the inspection of the property and her influence upon her husband; the fact that Seef was prepared to sacrifice a portion of the commission which he would normally have considered his due. It does not seem to me, however, that these favourable influences in any way disturb the inference of a causal connection between the efforts of plaintiff and the sale. In every potestative condition there are casual elements. If Beretta had died suddenly just before concluding the signed agreement there would have been no commission for anyone because of failure of the casual element in the condition. The opposite must apply: the favouring influences of defendant and Mrs. Beretta are legally irrelevant, and Seef's saorifice must be judged in the same manner unless, after weighing the effect of all the relevant influencing causes, it appears to have been the *causa causans* of the sale.

Beretta was an available witness, and it appears that a statement by him was in possession of the plaintiff at the trial but he was not called by either side. In a situation such as this, it was said in *Barnard & Parry Ltd v Strydom (supra)*, the state of mind of the purchaser during the stages leading up to the sale is very material and his own evidence thereon may be of great importance. In *Sampson v Pim* (1918 AD 657, 662),

which was an action arising out of a collision, the plaintiff's passenger had been subpoenaed and was available but was not put into the box. SOLOMON, J.A., observed:

> 'The inference is irresistible that his evidence would not have supported the plaintiff's case. It might of course have been negative, as he may not have been keeping a look-out and so may not have been able to assist the Court one way or the other. But if he could have given evidence favourable to the plaintiff it is inconceivable that he would not have been called.'

On these authorities the judgment was attacked and it was contended that plaintiff's failure to call Beretta led one to the almost inescapable inference that his evidence in regard to something which lay peculiarly within his own knowledge would have been unfavourable to plaintiff.

1948 (4) SA p682

VAN DEN HEEVER JA

In *Elgin Fireclays Ltd v Webb* (1947 (4), S.A.L.R. 744 at p. 749) the learned CHIEF JUSTICE, in dealing with a similar argument, observed:

> '. . . it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. (See *Wigmore*, secs. 285 and 286.) But the inference is only a proper one if the evidence is available and it would eludicate the facts.'

At the trial of this case Beretta was available to both parties, he was actually waiting outside the Court, all witnesses having been ordered out of Court. What *Wigmore* says in sec. 288 is very apposite. That author states:

> 'It is commonly said that no inference is allowable where the person in question is *equally available* to both parties; particularly where he is actually in court; though there seems to be no disposition to accept such a limitation absolutely or to enforce it strictly. Yet the more logical view is that the failure to produce is *open* to an inference *against both parties*, the particular strength of the inference against either depending on the circumstances.'

In the present case it appears that after the sale of 'Hadar Court' Beretta appointed Seef & Co. as his agents for collecting the rents; there are consequently closer business relations between Seef & Co. and Beretta than between him and the plaintiff firm. By reason of the indemnity, to which I shall refer later, Seef & Co. became the real defendants in the action. It would have been natural for plaintiff to think that, somehow, Beretta had conspired with Seef & Co. to intercept the major portion of a commission which should have accrued to him, the plaintiff. It would in the circumstances not have been pure unreason on the part of plaintiff to fear that Beretta, if called, might not be unbiased. Moreover a litigant who calls a witness vouches, as it were, on pain of being discredited himself, for his probity and truthfulness. The potential witness may be untruthfully hostile, he may have a bad memory or an unfortunate presence. After all, plaintiff was entitled to rest his case upon evidence which he considered adequate to discharge the *onus* which lay upon him. I am not persuaded therefore that, in the circumstances of the present case, an inference against the plaintiff should be drawn from the fact that he did not call Beretta as a witness; nor that it should follow, merely because the learned Judge in the Court below in a judgment which was not reserved did not expressly refer to this feature of the proceedings or to these considerations that he did not consider them.

If we consider the causative effect of plaintiff's efforts they are

---

1948 (4) SA p683

VAN DEN HEEVER JA

impressive. From the history of this dispute itself it is plain that to find a buyer for property - even an excellent proposition - at a figure approaching £40,000 was at that time and that place no easy matter. Plaintiff contacted such a person at a distance, roused his interest in the proposition and after a fairly long interval commenced bargaining. There is nothing to show that apart from plaintiff's activities Beretta would have been a prospective purchaser. By achieving this in a transaction of such magnitude the plaintiff has, as was pointed out in *Burchell v Gowrie & Blockhouse Collieries Ltd.* (1910, A.C. 614, 625), done the most effective part of his work. He got the purchaser interested in the property as an investment and took him to the building; it was due to him that Mrs.

Beretta, too, inspected the property. The impression one gets is that as a result of plaintiff's efforts the situation was ripe to crystallise into a sale; defendant was ready to sell and Beretta to buy at a figure in advance of £39,000. Actually real sales resistance had broken down. Defendant was still haggling only because that was admittedly his habit: to try at the last moment to beat down commission and to try and extract a further few hundred pounds from the purchaser.

But, it is said, plaintiff did not bring about the sale. It was not contended that the mechanical conclusion of the deed of sale was fulfilment of the condition; nor was it contended (for it could not) that the last act in order of time to produce that effect, namely that which induced the signature of the documents, was the proximate cause of the sale. Where is one to draw the line? If we weigh up the causative value of plaintiff's efforts and those of Seef & Co. the former preponderate. If one may use a simile: plaintiff designed and built the ship ready for launching; Seef & Co. presided over the formalities at the celebrations and pressed the button at the slipway. Plaintiff says it is due to him that the vessel exists at all whereas defendant, for his own ends, praises Seef & Co. as the sole cause of its being afloat.

Where the contact made by an agent with a prospective purchaser is broken off and after a long interval the same purchaser re-opens negotiations to acquire the same property with the principal direct or through another agent, the interruption may justify the inference that a sale which eventuates after resumed negotiations arises out of a fresh intervening cause and is not due to the efforts of the first agent. Here such an inference would not be justified. In spite of the long delay between May when the

---

1948 (4) SA p684

VAN DEN HEEVER JA

correspondence between plaintiff and Beretta ceased and November when the latter made his appearance in Johannesburg, it is beyond question that his entry into the field as a potential purchaser was a direct result of his correspondence with plaintiff. At this stage Beretta did not even know whether 'Hadar Court' was still in the market; plaintiff had to get information on the point and inform him.

The fact that defendant probably instructed Seef & Co. and other agents to try and sell the property as early as plaintiff received his 'mandate' or that Seef & Co. made efforts to sell to other buyers prior to November, 1947, seems to me irrelevant. There was a dearth neither of agents prepared to negotiate nor of persons who could not or would not buy. The problem was to obtain a person who was prepared and able to buy at a figure acceptable to defendant.

Upon reading the record it is difficult to avoid the conclusion that when defendant ultimately clinched his bargain with Beretta under the aegis of Seef, he was well aware of the fact that the plaintiff had discharged his 'mandate' and would be entitled to his commission if the sale went through. He admitted (after pressure in cross-examination) that he supposed L. K. Jacobs & Co. would sue him for commission; consequently he refused to sign the acceptance of Beretta's written offer until he had a document from Seef & Co. indemnifying him against any such claim. The indemnity is revealing. It reads:

> 'We (i.e. Seef & Co.) indemnify you against and undertake to hold you harmless from any claim for commission or otherwise by Messrs. L. K. Jacobs & Co. Ltd. and/or any other person or firm claiming by, through or under them, in respect, arising out of or in connection with the above sale through ourselves.
>
> Should you receive any letter of demand, summons or any other document containing a claim upon you for commission in this matter by, through or under Messrs. L. K. Jacobs & Co. Ltd., please let us have same and we will deal therewith at our own cost and expense at once.'

It was contended that plaintiff's efforts could not have been the effective cause of the sale, since without agreement as to price there can be no sale, and the price was settled only in the final negotiations between defendant, Beretta and Seef. This argument does not differ much from a suggestion that the agent who procures the signatures to the deed of sale effectively causes the sale to come into being. If at the stage at which Seef & Co. became active in the matter defendant himself had done everything which

---

1948 (4) SA p685

VAN DEN HEEVER JA

that agent did and, to gain his end had sacrificed £250 of the purchase price, there can be no doubt that plaintiff would nevertheless have been entitled to his commission. It is difficult to see why the position should be different now that defendant has done so through the mediation of another agent.

The question was asked, finally, how could plaintiff recover £987 10s. as commission seeing that at no stage in his dealings with Beretta was there even tentative agreement on a selling price of exactly £39,500. The answer is that defendant promised to pay the plaintiff 21/2 per cent. of an elastic figure, that upon which defendant and the purchaser would agree. The condition moreover was not 'if you clinch the deal' but 'if your efforts effectively cause a deal to eventuate'. If that were not so, the principal could always defeat the just claims of the agent at the ultimate bargaining by extracting a few more pounds from a buyer who has been rendered a willing buyer by the efforts of the agent. Before that bargaining defendant himself regarded the sale as virtually a *fait accompli;* he complimented Marcus upon the manner in which he had handled the transaction and said 'as soon as you put through this deal I will give you another block of flats that I have in Yeoville'. Defendant strenuously denies being liberal even with flattery, but where his evidence conflicted with that of plaintiff the learned Judge accepted the latter. In transactions of such magnitude between a genuine buyer and a genuine seller, Marcus tells us, a prospective sale never fails merely because of a difference of, say, £1,000.

In my judgment the learned trial Judge was clearly right in holding that the sale is chiefly attributable to the efforts of plaintiff; in other words that those efforts constituted the dominant or effective cause of the sale, and that the appeal must be dismissed with costs.

WATERMEYER, C.J., and CENTLIVRES, J.A., concurred.

Appellant's Attorneys: *Max Shainboum*, Johannesburg; *Lovius & Shtein*, Bloemfontein; Respondent's Attorneys: *A. Livingstone & Co.*, Johannesburg; *Goodrick & Franklin*, Bloemfontein.
