

SOUTH AFRICA / JUDGMENT

Lushaka Investments (Pty) Ltd v JHI Properties (Pty) Ltd (A5085/2014)

[2016] ZAGPJHC 45 (31 March 2016)

[2016] ZAGPJHC 45

COURT

South Gauteng High Court, Johannesburg

BEFORE

KM Satchwell, FHD Van Oosten, WL Wepener

CASE / FILE NUMBER

A5085/2014

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case number: A5085/2014

DATE: 31 MARCH 2016

In the matter between:

LUSHAKA INVESTMENTS (PTY) LTD.....APPELLANT

And

JHI PROPERTIES (PTY) LTD.....RESPONDENT

J U D G M E N T

SATCHWELL et VAN OOSTEN JJ:

INTRODUCTION

With the leave of the court a quo, this is an appeal and a cross-appeal against the judgment and order of Wright J of this division handed down on 17 September

2014. At issue is the interpretation of an agreement of mandate^[1] entered into between the owner of a property to be sold, the appellant ('Lushaka'), and the agent appointed to procure such sale, the respondent ('JHI Properties (Pty) Ltd').

The parties concluded the mandate (presented on 26 February 2013 and signed on 28 February 2013) in terms of which JHI undertook to procure a purchaser for Lushaka (described as ‘the Landlord’), of the World Trade Centre. The mandate was to be in force for a period of six months. The relevant portions of the mandate read:

‘This letter confirms the terms of a mandate to ourselves (as Agent) to procure a purchaser for your (the Landlord’s) property

‘3.1 The Landlord hereby authorizes and gives permission to the Agent to offer the Property for purchase to the parties nominated as per Annexure A attached hereto.’

‘3.2 JHI is exclusively appointed to negotiate a transaction with the parties referred to in 3.1.’

3.4.2 The appointment will remain in force for a period of 6 (six) months and upon expiry of that period or a valid sale of the Property being concluded, whichever occurs first, this mandate will automatically expire and, be of no further force and effect.’

‘4. We shall use our best endeavours to procure an offer for the Property at the best possible terms and conditions for your acceptance.....’

‘6. In the event of a sale being concluded over the Property during the term of this mandate or at any time thereafter with any party introduced to the Property by ourselves, you shall pay commission to us calculated in accordance with out tariff.....[2]

‘8. No variation or amendment of this mandate shall be enforceable unless reduced to writing and signed by both parties.’

Amongst the nominated prospective purchasers, contained in Annexure A, was an entity described as SA Corporate Real Estate Fund (‘SA Corporate’).

Pursuant to the mandate, JHI marketed the property and, on 28 February 2013, procured an offer from one of the entities on the list, Vividend Income Fund (‘Vividend’), which was presented to Lushaka. Lushaka referred this offer to its attorneys and various amendments to the Vividend offer were proposed by Lushaka. JHI vigorously pursued the offer and remained in discussions with Vividend in regard thereto.

However, unknown to JHI, Lushaka had, prior to the conclusion of the mandate, appointed another agency, Penny Brothers Brokers and Valuers (Pty) Ltd (‘Penny Brothers’) in October 2012, to solicit offers for the purchase of the property. During October 2012 Penny Brothers had introduced the property to SA Corporate, which as I have alluded to is one of the entities identified as one of the prospective purchasers in annexure A whom JHI was exclusively mandated to approach and which were the only potential purchasers whom JHI could approach in terms of the mandate.

The upshot was that Penny Brothers were, from October 2012, marketing the property and had already engaged in discussions with SA Corporate whilst, from February 2013, JHI enjoyed an exclusive mandate to market the property to nominated prospective purchasers

which included SA Corporate.

On 20 March 2013 Lushaka was presented with a first offer from SA Corporate by Penny Brothers. Amendments were required to be made to the offer and on 28 March 2013, Lushaka accepted the latest version of the offer from SA Corporate presented to Lushaka by Penny Brothers. On 3 April 2013, Lushaka informed JHI and Vividend that the Vividend offer was declined and confirmed that an offer from SA Corporate had been accepted.

THE LITIGATION

JHI's main claim is for damages. JHI alleges that Lushaka breached the mandate in a number of respects and that, by reason of such breach, JHI was prevented from performance which would have included an offer from SA Corporate. As a result JHI claims to have suffered damages in an amount equal to the commission on the transaction concluded through the agency of Penny Brothers as it was agreed.

JHI's second claim, with reliance upon the mandate, is based on an alleged tacit or implied term in the mandate that JHI was entitled to commission in the event of a sale with any party included in Annexure A and, the sale of the property having been concluded between Lushaka and SA Corporate, it was entitled to the commission as agreed.

At conclusion of the trial the learned judge in the court a quo found:

'16. I am not convinced by the main claim [first claim: damages]. The plaintiff's evidence did not go beyond proving that it would have received an offer from SA Corporate. The plaintiff's evidence did not go so far as to suggest that the offer would have been accepted by the defendant. This failure includes the failure to prove a price at which a deal would have been struck. It follows that damages have not been proved.

'19. [Second claim: commission]. There would be no point in SA Corporate being listed in Annexure A other than to identify it as one of the potential buyers in respect of whom the plaintiff held an exclusive mandate for 6 months. In my view the parties intended, in their written agreement of mandate, that commission would be payable when the defendant sold the property to SA Corporate at any time during or after the term of the mandate to any buyer listed in Annexure A. On the defendant's interpretation of the mandate, the plaintiff, because it had not introduced SA Corporate to the property, would never have the potential to earn commission on the sale of the property by the defendant to SA Corporate. The notion that the plaintiff was mandated to canvass SA Corporate without the prospect of commission is absurd. Accordingly, the plaintiff's reliance on the alleged tacit or implied term is unnecessary. I uphold the alternative claim.'

The learned judge however found for JHI on its second claim for commission. Lushaka's main appeal is against that finding. If Lushaka is successful in its appeal, then JHI's cross-appeal against the adverse finding of the court a quo in respect of the first (damages) claim needs to be adjudicated.

LUSHAKA'S APPEAL ON THE CLAIM FOR COMMISSION

The main ground of Lushaka's appeal is that JHI could not have become entitled to receive commission for the sale of the property because it had neither introduced SA Corporate to the property nor was it the effective cause of the sale.

13. The authorities relied on by Lushaka persuasively show that the well-known concept of 'effective, efficient or dominant cause' of the sale of the property is necessarily incorporated into the mandate by the words in clause 6 of 'introduced to the Property by ourselves'. But this court need not dwell on this aspect any further since it is common cause that JHI did not introduce SA Corporate to Lushaka and therefore cannot be considered as the introducing party in any sense of the phrase.

The learned judge in the court a quo did not find it necessary to make any decision on the alleged implied or tacit term as contended for by JHI in its particulars of claim. Instead the court found that the parties had intended, in their agreement, that JHI would be entitled to commission when the property was sold to any buyer listed in Annexure A, notwithstanding that JHI had not been the effective cause of the sale to such buyer. The ratio for this finding was that any other interpretation of the mandate would mean that JHI, 'because it had not introduced SA Corporate to the property, would never have the potential to earn commission on the sale of the property by the defendant (Lushaka) to SA Corporate. The notion that the plaintiff was mandated to canvass SA Corporate without the prospect of commission is absurd'.

15. We are unable to agree with the reasoning or the ratio as set out in the judgment of the learned judge in the court a quo.
16. The wording of the mandate is clear. Clause 6 specifically limits the payment of commission by Lushaka to JHI to a sale 'with any party introduced to the Property by ourselves' [emphasis added]. It follows from the wording that it is not any sale concluded during the period of the mandate which would entitle JHI to payment of commission but only a sale in which JHI had effected the introduction of the purchaser.
17. The wording in clause 6 read in context of the mandate as a whole, limits the earning of commission in two ways: the purchaser must be one of the parties listed on Annexure A because those are the only parties which JHI was entitled to approach and the purchaser must have been introduced by JHI to Lushaka.
18. To find another intention on behalf of both contracting parties would be a direct contradiction of the express terms to which they contracted in clause 6 of the mandate and would 'subvert the meaning to be derived from a consideration of the language of the agreement only.[3]

The absurdity found by the learned judge a quo is difficult to comprehend. JHI was not mandated to canvass SA Corporate without the prospect of commission as the learned judge appears to have understood. Its commission was subject to introducing SA Corporate and a sale resulting. Clause 6 is very clear as to the requirements for commission. Firstly, there must be a party introduced to

the property by JHI and secondly, a sale must be concluded between the party who was introduced to the property by JHI and Lushaka. JHI was not expected to work without the prospect of commission.

JHI contends for an implied or tacit term in the mandate that JHI need not be the introducing agent. Incorporation of such term would evidently be distinct from and in contradiction to the express wording of the mandate which, as I have stated, requires JHI to be the introducing agent.

However, JHI sought to find a peaceful coexistence between the finding of the court a quo and the contrary wording of the mandate. We are unable to agree. It is difficult to conceive how such coexistence could exist. The submission would attribute a meaning to clause 6 to the effect that commission would be paid to JHI in the event of a sale being concluded 'with any party introduced to the property by JHI or (as counsel would have it) introduced by anyone else in the whole wide world'. In short, JHI contends that the requirement that commission is only payable to JHI should it have introduced the purchaser ought to change to mean that commission be payable to JHI should any other individual or entity have introduced the purchaser. Rewriting of clause 6, as contended for, would import into the agreement a term which is quite contrary to its express wording and therefore

nullifies that which was expressly agreed by the parties.[4]

It is our view that the appeal must succeed.

JHI'S CROSS APPEAL ON THE CLAIM FOR DAMAGES

23. The cross appeal is premised on JHI's contention that, were it not for the multiple breaches of Lushaka, JHI 'would have presented an offer for the purchase of the property from a willing and able purchaser including an offer from SA Corporate Real Estate Fund' for the price eventually secured and, 'as a result of Lushaka's aforesaid breaches and conclusion of the aforesaid Agreement of Sale', JHI has suffered damages in an amount equivalent to the commission which would have been earned.

Subsequent to hearing of the appeal, we received further heads of argument from Lushaka to which JHI was given the opportunity to respond.

BREACH BY LUSHAKA

There is no dispute, and counsel for Lushaka conceded, that Lushaka acted in breach of the mandate. In essence, Lushaka's breach consisted of selling the property through the agency of Penny Brothers while the exclusivity afforded to JHI in terms of the mandate, was still in force. Applied to the facts of this matter Lushaka's breach can be divided into the following components:

Firstly, Lushaka allowed another agent to market this property without restriction as to prospective purchasers even though it had granted an exclusive mandate to JHI in respect of identified prospective purchasers. Lushaka did not inform Penny Brothers of the existence of the exclusive mandate with JHI in respect of those entities listed on Annexure A.

Secondly, Lushaka allowed SA Corporate to remain on the list of nominated prospective purchasers to which JHI was solely entitled to make an approach and enter into negotiations when it knew that Penny Brothers was in contact with SA Corporate. The witness for the appellant, Aquino, denied having been aware of the approach to SA Corporate by Penny Brothers until he was presented with the first SA Corporate offer on 20 March 2013. He did not then inform JHI of the interest expressed by SA Corporate through the agency of Penny Brothers or take any steps of disclosure to JHI or procure amendment of the mandate (for example, by attempting to obtain the consent of JHI to delete of SA Corporate from Annexure A).

Third, Lushaka allowed Penny Brothers to continue working with SA Corporate contrary to the exclusive mandate. Having received the first notification of interest by SA Corporate when the 20 March offer was presented, Aquino negotiated further until the final offer of SA Corporate of 28 March was presented and then obtained a special resolution of the Board of Directors of Lushaka authorizing acceptance of the offer on 3 April. During this period, Aquino knew of and was actively involved in the transaction with SA Corporate but failed to inform JHI thereof.

Fourth, JHI had presented an offer from Vividend on 28 February, the very day the mandate was signed. Aquino's response was to instruct JHI to attempt to negotiate a better offer from Vividend. He moreover submitted the Vividend offer to his attorney for advice, which was indeed forthcoming in that certain amendments were proposed and these were passed on to JHI. The Vividend offer was still in play when Lushaka accepted the offer from SA Corporate. Lushaka only informed JHI that the Vividend offer was rejected on 3 April. During all this time, Aquino was negotiating with Penny Brothers and SA Corporate contrary to the terms of the mandate.

Fifth, Aquino conceded that he kept the work of Penny Brothers, the offer from SA Corporate, the negotiations with SA Corporate, and the further offer from SA Corporate 'secret' from JHI because 'I did not want to jeopardise this transaction'

and 'I wanted to make sure that the deal would not be destroyed or killed by competing offers'.

Sixth, Lushaka accepted the revised offer from SA Corporate through the agency of Penny Brothers notwithstanding the exclusivity that JHI still enjoyed in terms of the mandate.

On a conspectus of all these facts there is ample support for the summary by JHI in its particulars of claim: 'The defendant

[Lushaka] prevented the plaintiff [JHI] from negotiating with, and obtaining an offer from, SA Corporate Real Estate Fund, by

receiving, entertaining and ultimately accepting an offer for the purchase of the property from SA Corporate Real Estate Fund, through Penny Brothers'.

PREVENTION OF PERFORMANCE

There can be no doubt that by accepting the offer presented through Penny Brothers, Lushaka rendered it impossible for JHI to continue with its mandate.[5]

It was no longer possible for JHI to approach any of the nine remaining entities listed on Annexure A, market the property to them, procure offers or expressions of interest, negotiate or discuss any aspect of such offers and present them to Lushaka. As correctly pleaded, it was not only SA Corporate whom JHI could no longer approach but any willing and able purchaser which might have been one or more of the nine other entities on the list of prospective possible purchasers whom only JHI was allowed to approach.

Lushaka accordingly, through its breaches, rendered further performance by JHI impossible.

DAMAGES

30. JHI, as the aggrieved party in respect of Lushaka's breach of contract, is entitled to damages. JHI pleads that it was deprived of its contractual right to deal with SA Corporate as a potential purchaser of the property thereby effectively preventing it from being able to perform its exclusive mandate. The damages claimed by JHI is an amount equal to the commission on the gross purchase price paid by SA Corporate to Lushaka in respect of the property. Lushaka contends that it is insufficient for JHI to plead a breach resulting in a frustration of JHI's own abilities to have procured an offer from SA Corporate or any other entity listed on Annexure A, and to have secured an agreement of sale between SA Corporate and Lushaka. It further argues that JHI has failed to discharge the onus to prove that it was indeed frustrated by Lushaka's breach from obtaining an acceptable offer from SA Corporate or any other entity.
31. The damages to which JHI may be entitled are the loss which it has suffered through not being able to fulfil the mandate by reason

of Lushaka's breach (*De Coning v Monror Estate and Investment Co* 1974 (3) SA 72 (E) 74H-75). Counsel for Lushaka sought to suggest that JHI's claim was for commission and not damages. Reliance was placed on the judgment of Baker J, in *Watson v Fintrust Properties (Pty) Ltd* 1987 (2) SA 739 (C), where the learned judge explained the nature of the claim, as follows (at 752I-754A):

'But in principle the two actions are different. If the principal, by some wrongful act or default, prevents the agent from earning his commission the agent is entitled to recover as damages the actual loss sustained (*Boosé v Zeederberg and Duncan* 1918 CPD 283 at 287 bottom; *Vos v Cronje and Duminy* 1947

- (4) SA 873 (C) at 878 lines 11, 22 - 23; *De Coning v Monror Estate & Investment Co* 1974 (3) SA 72 (E) at 74 bottom - 75 line 2). The agent sues for damages, not for commission for services rendered. The above reference to the *De Coning* case will make it clear that there is a distinct difference between the two forms of action. Addleson J there said:

'The damages to which the plaintiff may be entitled are not 'commission which it would have earned', but the loss which it has suffered through not being able to fulfil the contract by reason of the defendant's breach.'

'The solatium awarded to a successful plaintiff in such a case is considered damages and not commission for services rendered (De Coning's case *supra*, cited in De Villiers and Macintosh (*supra* at 411-12); see also *The Firs Investment v Levy Bros Estate* [1984] ZASCA 20; 1984

(2) SA 881 (A), another 'prevention' case; and *Tony Morgan Estates v Pinto* 1982 (4) SA 171 (W)).

'The difference between the two causes of action was recently emphasized once again in *Badenhorst v Van Rensburg* 1985 (2) SA 321 (T) where the Full Bench, per Le Roux J, pointed out at 334 that, if the agent's right to commission is frustrated by the act of the principal before the agent brings about the sale (eg by the principal having already sold the property via another agent), the plaintiff agent by virtue of the doctrine of fictional fulfilment can sue for damages. He cannot sue for commission as such. His claim is for something quite different, ie damages. The quantum might be equal to the commission which he had hoped to earn, but the cause of action is different. The fact that the quantum of the damages may equal the quantum of commission is coincidental. Sometimes the damages may be less than the commission (cf the *De Coning* case at 74G - 75B; *Vigne v Leo* 9 HCG 229; *A G Hendrie & Co v J McGarry* 1936 SR 209) and no doubt very often they will be the same (cf *Fagan v Pretorius* 1921 CPD 502): but they are different in nature''

32. In the present matter the quantum of damages claimed by JHI is the same as the quantum of the commission it would have earned had it not been for the prevention of performance by Lushaka. As pointed out in *Watson*, those amounts may coincidentally be the same. But that does affect the true nature of JHI's claim for damages. JHI is entitled to positive interesse: to be placed in the same position it would have been in had the mandate been performed (*Wireless Rentals (Pty) Ltd v Stander* 1965 (4) SA 753 (T) 754).

33. JHI, having become entitled to claim damages, must of course prove its damages. As much is clear from the judgment of the then Appellate Division in *Eileen Louvet Real Estate v AFC Property Development Co* 1989 (3) SA 26 (A), where Van Heerden JA, writing for the court, in regard to a sole agency agreement containing a mandate for a specific period, held:

'...the agreement of mandate may obviously not be terminated during its currency. Should the owner in such a case purport to revoke the mandate, the agreement will not be terminated, and should the agent perform the agreed services, or show that, but for an act of the owner frustrating the performance of the services entitling him to payment of commission, he would have earned the same, the realtor will be entitled to commission or damages as the case may be.' [emphasis added]

34. JHI's case, as pleaded, is that had it not been for the Lushaka's breach 'it would have presented an offer from a willing and able purchaser, including an offer from SA Corporate, for a price of R353 000 000'. Lushaka contends that JHI has failed to discharge the onus of proving what it has pleaded. We do not agree. The evidence in chief of Collins, the general

manager at JHI, was not challenged in cross examination or refuted by Aquino in his evidence. JHI had a relationship with SA Corporate over many years which was still ongoing and Collins, personally, had a good relationship with SA Corporate. Mr Van Zyl, of SA Corporate, was specifically known to Collins: they had breakfast together in February 2013 and Collins knew that SA Corporate had cash earmarked for property acquisitions; in fact ‘they needed to spend this cash quite urgently’. There was no reason why SA Corporate would not deal through JHI in this particular (or any other) transaction. Ginsberg also confirmed ‘an ongoing business relationship’ between JHI and SA Corporate.

35. On the strength of this evidence it was not necessary for JHI to call a further witness, such as MacKay from SA Corporate, as was contended for by Lushaka. The known experience of and relationship between JHI and SA Corporate, and the willingness of SA Corporate to deal through JHI, were not placed in dispute at the trial. Neither was it necessary to present such evidence from Aquino since his signature to the mandate agreement confirmed that Lushaka was prepared to deal through JHI to obtain an offer from SA Corporate
36. It has always been common cause that the purchase price eventually offered by SA Corporate and accepted by Lushaka, was acceptable to both seller and purchaser. To argue, as did Lushaka, that SA Corporate may not have been willing or able to keep its offer open for a period of six months does not accord with the provisions of the mandate agreement or the facts. The mandate allowed JHI to proceed through the list of entities on Annexure A, for the period of six months. It did not require JHI to obtain an offer from SA Corporate or any other entity at the beginning of the six month mandate period and then to maintain such offer on hold for a six month period. Lushaka was free to accept whatever offer was procured from the entities on Annexure A, through the services of JHI over the six month period. It was only because Penny Brothers had, contrary to the mandate agreement, obtained, presented and negotiated the offer from SA Corporate in March that there was an offer by SA Corporate awaiting a response at that particular time. Such an offer could have come through JHI at a later date.
37. We pause to briefly dispose of an argument raised by counsel for Lushaka. Counsel submitted that the reference to Gerhard Van Zyl as ‘the representative’ of SA Corporate in Annexure A, required proof by JHI that it would have obtained an offer from SA Corporate represented by Van Zyl, and no one else, before any entitlement to damages could arise. It was common cause that Van Zyl was no longer the person responsible for such property deals and that JHI, at the time of Lushaka’s breach, could not have introduced the property or finalized any sale through Van Zyl as the representative of SA Corporate. To afford such prominence to that particular reference in Annexure A would not only be unrealistic but seemingly un-businesslike. This issue was moreover, not raised in evidence and this court cannot speculate as to the reason for the reference appearing in Annexure A. The fact of the matter is that SA Corporate was required to be properly represented, and at the time of signing of the mandate, Van Zyl was identified in Annexure A as such person. When Penny Brothers came on board, they negotiated with a Mr MacKay, as the representative of SA

Corporate and it is common cause that a valid and binding agreement of sale was concluded.

38. Lushaka criticizes JHI for not having introduced SA Corporate and submits that JHI failed, as required by the mandate, to use its 'best endeavours' to procure the best possible offer for the property. JHI in fact, right at the outset, vigorously pursued the possible successful transaction with Vivident, which eventually came to naught. There is nothing to suggest that JHI would not thereafter, have pursued the other options that were available to it in terms of the mandate. There was still, at the time of Lushaka's breach, ample time left for the proper execution of the mandate but it was prevented from doing so by Lushaka's breach.
39. The 'best endeavours' argument, latched onto by Lushaka, lacks merit and, in any event, has no relevancy to the issue of damages. By way of background, the mandate requires JHI to use its 'best endeavours to procure an offer for the Property at the best possible terms and conditions for your acceptance...' At the trial, the process adopted by and the performance of JHI were criticized in the cross examination of both Collins and Ginsberg, as well as in the evidence in chief of Aquino. However, no breach of the mandate was pleaded by Lushaka, nor adverted to during the trial, nor raised in the Notice of Appeal or the Application for Leave to Appeal. However, the argument is now advanced that JHI failed to use its 'best endeavours in execution of this mandate'. This argument is based upon the urgency experienced by Aquino on behalf of Lushaka to sell the property and his understanding of the need for the creation by JHI of a 'critical mass' of offers to ensure and expedite the sale of the property. In this regard he testified:

'I wanted to spread the net as wide as possible to get clients to put up the office building, because that was our objective...'

'My objective was to try and get as many offers on the table as possible and so I was certainly happy that JHI was approaching me to bring offers to the table...'

'My understanding is when an agent It is almost impossible to have an offer on the table and for that offer to be the best possible offer. The only way that you can achieve a higher rate or higher return on your investments is to have a number of offers with certain trims [terms] and conditions on each offer, so, that you can select the best offer that makes sense and it reaches the necessary rates to pay back, in my case I was under pressure to repay the bank.'

'I had interpreted as that JHI on my behalf would be able to approach a number of different buyers and handle the business of canvassing and acquiring multiple offers and presenting them to me as the client. So, that I could then select on behalf of myself and the shareholders of the business the best possible offer because, I can sell the property once.'

'My objective to sign a mandate was that JHI was instructed to get me multiple offers from that list that they put on that mandate.'

‘That [they] only provided one offer, which was Vividend and they stopped there. They did not go any further. They did not give me other offers like I requested them to do so.’

40. The reference to ‘critical mass’ has its origin in an email from JHI, and is nowhere to be found in the mandate. Only

one offer was indeed presented by JHI (the Vividend offer). A six month period of exclusivity was afforded to JHI within which to approach identified prospective purchasers, procure an offer, present same, negotiate better terms and conditions (including price) and conclude a sale agreement. That, in our view, is the context within which the endeavours of JHI should be evaluated. It is argued, in the context of ‘best endeavours’ that JHI’s obtaining of only one offer was not sufficient and in fact resulted in JHI being in breach of the mandate. On the basis of the obligations of the parties to the mandate being reciprocal, so the argument went, JHI was not entitled to claim damages. In neither the trial court nor this court was a case made out for reciprocity of obligations. On a proper interpretation of the mandate reciprocity of obligations, as contended for by Lushaka, in our view, does not exist (see *Man Truck & Bus (SA) (Pty) Ltd v Dorbyl Ltd. t/a Dorbyl Transport Products and Busaf* (38/03) [2004] ZASCA 8; [2004] 2 All SA 113 (SCA) (25 March 2004) para 11).

41. A ‘critical mass’ of multiple offers through JHI does not seem to have been necessary for Aquino at the time he was negotiating and then accepted the revised offer from SA Corporate. Firstly, he testified that he kept secret from JHI the negotiations with SA Corporate and the revised offer from SA because ‘I wanted to make sure that the deal would not be destroyed or killed by competing offers’. Secondly, the unchallenged evidence of Collins was that, after the revised Vividend offer was sent through to Aquino, he was informed by Aquino, on 19 March, that there was a cash offer from an unidentified private fund on the table that ‘they would move on to an unconditional deed of sale’ and that ‘his intention was to accept another offer’. Thirdly, Aquino’s own evidence was that he did have a multiplicity of offers to consider, there was one from Delta, one from Vunani, another from Vividend and one from SA Corporate. In short, the critical mass appears only of importance insofar as Lushaka wishes to criticize JHI for not procuring same. But that was not a requirement of the six month mandate which had five months to go when the breach occurred.
42. The issues relating ‘best endeavours’, ‘critical mass’ and the sale process adopted by JHI are not issues which this court is required to decide. It was neither pleaded nor raised in the application for leave to appeal, it is not contained in the mandate and finally, the evidence does not afford any prominence to it at the time.
43. We are satisfied that there is sufficient basis upon which this court can conclude, on a balance of probabilities, that JHI was equally willing, able and capable of procuring exactly the same offer eventually made by SA Corporate, if Lushaka had not been in breach of the mandate, rendering it incapable of fulfillment by JHI and if JHI had been allowed in terms of the mandate to continue to market the property and approach SA Corporate. We are

unable to agree with Lushaka's argument that, as for the quantum of JHI's claim, JHI has confused damages with commission and we can see no reason why the damages sustained by JHI should not be found to be the amount equal to the commission which it was prevented from earning by reason of the unlawful actions of Lushaka.

44. For all these reasons the cross appeal must succeed.

ORDER

45. In the result the following order is made:

1. The appeal against the order of the court a quo dated 17 September 2014, in respect of the second claim for commission, is upheld and the order of the court a quo is set aside.
2. The cross appeal against the order of the court a quo dated 17 September 2014, in respect of the first claim for damages, is upheld.
3. The appellant (Lushaka Investments (Pty) Ltd) is ordered to pay to the respondent (JHI Properties (Pty) Ltd) :
 - a. The sum of R 9 million (nine million rand);
 - b. Interest on the aforesaid sum at the rate of 15.5% per annum from 5 November 2013 to date of payment; and
 - c. Costs of the trial and costs of the appeal and the cross-appeal.

KM SATCHWELL

JUDGE OF THE HIGH COURT

F H D VAN OOSTEN

I agree.

WL WEPENER

Counsel for appellant Adv C Badenhorst SC and with him Adv G Fourie

Attorneys for appellant Strauss Scher Inc

Counsel for respondent Adv J G Nel.

Attorneys for respondent Corien Potgieter Incorporated

Date of hearing 17 February 2016

Date of judgment 31 March 2016

[1] We use the word 'mandate' on the same basis as it was used in *Eileen Louvet Real Estate v AFC Property Development Co* 1989

(3) SA 26 AD 30G, viz on the basis that a contract between the owner and the realtor is not an agreement of mandate but a contract sui generis but, for the sake of convenience, the authority of the realtor may be denoted as a 'mandate'.

[2] It is common cause that 'ourselves' and 'us' are JHI.

[3] SA Mutual Aid Society v Cape Town Chamber of Commerce 1962

(1) SA 598 AD 615E.

4 The term sought to be implied could neither be said to be one which the parties had in mind but failed to include in their agreement or which they would have expressed if they had considered the situation (see McAlpine & Son (Pty) Ltd v Tvl Provincial Administration 1974

(3) SA (A) 531 D-532C.

[5] See The Firs Investment Ltd v Levy Bros Estate Pty Ltd

[1984] ZASCA 20; 1984 (2) SA 881 (A) 886, on the meaning of a sole and exclusive mandate.

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