

IN THE HIGH COURT OF LESOTHO

(Commercial Court)

In the matter between:

RUN ESTATE AGENCY (PTY) LTD

PLAINTIFF

And

MOHOLO KOU

DEFENDANT

Date of Hearing : 1 June and 14 June 2010

Date of Judgment : 15 July 2010

CORAM : **MR. ACTING JUSTICE J.D. LYONS**

Counsel:

Mr. P.V. Tsenoli for Plaintiff

Mr. Mpaka for Defendant

JUDGMENT

The plaintiff company is a real estate agent. The principal of the plaintiff firm is a Mr. Tlebere. He is, I understand, employed there as a real estate agent.

The defendant was, at all material times, the owner of plot no. 132 – 1008.

In late 2006 the defendant sold plot no. 132-1008 (the land) to a Mr. Peter Hlutwa for M600,000. The plaintiff's claim is for agents commission in the sum of M60 000, being commission at the rate of 10%.

There being no agreement in writing to substantiate the arrangement the plaintiff relies on, it is to the other evidence that the court must turn its attention.

The trial proceeded by way of witness statements being treated as evidence in chief with cross examination thereon. I heard from Mr. Tlebere for the plaintiff and Mr. Kou and Mr. Hlutwa for the defendant.

There is common cause on the law to be applied. The plaintiff must show that it was the effective cause of sale. Thus is ultimately a question of fact (re: Wakefield a Sons (PTY) Ltd v Anderson (1965) 4 SAR 453; Moneywood Pty Ltd v Salamon Nominees Pty. Ltd. [2001] HCA 2, 177 ALR 390 url; <http://www.austlii.edu.au/au/cases/cth/HCA/2001/2.html> and L.J. Hooker Ltd v W.J Adams Estates pty.ltd (1977) CLR 52). The agent must prove that he was the *causa causans* of the sale.

Gibbs J. (as then was) said in L.J. Hooker Estates that "(T)he right of an agent to receive commission from his principal rests on contract express or implied. It was made clear by the House of Lords in Luxor (Eastborne) Ltd vs Cooper (1941) AC 108, that commission contracts "are subject to no peculiar rules or principles of their own" (per Lord Russell of Killowen (1941) AC, at p124)".

Mere introduction of the buyer to the vendor is, of itself, insufficient for the agent to claim commission (see: *Moneywood* (supra) per Gummow J at para 83 *austlii* reference; *Burchell v Gowrie and Blockhouse Collieries Ltd* (1910) A.C. 614 at 624, *L.J. Hooker Estates* (supra) and *Moneywood* (supra) per Kirby J paras 119 – 127 *austlii* reference).

Mr. Tlebere and Mr. Kou were neighbours and family friends. Mr. Hlutwa was a tenant of Mr. Tlebere. Mr. Tlebere and Mr. Kou had previously had discussions over land but it appears it involved the renovation of their respective properties in preparation for some mooted government acquisition or some such. I was not given the precise details, but it does seem that this discussion did not relate to the actual sale of any land and that no part of the discussion led to Mr. Tlebere informing Mr. Kou of his being employed as a real estate salesman (albeit as manager) by the plaintiff.

The first matter to be decided is if there was a contract. If so, its terms must be determined. Then the plaintiff must satisfy the court that it performed its obligations under that contract.

I observed the witnesses as to their demeanor. Applying the appropriate burden of proof (being the balance of probabilities) and weighing all matters carefully, I am drawn to the conclusion that the defendant's evidence should be preferred to that of the plaintiff.

The defendant said that, whilst he and Mr. Tlebere discussed his (Mr. Kou) plans to sell the land, at no time did Mr. Tlebere tell Mr. Kou that he was a real estate salesman employed by the plaintiff. At no time, according to Mr. Kou, was any mention made of a contract or agreement between he and Mr. Tlebere that the plaintiff would be paid a 10% commission. Mr. Kou asserts that he had no knowledge of the plaintiff firm or its location. He went looking for its office after the event and failed to find it.

Mr. Tlebere says that he had discussions with Mr. Kou about the sale of the land. He says that the terms agreed were that he would be paid a 10% commission if he found a buyer.

I reject the evidence of Mr. Tlebere. There are two inconsistencies in his evidence that compel this.

In his witness statement he says the agreement was entered into at the plaintiff's place of business. (exhibit 1 para 2)

Under cross-examination, though, he said that the agreement was made whilst he was with Mr. Kou next to the gate of the defendant's property (record p6).

Later in cross-examination, when explaining events after the sale, he related a discussion between he and Mr. Kou where he said "the defendant asked me where is my office." Mr. Tlebere says he told him "at Christ House." (record p.8 – p9.)

Mr. Tlebere continued to say,

“What surprised me was that all along he was not asking me about my office, although he went to Christ House he never went to my office instate (sic-instead) he went into Mrs Mphatsoe’s office” (record p9).

I find this evidence to be inconsistent with Mr.Tlebere’s evidence that the agreement was concluded at the plaintiff’s office. Had that been the case I would have expected different evidence from Mr. Tlebere in respect of Mr. Kou’s inquiry as to the whereabouts of his office. Mr. Kou would have known where the plaintiff’s office was, thus compelling a different inquiry – or no inquiry at all.

I am not satisfied that any agreement was reached between the plaintiff and Mr. Kou regarding the sale of the land.

Even if there was an agreement (which I do not find), the plaintiff did nothing more than a mere introduction of Mr Hlutwa to Mr. Kou.

Mr. Hlutwa’s evidence was that he was a tenant of Mr. Tlebere. He told Mr. Tlebere in casual conversation that he was looking for some land to buy. He did not know Mr. Tlebere was employed as a real estate salesman. Mr. Tlebere then took Mr. Hlutwa to meet Mr. Kou. No mention was made of the price. Mr. Tlebere just introduced Mr. Kou and Mr. Hlutwa and left both of them to sort out the details. It was not until late in the day (too late, in my view) that Mr. Tlebere

(probably having heard that a deal had been negotiated) chased up Mr. Hlutwa. He found him at an attorney's office in the process of instructing the attorney to prepare the deeds of sale and transfers so as to complete the 'paperwork' for the sale. (record page 7). Mr. Tlebere remonstrated with Mr. Hlutwa telling him it was his (Mr. Tlebere's) job to do that as the agent. On the plaintiff's own case Mr. Hlutwa would not have needed to go to the attorney at that point had Mr. Tlebere done his part effectively.

In my judgment Mr. Tlebere did nothing more than effect the merest of introductions of the purchaser (Mr. Hlutwa) to the vendor (Mr. Kou). It was only after he may have found out that a completed sale was in the offering, than he belatedly decided to put on the mantle of a real estate salesman and claim a commission. This is insufficient for him to claim to be the 'effective cause' or '*causa causans*' of the sale.

Considering all of the evidence, I reject the plaintiff's evidence in preference to that of the defendant.

That being so, the plaintiff's case is dismissed with costs to be taxed if not agreed.

J.D. LYONS

JUDGE