

Dispute Resolution and Real Estate Law

ALERT | 25 February 2025



In this issue

SOUTH AFRICA

Whose commission is it anyway?



For more insight into our expertise and services

Whose commission is it anyway?

In *City and Atlantic Real Estate CC t/a Remax Living v Smith and Others* (7118/2023) [2024] ZAWCHC 426 (13 December 2024), the court was called upon to determine which estate agency, City and Atlantic Real Estate CC t/a RE/MAX Living (RE/MAX) or Kapstadt International Properties CC (Kapstadt Properties), was the “effective cause of the sale”, entitling it to the agent’s commission in the matter before it. Notably, the court held that there were two requirements that estate agents, sellers and purchasers should be mindful of when determining whether an agent is entitled to commission in a property sale.

The case revolved around a written joint mandate concluded on 1 September 2021 between RE/MAX, Mr and Mrs Smith (Smiths) and Kapstadt Properties for the marketing and finding of a purchaser for the property belonging to the Smiths. The mandate provided that in the event that the property was sold by RE/MAX or sold to any other person introduced by RE/MAX during the mandate period, RE/MAX, as the effective cause of the sale, would be entitled to commission calculated at 3,5% plus value-added tax of the purchase price achieved. The mandate would be in force until 17h00 on 30 April 2022.

In November 2021, RE/MAX approached one of its existing clients, Mr Pears, to ascertain whether he wished to view the property. Several viewings of the property subsequently took place, with Pears eventually making an offer to purchase the property, but which offer ultimately fell short of the Smiths’ asking price. A representative from RE/MAX advised Pears that the Smiths had received a higher offer from an American purchaser, which the Smiths had accepted. The American purchaser, who was introduced to the Smiths by Kapstadt Properties, subsequently abandoned the proposed sale in February 2023 as he was unable to fulfil the terms of the transaction due to an unforeseen change in his personal circumstances. Thereafter, around February 2023, the Smiths eventually accepted a revised offer from Pears for the purchase of the property via Kapstadt Properties.



Whose commission is it anyway?

CONTINUED

The court was called upon to determine:

- the terms of the mandate provided by the Smiths to RE/MAX;
- whether RE/MAX performed in terms of the mandate; and
- whether RE/MAX was the effective cause of the sale of the property to Pears.

RE/MAX sought relief not from Kapstadt Properties but from the Smiths for the commission, despite Kapstadt Properties' contentions that (i) the property was sold more than 90 days after the mandate period had expired; (ii) RE/MAX was not marketing the property any longer at the time of the sale; and (iii) motion proceedings were not suited to settle the dispute around what it termed an interpretive dispute, which should have been ventilated at trial. In their dealings with Kapstadt Properties, the Smiths sought an indemnity from them in respect of any claim by RE/MAX for commission.

Findings

In analysing the case before it, the court found that Kapstadt Properties' contentions were meritless on the basis that the Smiths were, *inter alia*, acutely aware of the circumstances surrounding the sale of the property and that as an established canon of interpretation, the starting point in interpreting any document is the language of the document in question read in context and having regard

to the purpose of the provision and the background to the preparation and production of the document. With the language being clear and with the facts being common cause, there was no dispute of facts and the only dispute was who was the effective cause of the sale. Pertinently, the court reconfirmed the effective cause requirement by stating that it is met when (i) an estate agent introduces a purchaser to a property and (ii) the agent is mandated at the relevant time.

In expanding on its reasons, the court found that on the facts before it, RE/MAX was the effective cause of the sale in that it introduced Pears to the Smiths within the mandate period as the principal, and but for RE/MAX, the property would not have been purchased by Pears from the Smiths.

The court further noted that an alternative dispute mechanism should have been used to resolve the matter in a quick and cost effective manner.

This case highlights the importance of parties to a sale of property agreement being alive to the requirements regarding estate agent's commission, and that they must carefully consider clauses in mandates to ensure that they are clearly drafted. Moreover, and should there be a dispute on similar facts, mediation or some other alternative dispute mechanism should first be considered to resolve the dispute in question.

Simóne Franks, Dipuo Titipana and Caitlin Freddy

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa, Kenya, and Namibia, please contact:



Rishaban Moodley

Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Tim Fletcher

Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Imraan Abdullah

Director:
Dispute Resolution
T +27 (0)11 562 1177
E imraan.abdullah@cdhlegal.com

Timothy Baker

Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester

Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Neha Dhana

Director:
Dispute Resolution
T +27 (0)11 562 1267
E neha.dhana@cdhlegal.com

Denise Durand

Director:
Dispute Resolution
T +27 (0)11 562 1835
E denise.durand@cdhlegal.com

Claudette Dutilleux

Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Jackwell Feris

Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Nastascha Harduth

Sector Head: Corporate Debt,
Turnaround & Restructuring
Director: Dispute Resolution
T +27 (0)11 562 1453
E n.harduth@cdhlegal.com

Anja Hofmeyr

Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tendai Jangara

Director:
Dispute Resolution
T +27 (0)11 562 1136
E tendai.jangara@cdhlegal.com

Corné Lewis

Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Nomlayo Mabhena-Mlilo

Director:
Dispute Resolution
T +27 (0)11 562 1743
E nomlayo.mabhena@cdhlegal.com

Sentebale Makara

Director:
Dispute Resolution
T +27 (0)11 562 1181
E sentebale.makara@cdhlegal.com

Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Khaya Mantengu

Director:
Dispute Resolution
T +27 (0)11 562 1312
E khaya.mantengu@cdhlegal.com

Richard Marcus

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer

Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhodie

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey

Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit

Sector Head:
Consumer Goods, Services & Retail
Director: Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Marelise van der Westhuizen

Director:
Dispute Resolution
T +27 (0)11 562 1208
E marelise.vanderwesthuizen@cdhlegal.com

Joe Whittle

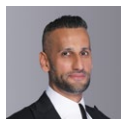
Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse

Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

OUR TEAM

For more information about our Real Estate Law practice and services in South Africa, Kenya, and Namibia, please contact:



Muhammad Gattoo
Practice Head & Director:
Real Estate Law
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com



Bronwyn Brown
Director:
Real Estate Law
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com



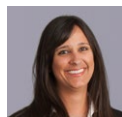
Mike Collins
Director:
Real Estate Law
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com



Simone Franks
Director:
Real Estate Law
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com



Fatima Gattoo
Director:
Real Estate Law
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com



Simone Immelman
Director:
Real Estate Law
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com



Lydia Owuor
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E lydia.owuor@cdhlegal.com



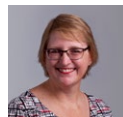
Muriel Serfontein
Director:
Real Estate Law
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com



John Webber
Director:
Real Estate Law
T +27 (0)11 562 1444
E john.webber@cdhlegal.com



Alex de Wet
Director:
Real Estate Law
T +27 (0)11 562 1771
E alex.dewet@cdhlegal.com



Natasha Fletcher
Counsel:
Real Estate Law
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com



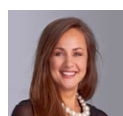
Samantha Kelly
Counsel:
Real Estate Law
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com



Bridget Witts-Hewinson
Senior Associate:
Real Estate Law
T +27 (0)21 481 6447
E bridget.witts-hewinson@cdhlegal.com



Lutfiyya Kara
Senior Associate:
Real Estate Law
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com



Sune Kruger
Senior Associate:
Real Estate Law
T +27 (0)11 562 1540
E sune.kruger@cdhlegal.com



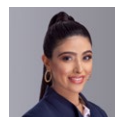
Lulama Lobola
Senior Associate:
Real Estate Law
T +27 (0)21 481 6443
E lulama.lobola@cdhlegal.com



Ceciley Oates
Senior Associate:
Real Estate Law
T +27 (0)11 562 1239
E ceciley.oates@cdhlegal.com



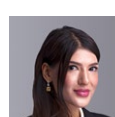
Henry Omukubi
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E henry.omukubi@cdhlegal.com



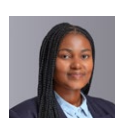
Fatima Essa
Associate:
Real Estate Law
T +27 (0)11 562 1754
E fatima.essa@cdhlegal.com



Muneerah Hercules
Associate:
Real Estate Law
T +27 (0)11 562 1579
E muneerah.hercules@cdhlegal.com



Zahra Karolia
Associate:
Real Estate Law
T +27 (0)11 562 1701
E zahra.karolia@cdhlegal.com



Asisipho Kozana
Associate:
Real Estate Law
T +27 (0)21 405 6168
E asisipho.kozana@cdhlegal.com



Eburn Taigbenu
Associate:
Real Estate Law
T +27 (0)11 562 1049
E ebun.taigbenu@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

NAMIBIA

1st Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020
T +264 833 730 100 E cdhnamibia@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2025 14401/FEB

