

AN ESTATE AGENT'S CLAIM FOR PAYMENT OF COMMISSION, PARTIAL COMMISSION, DAMAGES, PENALTIES AND A QUANTUM MERUIT

Henk Delpont
BA LLB LLD
Professor of Law
Nelson Mandela Metropolitan University
Port Elizabeth

Summary

Estate agents often become engaged in disputes regarding remuneration, and their legal representatives need to have a clear understanding of the remedies that are available in the circumstances and the different causes of action that can form the basis of a claim. The traditional claim is one for payment of commission, based on common law, on the grounds that the estate had performed the mandate. This requires proof that the estate agent was the effective cause of the transaction contemplated by the mandator. A commission claim may also be based on a *stipulatio alteri* contained in a sale agreement negotiated by an estate agent, in which event only the terms of the *stipulatio* (express or implied) need to be established. The *stipulatio* may be worded to the effect that commission would be payable regardless of whether or not the estate agent was the effective cause of the sale. In certain instances the claim would be a claim for damages, not commission, requiring proof of the damages suffered. Claims for the enforcement of a penalty clause are subject to the Conventional Penalties Act 15 of 1962. A claim based on enrichment is a possibility in certain, rare instances. Generally an estate agent's claim would be a claim for the full commission (or damages in lieu of commission), but a claim for payment of a portion of the commission is nevertheless possible in certain instances.

1 INTRODUCTION

This article explores the remedies available to an estate agent who is denied monetary payment in circumstances where the estate agent had performed his or her mandate partially or in full, or was prevented from doing so, or had rendered certain services benefiting another despite not having been engaged to do so. Most estate agents would probably not be concerned whether the remedy is a claim for payment of commission, damages or something else; what really matters is the payment as such, particularly the quantum thereof, not its label. From a legal perspective, however, it must be properly understood that not every claim for payment instituted by an estate agent is necessarily a commission claim. Depending on the cause of action

other remedies may have to be pursued, each having its own particular elements or requirements, even though the amount claimed might well be equal to the commission agreed upon between the estate agent and the mandator.

The article focuses specifically on the question whether a claim to be instituted by an estate agent requires proof of the effective cause requirement, as it is understood in estate agency law.¹ At common law an estate agent mandated to find a buyer earns the commission payable in respect of the mandate only if, amongst others, he or she is the effective-cause of the sale concluded between the seller and the purchaser. What this means is that an estate agent will not be entitled to payment of commission on a sale if its efforts significantly contributed towards the transaction but were not the “decisive factor” or “overridingly operative”: the estate agent’s input must be the *causa causans* of the transaction, not a *causa sine qua non*. In practice, however, it is not always an easy task to establish that an estate agent’s efforts were indeed the effective cause of a particular transaction, especially if the mandator’s own input and/or that of other estate agents engaged to market the property also played a role. It is therefore particularly important to determine whether or not an estate agent’s claim for payment requires proof of the fact that the estate agent’s input was the effective cause of the outcome contemplated by the mandator. If such proof is indeed required it may have a material impact on the decision to pursue or abandon the claim.

2 THE DISTINCTION BETWEEN COMMISSION CLAIMS, DAMAGES CLAIMS, THE ENFORCEMENT OF PENALTY CLAUSES AND ENRICHMENT CLAIMS

In dealing with payment claims by an estate agent a clear distinction must be drawn between each of the following six causes of action:²

- (a) a claim for payment of commission based on the ground that the mandate had been performed;
- (b) a claim for payment of commission based on a commission clause contained in the sale agreement concluded between a seller and buyer;³
- (c) a claim for payment of *damages* (not *commission*) based on the ground that the seller or buyer has prevented the estate agent from fulfilling the mandate;
- (d) the enforcement of a penalty clause contained in the estate agent’s mandate and/or the sale agreement concluded between the seller and buyer;
- (e) a claim for commission or a share thereof based on a third party’s ruling which the mandator agreed to implement; and

¹ For a full discussion of the effective cause requirement in estate agency law see Delpont “Estate Agent Commission: ‘Effective Cause’ Explained (1)” 2010 *THRHR* 414.

² See *Watson v Fintrust Properties (Pty) Ltd* 1987 2 SA 739 (C).

³ Reference is made only to sale agreements, but the discussion applies *mutatis mutandis* to lease agreements.

(f) a claim based on enrichment for payment of a *quantum meruit*.

Each of these causes of action is discussed more fully below. For the sake of convenience claims under (c) and (d) are dealt with together.

3 BASING A COMMISSION CLAIM ON THE GROUND THAT THE MANDATE HAS BEEN PERFORMED

Generally stated, an estate agent is entitled to payment of commission if he or she has fulfilled the mandator's mandate. What the mandate entails depends on the terms (express and/or implied) of the mandate agreement. The mandate determines the service expected of the estate agent and the event(s) that is or are to occur in order for commission to be earned.⁴ In addition, it may also stipulate at what point in time payment will be effected. For example, a mandate may state that commission will be earned on conclusion of an enforceable sale agreement between the mandator and a buyer introduced by the estate agent, but that payment will be made only when the purchaser has paid the full purchase price and the property has been transferred.⁵

At common law an estate agent given a mandate to "find a buyer" is deemed to have performed the mandate, thereby earning the right to payment of commission, if the following requirements are complied with:

- (a) the estate agent must introduce a buyer who is not only willing but also legally and financially able to buy the property in question;⁶
- (b) a binding and enforceable sale agreement must be concluded between the seller and the buyer;⁷
- (c) the sale agreement and its terms must be substantially in accordance with what the seller (the mandator) actually envisaged;⁸ and

⁴ See *Vanarthdoy (Edms) Bpk v Roos* 1979 4 SA 1 (A) 6B: "Dit is van belang om die juiste bepalings van die mandaat vas te stel ten einde 'n bevinding te kan doen of kommissie betaalbaar is, al dan nie. Kyk, onder meer, *Gluckman v Landau & Co* 1944 TPD 261 te 268. Maw indien daar op die bepalings van die mandaat gelet word, watter gebeurtenis maak eiser geregtig op die betaling van kommissie?" See further *Karoo Auctions (Pty) Ltd v Hersman* 1951 2 SA 33 (E); and *Brayshaw v Schoeman* 1960 1 SA 625 (A). With regards to the interpretation of a mandate see *John H Pritchard & Associates (Pty) Ltd v Thorny Park Estate (Pty) Ltd* 1967 2 SA 511 (D); and *Brayshaw v Schoeman supra* 629F-630.

⁵ A distinction must be drawn between cases where registration of transfer is stipulated to be the event to occur before commission becomes payable, and cases where it is merely the time when payment will be made. In the former case commission will not be earned unless transfer takes place, meaning that if the seller cancels the sale before transfer by reason of the buyer's default the estate agent will not be entitled to any commission. In the latter case commission is payable immediately should transfer become impossible by reason of cancellation of the sale: *Van Heerden v Hermann* 1953 3 SA 180 (T) 186A-D; *Ferndale Investments (Pty) Ltd v D.I.C.K. Investments* 1968 1 SA 392 394E; and *Venter Agentskappe (Edms) Bpk v De Sousa* 1990 3 SA 103 (A).

⁶ *Beckwith v Foundation Investment Co* 1961 4 SA 510 (A); and *Wacks v Record* 1955 2 SA 234 (C).

⁷ *Brayshaw v Schoeman supra*; *John H Pritchard & Associates v Thorny Park Estates supra*; *Naidu v Naidoo* 1967 2 SA 223 (N).

⁸ *John Wilkinson and Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd* 1966 1 SA 791 (D); *Metro-Goldwyn-Mayer (SA) (Pty) Ltd v Herman* 1938 TPD 226.

(d) the estate agent must be the effective cause of the transaction.⁹

Whether or not these requirements come into play in a particular commission claim based on the performance of the mandate depends on what was agreed between the mandator and the estate agent. In the absence of any contrary agreement the common law applies in full. However, the parties may agree that additional requirements are to be met, or that stricter or lesser requirements would apply. For example, it may be agreed that no commission would be payable unless the seller gets a specific price free from any commission.¹⁰ It could also be agreed that commission would be earned whether or not

(a) the buyer introduced by the estate agent is a financially able buyer;¹¹

(b) a binding sale agreement has been entered into between the seller and buyer;¹² and/or

(c) the estate agent was the effective cause of the sale.¹³

Depending on what was agreed with the mandator, an estate agent given a mandate to sell a property may therefore be legally entitled to claim commission on the grounds that the mandate had been performed, even though no sale resulted from the estate agent's efforts. In other words, a successful sale is not in all instances a prerequisite for a commission claim based on the performance of the mandate. Typically this would arise in situations where a sale agreement had been entered into with the buyer introduced by the estate agent but the sale fell away because a suspensive condition in the sale agreement had not been fulfilled, or the seller subsequently cancelled the agreement by reason of the buyer's inability to pay the purchase price. Commission would still be payable if the mandate imposed no duty on the estate agent to bring about a binding and enforceable sale agreement or to introduce a financially able buyer. It should be noted, however, that pursuing the claim in these circumstances may expose the estate agent to disciplinary action by the Estate Agency Affairs Board¹⁴ if the estate agent had not met the relevant requirements of the estate agents code of conduct in this regard.¹⁵ Accordingly, if the relevant requirements under the

⁹ See the cases cited by Delpont 2010 *THRHR* 414.

¹⁰ *Van Heerden v Retief* 1981 1 SA 945 (A).

¹¹ *Vesta Estate Agency v Schlom* 1991 1 SA 593 (C). A clear agreement to this effect is required: *Roux v Schreuder* 1968 3 SA 616 (O); and *Basil Elk Estates (Pty) Ltd v CE Solarsh* (unreported – case no. 4196/84 (W)).

¹² See for example *Commercial Business Brokers v Hassen* 1985 3 SA 583 (N) where it was agreed that commission would be payable even if a suspensive condition contained in the sale agreement was not fulfilled.

¹³ Such an agreement is not readily assumed and must be set out in clear terms: see Delpont 2010 *THRHR* 414.

¹⁴ If an estate agent is found guilty of a contravention of the code of conduct the Estate Agency Affairs Board or a disciplinary committee may reprimand the estate agent, impose a fine up to R25 000 or withdraw the estate agent's fidelity fund certificate: s 30(3) of the Estate Agency Affairs Act 112 of 1976. If the fidelity fund certificate is withdrawn the estate agent may not continue working as an estate agent: s 26 of the Act.

¹⁵ In terms of clauses 8.1 and 8.4 of the code of conduct clauses in mandates and/or sale and lease agreements entitling an estate agent to payment of commission without having to bring about a binding and enforceable sale agreement or to introduce a financially able buyer are permitted only if (a) good cause exists; (b) a separate written, signed agreement is entered into between the estate agent and the party liable for payment of the commission whereby

code of conduct had not been complied with it would be inadvisable to proceed with the claim, despite the fact that the estate agent had performed the mandate and is legally entitled to payment of commission.

4 BASING A COMMISSION CLAIM ON A COMMISSION CLAUSE CONTAINED IN A SALE AGREEMENT

In practice estate agents invariably use standard pre-printed contract documents to bring about sale or lease agreements. The estate agent negotiating a transaction would normally fill in the blank spaces in the relevant standard document and then present it to the respective parties for signature. These standard documents usually contain a commission clause stipulating (i) when commission will be earned (for example on signature of the agreement by both parties and fulfilment of all suspensive conditions agreed upon); (ii) which party is responsible for payment of the commission; (iii) the amount of the commission, and (iv) when the commission will be paid (for example on transfer of the property to the buyer, in the case of a sale). Such a clause, contained in an agreement of sale between a purchaser and a seller, does not in itself give the estate agent the right to claim commission from the seller. The agreement is binding between the seller and the buyer only, and the estate agent, not being a party to the agreement, cannot enforce its terms.¹⁶ For this reason estate agents' pre-printed documents usually state that the commission clause is to be construed as an agreement for the benefit of the estate agent (*stipulatio alteri*), with the result that on accepting the benefit the estate agent becomes a party to the commission clause and can enforce its terms against the party liable for payment of commission.¹⁷

In cases where a commission claim is based on a *stipulatio alteri* the claim is not that the estate agent has performed his mandate; the claim is that he is entitled to commission given the terms of the agreement between the *stipulans* and the *promittens*.¹⁸

Most standard pre-printed sale documents contain a commission clause obliging the *seller* to pay commission. This is because in the majority of cases in practice the seller would have given the estate agent a mandate to sell the property; the seller is therefore the mandator and assumes responsibility for payment of commission. In the case of a buyer agency – where a prospective buyer confers on an estate agent a mandate to find a property – the

the latter agrees to payment of commission in these circumstances; and (c) such agreement contains an explanation of the implications and financial risk pertaining to the payment.

¹⁶ Joubert *Die Suid-Afrikaanse Verteenwoordigingsreg* (1979) 250.

¹⁷ See, eg, *Baker v Afrikaanse Nasionale Afslaers et al* 1951 3 SA 371 (A); *Van Heerden v Hermann supra* 185B; *Minnaar v Jugdeow* 1964 1 SA 770 (D); *Tony Morgan Estates v Pinto* 1982 4 SA 171 (W); *Pace Real Estate (Pty) Ltd v Wilson* 1983 3 SA 753 (W); *Joel Melamed and Hurwitz v Vorner Investments* 1984 3 SA 155 (A) 172D-E; *Vesta Estate Agency v Schlom supra*. Some standard pre-printed contract documents contain a separate section which must be completed by the seller (or buyer) and the estate agent and which in effect constitutes a separate agreement between them on payment of commission. This separate agreement can then be enforced by the estate agent against the seller or buyer, depending on who is liable for payment of commission.

¹⁸ *Jurgens Eiendomsagente v Share* 1990 4 SA 664 (A) 675C and 677D-E; *Badenhorst v Van Rensburg* 1986 3 SA 769 (A) 780B.

commission clause would usually oblige the buyer to pay commission.¹⁹ However, it is quite possible for a commission clause to be worded to the effect that the buyer is liable for payment of commission, even though the seller is the mandator. Some standard documents commonly used in the estate agency industry stipulate that the seller is liable for payment of commission but that the estate agent may in certain circumstances hold the *buyer* responsible for payment.

The impact of commission clauses on the effective cause requirement is discussed next.

4 1 Commission clauses obliging the mandator to pay commission

In a case where a commission clause can be construed as a *stipulatio alteri* in terms of which the estate agent may hold the mandator (seller or buyer) liable for payment of commission, the estate agent has a choice to base a commission claim on either the terms of the mandate or the *stipulatio alteri*, assuming that the *stipulatio* does not contradict the mandate. If a contradiction exists, for example where the commission clause provides for payment of commission by the mandator upon the occurrence of a certain event not stated in the mandate, it could be argued that the terms of the mandate were amended when the estate agent accepted the benefit stipulated in its favour and that, accordingly, a commission claim can no longer be based on the original terms of the mandate. In certain instances, therefore, an estate agent can act to his detriment by accepting the “benefit” of a *stipulatio alteri*. However, the converse is also true. Since the claim for commission is based on the *stipulatio alteri*, only those terms need to be proved and their wording may be such that it is far easier for the estate agent to recover commission based on the *stipulatio alteri* than on the terms of the mandate.²⁰ Take the situation where a property is listed with several estate agents and a prospective purchaser is shown the same property by more than one estate agent. The estate agent who eventually succeeds in closing the sale using his own pre-printed standard form agreement, will normally have little difficulty in recovering the commission if in terms of the commission clause he need not prove that he was the effective cause of the transaction.²¹

¹⁹ Buyer agency is quite popular in the USA and to some extent in the UK. It has not really become established in the South African market.

²⁰ Whether or not a *stipulatio alteri* benefits an estate agent depends on the wording of the stipulation. If the terms of the mandate and the *stipulatio alteri* are identical from the point of view of the estate agent's entitlement to commission, it would make no material difference whether the claim is based on the mandate or the *stipulatio alteri*. In practice, however, the *stipulatio* is frequently worded differently from the mandate to benefit the estate agent. See, for example, *Baker v Afrikaanse Nasionale Maatskappy supra* 376H, where the Appellate Division (as it then was) pointed out that the commission clause in the sale agreement in question was drafted specifically to avoid the difficulties usually experienced by an estate agent to prove that the mandate has been performed, especially if the seller and buyer decide later not to proceed with the transaction.

²¹ If the estate agent who first introduced the buyer can show that *he/she* was the effective cause of the sale it may well be that legally the seller can be held liable to pay double commission: see Delpont “The Risk of Having to Pay Double Estate Agent's Commission” 2009 Obiter 738.

A commission clause, worded as a *stipulatio alteri* in a sale agreement, does not by necessary implication exclude the effective cause requirement. Accordingly, unless agreed otherwise an estate agent basing a commission claim against a mandator on a *stipulatio alteri* has to prove that he was the effective cause of the transaction giving rise to the commission, even if the commission clause does not say so expressly. Clear language is required before the court will accept that the *stipulatio* exempts an estate agent from such proof.²²

4 2 Commission clauses obliging the party other than the mandator to pay commission

As stated earlier, it is not unusual to find a commission clause in a standard document worded to the effect that the *buyer* is liable for payment of commission, even though the *seller* is the mandator.²³ Some standard pre-printed documents contain a clause stating that the purchaser undertakes to pay the estate agent's commission should he (purchaser) fail to fulfil his obligations under the sale agreement.²⁴ The latter clause would for example entitle the estate agent to claim commission from the buyer should a binding sale agreement not materialize by reason of the buyer's wilful default. Take the case where a sale is subject to a suspensive condition that a loan must be obtained by the buyer on or before a certain date. If the buyer fails to apply for a loan the estate agent could lose the commission because the sale will not be enforceable due to non-fulfilment of the suspensive condition.²⁵ A commission clause obliging the purchaser to pay commission in these circumstances gives the estate agent the necessary protection and also

²² See the discussion in par 5 below.

²³ See, eg, *Du Plessis v Du Plessis* 1970 1 SA 683 (O). In earlier years this was often done to reduce the purchaser's transfer duty liability. In cases where a seller is liable for payment of commission, the purchase price usually includes the estate agent's commission and transfer duty is calculated on the gross price. In the past, however, by making the buyer liable for payment of commission the purchase price was reduced by the amount of the commission with the result that some saving in transfer duty could be achieved. S 6(1) of the Transfer Duty Act 40 of 1949, prior to its amendment in 1998, stipulated that any commission or fee paid or payable by the person acquiring a property in excess of 5% of the consideration payable for the property, had to be added to the consideration payable on the acquisition of the property for the purposes of calculating transfer duty. This meant that if the purchaser was made liable for payment of commission transfer duty could in certain instances be reduced, in that commission up to 5% of the purchase price of the property was *excluded* from the consideration on which transfer duty had to be calculated. S 6(1) now states that this applies only in the case of a sale in execution.

²⁴ See *Aida Uitenhage CC v Singapi* 1992 4 SA 675 (E).

²⁵ In such cases it might nevertheless be possible to argue that the sale agreement is binding by reason of the doctrine of fictional fulfilment of a suspensive condition and that the estate agent is therefore entitled to the commission: see *Van Heerden v Hermann supra*; *Badenhorst v Van Rensburg* 1985 2 SA 321 (T) and *Watson v Fintrust Properties (Pty) Ltd supra* 757G. However, the doctrine of fictional fulfilment can only be invoked when the *principal* has deliberately done something to prevent the fulfilment of a condition precedent to his liability to the agent whom he has engaged to sell his property: *Watson v Fintrust Properties (Pty) Ltd supra* 757H. If a buyer deliberately frustrates fulfilment of a suspensive condition by not applying for a loan one would have to argue that the *seller* should have taken steps to compel the buyer to comply with his obligations under the sale agreement; failure to do so meant that the seller deliberately prevented the fulfilment of the suspensive condition. This argument may be somewhat forced, hence the need for the clause discussed in the text.

places a duty on the buyer not to intentionally frustrate fulfilment of the condition. In this way the interests of the seller are also protected.

A commission clause empowering an estate agent to claim commission from a party other than the mandator confers on the estate agent a basis for a commission claim not provided for at common law. Accordingly, the normal common law principles governing an estate agent's right to payment of commission do not apply. Unlike the position at common law, it is not an implied term of such a commission clause that commission will be payable only if the buyer is financially able to purchase the property²⁶ or that the mandate has to be performed substantially before commission will be payable.²⁷ It is submitted that in claims of this nature the estate agent also need not prove that he is the effective cause of the transaction in question.²⁸ The commission claim is based purely on the wording of the *stipulatio alteri* and there are no common law principles that apply. In other words, it cannot be argued that the effective cause requirement has to be read into the commission clause on the grounds that it is a rule of common law. Obviously the position would be different if such proof is required in terms of the commission clause, but this would be rather unusual.

5 THE ENFORCEMENT OF PENALTY CLAUSES AND AN ESTATE AGENT'S CLAIM FOR PAYMENT OF DAMAGES

At common law a mandate given to an estate agent to find a buyer places no obligation on the seller to sell his property to a person introduced by the estate agent, even if the latter submits an offer at the exact asking price stipulated in the mandate.²⁹ There is also nothing prohibiting the seller from revoking the mandate at any time³⁰ or finding a buyer himself.³¹ The seller incurs no liability whatsoever to pay commission to the estate agent in any of these instances, subject to the terms of the mandate.³² The same applies if the seller mandates an estate agent to find a buyer but then sells the property to a buyer introduced by another estate agent. Unless agreed otherwise the seller is free to appoint as many estate agents as he wishes and to sell through any estate agent mandated by him. He would incur no commission liability towards any of the other estate agents provided none of them is the effective cause of the sale.

It is rare to find terms in open mandates (*ie* mandates other than sole mandates) imposing any restrictions on a seller in this respect. However, in

²⁶ *Aida Uitenhage CC v Singapi supra* 683I-J.

²⁷ Boberg PQR 1970 *Annual Survey of South African Law* 130.

²⁸ See *The County Homeseach Co (Thames & Chilterns) Ltd v Cowham* [2008] EWCA Civ 26, where the Court held that in the case of a buyer agency a commission clause in the sale agreement cannot be said to contain an implied term that commission is payable by the buyer only if the estate agent was the effective cause of the sale.

²⁹ *Gluckman v Landau* 1944 TPD 261; *Brayshaw v Schoeman supra*.

³⁰ *Tony Morgan Estates v Pinto supra*; *Pretorius v Erasmus* 1975 2 SA 765 (T) 770.

³¹ *Gluckman v Landau supra*; *Mendes v Ermelo Eiendomme en Verhulingsagente* 1995 4 SA 821 (T).

³² See the discussion in par 3 above.

practice sole agency documents used by a number of estate agency firms³³ stipulate that the seller would be liable to pay the estate agent an amount equalling the estate agent's commission should the seller, in breach of the obligations imposed by the sole agency agreement –

- (a) reject a written offer, made in good faith and submitted by the estate agent during the mandate period, to purchase the property on the terms stipulated in the sole mandate;
- (b) during the mandate period appoint or allow another estate agent to find a buyer for the property referred to in the mandate, or personally sell or market the property;
- (c) revoke the sole agency before the expiry date thereof;
- (d) refuse to co-operate with the estate agent to sell the property, more particularly by
 - (i) denying the estate agent access to place a for-sale board on the property, or removing the board, if permission to erect such board had been given; or
 - (ii) denying the estate agent access at reasonable times for the purposes of showing the property to potential buyers or holding show days.

A clause of this nature is essentially a penalty stipulation governed by the Conventional Penalties Act.³⁴ It is submitted that the enforcement of such clause does not bring into play any issues relating to effective cause, except to the extent stated in the clause. In the typical clause referred to above, the estate agent seeking to enforce the clause need not prove himself to be the effective cause of anything: the events or circumstances giving rise to the penalty are circumscribed by the clause itself, which makes no mention of effective cause at all. Any event set out in the clause triggers a right to claim payment of an amount equalling the commission stipulated in the sole agency, irrespective of the question whether the estate agent would have been the effective cause of the transaction contemplated by the sole mandate had that event not occurred.³⁵

³³ See clause 5 of the Estate Agency Affairs Board's *Agreement Granting a Sole and Exclusive Mandate to Sell*. The clause is reproduced in many estate agency firms' pre-printed sole mandate document. See also *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd* 1989 3 SA 26 (A), where the commission clause read as follows:

"Furthermore, if during the period of this sole mandate the property/stands/units is/are sold by (the seller) or any other person, then (the seller) shall be liable to pay (the estate agent) commission at the rates referred to above and calculated on the price at which the property/stands/units is/are sold."

The seller had sold a portion of the property privately to a buyer not introduced by the estate agent. The Court held that the clause entitled the estate agent to payment of commission.

³⁴ 15 of 1962. The Act (s 1) refers to a penalty stipulation as "a stipulation ... whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person". On penalty stipulations in general see Van der Merwe, Van Huysteen, Reinecke and Lubbe *Kontraktereg Algemene Beginsels* 3ed (2007) 468.

³⁵ In *Watson v Fintrust Properties (Pty) Ltd supra* 7521 it was remarked that "(w)hen the agent has been prevented from carrying out his mandate his only possible claim is one for damages: he cannot claim commission because he has not ... earned it". With respect, this statement is perhaps too widely formulated, since there is nothing preventing a seller and an

Not all sole agency agreements with estate agents contain penalty clauses. However, in the absence of such a clause an estate agent aggrieved by a seller's breach of contract may have a common law claim for damages on the grounds that he/she has been prevented from performing the mandate.³⁶ For example, a damages claim may arise should a seller unlawfully purport to terminate a fixed term sole agency by revoking the mandate before the expiry thereof, and then frustrate the estate agent's efforts to bring about a sale.³⁷ The same applies should the seller during the period of an irrevocable sole agency withdraw the property from the market after having been presented with an offer to purchase the property on the terms set out in the sole agency.³⁸ In such instances the estate agent's case is not that he has performed the mandate or that the event entitling payment of commission has occurred: the case is that the estate agent is entitled to payment of damages on the grounds that the seller has breached the sole mandate agreement, thereby preventing the estate agent from earning the commission.³⁹ To succeed in such a claim the estate agent will have to prove the loss occasioned by the seller's conduct. The damages to which the estate agent is entitled are not "commission which it would have earned" but "the loss which it has suffered through not being able to fulfill the contract by reason of the defendant's breach".⁴⁰ The damages may be less than the commission but very often they will be the same.⁴¹ It is submitted that in order to establish any damages the claimant would have to prove that, but for the defendant's conduct, it could have sold the property referred to in the sole agency and that it would have been entitled to commission on that transaction.⁴² That means the claimant would have to prove, amongst others, that it would have been the effective cause of the transaction. In other words, a claim for damages cannot succeed unless the plaintiff can establish on a balance of probabilities that the event contemplated by the mandate would have occurred and that it would have been the effective cause thereof. Such proof would not be required, however, if the effective cause requirement has been excluded by agreement between the parties.

estate agent agreeing that the seller would pay the estate agent *commission* should the seller prevent the agent from carrying out the mandate, for example by selling the property privately: see *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd supra* and *Mendes v Ermelo Eiendomme en Verhuringsagente supra* 825F.

³⁶ For a discussion of the differences between a commission claim and a claim for damages, see *Watson v Fintrust Properties (Pty) Ltd supra* 753D. See too *Badenhorst v Van Rensburg* 1985 2 SA 321 (T).

³⁷ See *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd supra*.

³⁸ *The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* 1984 2 SA 881 (A).

³⁹ *Watson v Fintrust Properties (Pty) Ltd supra*.

⁴⁰ See *De Coning v Monror Estate & Investment Co* 1974 3 SA 72 (E).

⁴¹ *Watson v Fintrust Properties (Pty) Ltd supra* 753J. Take the case where a sole agency states that the commission would be R300 000 and that the estate agent will advertise the property in certain high-class publications. If the seller unlawfully revokes the mandate before the advertisements have been placed the estate agent cannot claim R300 000 by way of damages since it would then be placed in a better position than it would have been had the mandate been performed. The estate agent's actual loss would be R300 000 minus the cost of the advertisements (which could be substantial) unless the estate agent can prove that it would have sold the property without placing the advertisements.

⁴² See *De Coning v Monror Estate & Investment Co supra* 75A; and *Eileen Louvet Real Estate (Pty) Ltd v AFC Property Development Co (Pty) Ltd supra* 31E-F.

6 A CLAIM FOR COMMISSION OR A SHARE THEREOF BASED ON A THIRD PARTY'S RULING WHICH THE MANDATOR AGREED TO IMPLEMENT

When a property is listed with several estate agents and they compete in trying to conclude a sale by the seller to a particular buyer, it may be difficult (sometimes even impossible) to distinguish between the efforts of one agent and another and to determine which estate agent is the effective cause of the transaction. South African courts have not yet given a decisive answer as to whether the mandator may be held liable to pay commission to each estate agent in circumstances where it cannot be determined whose efforts were the decisive factor.⁴³ What is clear, however, is that a court is not empowered to take into account the respective contributions of the agents involved in the transaction and to apportion the commission accordingly.⁴⁴ As was stated by Mummery J in *Standard Life Assurance Company v Egan Lawson Limited*:⁴⁵

“None of the cases indicate that it is legally possible, in the absence of an express or implied contract to that effect, for the court to apportion the agreed commission between the two agents on an equitable basis that each introduction was a contributory cause of the purchase by the person introduced. Neither side proposed that solution as a legally permissible (or even desirable) result in this case. It is a case of winners and losers, all or nothing.”

Accordingly, if a court finds that the efforts of estate agent A (the plaintiff) contributed 55% towards the conclusion of a transaction and that of estate agent B (who is not a party to the case) 45%, the Court cannot apportion the commission by awarding A only 55% of the amount payable. If A is held to be the effective cause of the transaction he or she will be awarded the commission in full. Not being the effective cause, estate agent B would have no claim for payment of commission despite having made a fairly significant contribution towards the sale. This not unfair: the fundamental nature of a selling or letting agent's business is to bring about a specific result regardless of the time and effort required to achieve that result. Commission is linked to the result, not the effort that contributed towards the result. It is an inherent risk of an estate agency business that the efforts made towards achieving the result may come to nothing, despite being significant or useful, in which case no commission would be earned.⁴⁶

In cases where a seller (mandator) does not deny liability for payment of commission on the sale of his or her property but faces a dispute involving more than one estate agent relating to effective cause, the estate agents in question sometimes agree to accept a ruling by an independent outsider as to

⁴³ The matter was left open by the Appellate Division in *Webranchek v LK Jacobs and Co Ltd* 1948 4 SA 671 (A). See Delpont 2009 Obiter 738.

⁴⁴ See Van Jaarsveld “Die Problematiek van Kommissieloon Betaalbaar aan Eiendomsagente” 1974 *De Rebus Procuratoriis* 161 who advocates that a system similar to the Apportionment of Damages Act 34 of 1955 be introduced to provide for the apportionment of commission where several estate agents are involved in a transaction. There is much to be said in favour of this view, but fact remains that currently there is no legal basis empowering courts to apportion commission.

⁴⁵ [2000] EWCA Civ 293; [2001] 1 EGLR 27.

⁴⁶ See Delpont 2010 *THRHR* 414.

which estate agent was the effective cause of the transaction and/or to what extent the commission must be shared amongst them on an equitable basis, if at all. The underlying intention is to avoid engaging the estate agents' mutual client (the mandator) in potentially costly litigation. Not being a party to this arrangement the mandator is not bound to these rulings and they cannot be enforced against him or her. However, where a seller (mandator) had agreed to accept and implement a ruling but subsequently fails or refuses to do so, there is no reason why the aggrieved estate agent(s) should not be entitled to proceed against the mandator based on the terms of the agreement. Accordingly, if for example the ruling was that commission be shared equally the estate agent denied his or her share may claim same from the mandator. The plaintiff's cause of action would be based on the terms of the agreement in question, not common law, with the result that the common law requirements pertaining to a commission claim do not enter the picture.

7 A CLAIM BASED ON ENRICHMENT FOR PAYMENT OF A QUANTUM MERUIT

South African common law of estate agency is firmly based on the all-or-nothing approach whereby an estate agent is not entitled to payment of any commission unless it can be established that his or her input was the effective cause of the result contemplated by the mandator.⁴⁷ The corollary of this rule is that at common law an estate agent who cannot prove that he has earned the commission in full cannot claim a share thereof based on the value of his or her input. According to Kerr,⁴⁸ however, the position is not quite as simple: in his view a court has a discretion to allow an estate agent's claim on contract for part of the commission; alternatively a claim for a share of the commission may possibly be pursued in an enrichment action:

"There seems ... to be no good reason why two or more agents who are each appointed by the same principal to perform the same service should not combine to claim the commission. Failing a willingness to combine, may an agent who cannot prove that he is entitled to the whole of the commission sue in contract for part of it? Since the decision in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* it is within the discretion of the court to grant such an action. I suggest that a court would not grant an action to the first agent if the circumstances of *Eschini v Jones* were to recur but would grant it to an agent whose work was of a significance equal to that of another agent or of substantial significance. Another possibility is an action on unjust enrichment for a *quantum meruit*. Such an award is not for commission, or a part thereof, *qua* commission. Each agent has to prove the amount to which he is entitled."

This requires a closer look. The judgment in *BK Tooling* was delivered in the context of a reciprocal contract (*locatio conductio operis*), that is, a contract in terms of which both contracting parties have contractual rights and duties. It was held that where a contractor fails to perform fully in terms of the contract but the employer nevertheless accepts the defective performance, the court has a discretion based on reasonableness and fairness to award the

⁴⁷ See the authorities cited by Delpont 2010 *THRHR* 414. However, a seller who mandates more than one estate agent to find a buyer should not escape liability for payment of more than one commission where the estate agents' services in finding a buyer were of equal value so that it cannot be said who the effective cause was: Delpont 2009 *Obiter* 738.

⁴⁸ *The Law of Agency* 3ed (2006) 171.

contractor the contract price *minus* a deduction to be made for the proper completion of the contract.⁴⁹ At common law a mandate conferred on an estate agent to find a buyer does not constitute a reciprocal contract in that no contractual duties are imposed on the estate agent in terms of the mandate:

“The appointment of an estate agent to find a purchaser for immovable property in return for commission, without more, places the agent under no contractual obligations. The contract is merely a promise, binding upon the principal, to pay a sum of money upon the happening of a specified event.”⁵⁰

It is submitted that *BK Tooling* is no authority for the proposition that a court has a discretion to allow a claim for a part of the commission payable on a sale of a property where the plaintiff estate agent was mandated to find a buyer and had made a significant, but not decisive, contribution towards the sale. To the extent that the judgment may be applicable in such circumstances it is in any event not the type of scenario where the court's discretion should be exercised in favour of the plaintiff. As stated earlier, the all-or-nothing principle underlying estate agency commission is inherently part and parcel of an estate agent's business. It is neither unfair nor unreasonable for an estate agent to be paid a significant commission for bringing about the event contemplated by the principal, even if it involved relatively little effort on the estate agent's part; by the same token it is not unreasonable or unfair for an estate agent to receive nothing if his or her efforts did not effectively bring about the desired result but merely contributed thereto in some way.

It is furthermore submitted that there is no room for an enrichment claim by an estate agent who made a contribution towards a sale transaction contemplated by the mandator but the efforts in question were not the effective cause of the sale. The seller may well have benefited by the estate agent's input, but it does not follow that the seller had been unjustifiably enriched at the estate agent's expense.⁵¹ If the seller sold the property in question through the intervention of another estate agent who turned out to be the effective cause of the sale, the seller had not been enriched: his or her estate has not experienced a net surviving gain by reason of the first agent's efforts. All that occurred was that the purchase price replaced the property in the seller's estate, and there was no decrease or non-increase of liabilities in the estate given the payment of the full commission to the second estate agent.

This does not mean that an estate agent can never rely on an enrichment action for a *quantum meruit*. At the outset it needs to be noted that “the words ‘*quantum meruit*’ have no precise technical significance in our law”.⁵² Generally the expression is used in two instances:⁵³ firstly in the context of an enrichment claim to refer to the quantum of the defendant's enrichment, and secondly in the context of a contractual claim to refer to the reasonable price of the work or services specified in the contract where the parties had not at

⁴⁹ See the commentary on *BK Tooling* by Eiselen and Pienaar *Unjustified Enrichment. A Casebook* 3ed (2008) 329.

⁵⁰ *Ronstan Investments (Pty) Ltd v Littlewood* 2001 3 SA 555 (SCA).

⁵¹ See Visser *Unjustified Enrichment* (2008) 161. The author gives a clear explanation as to why not every economic benefit amounts to enrichment.

⁵² *Inkin v Borehole Drillers* 1949 2 SA 366 (A) 371.

⁵³ Eiselen and Pienaar 320.

the outset agreed on a specific price.⁵⁴ For present purposes the discussion focuses on *quantum meruit* based on enrichment. *Blesbok Eiendomsagentskap v Cantamessa*⁵⁵ is a useful point of departure. The case concerned a claim by an estate agent to recover expenses incurred by it in the execution of a mandate. The defendant (C) had purchased a property and a business through the intervention of the estate agent and required a valuation of the *merx* in order to secure financial assistance to pay the purchase price (although the reported judgment does not state so specifically, it may be assumed that the financial arrangements were a pre-requisite for a successful sale and that the usual rule applied, namely no sale, no commission). According to the estate agent C had given him/her a verbal mandate to obtain the valuation on C's behalf, but nothing was said about the costs of the valuation. The estate agent duly obtained the valuation, rendering its own services in this regard free of charge, but had to employ and pay a registered valuer R1 316 to perform the work. The estate agent alleged that it was entitled to a reimbursement of the R1 316 on the grounds that it had performed the mandate; alternatively, if there was no mandate C had been enriched at its expense. C denied having given the estate agent any mandate to obtain the valuation, but conceded that he needed the valuation and that it had benefited him.

The court (Van Zyl J and De Klerk J) found on the facts that C had indeed given the estate agent a mandate to obtain the valuation on his behalf. It was furthermore held that at common law a principal is bound to reimburse an agent for all expenses incurred by the agent in the execution of his or her mandate, provided such expenses are necessary, reasonable and have been incurred in good faith. On the facts there was no question that these requirements had been met, with the result that the estate agent was clearly entitled to be reimbursed the R1 316. Van Zyl J then turned to the alternative claim based on enrichment (De Klerk J found it unnecessary to express any view in this regard) and held that even if a mandate had not been given to the estate agent it (the estate agent) would nevertheless have been entitled to claim the valuer's fee based on enrichment given the fact that it had paid the costs of the valuation which C would otherwise have had to incur himself. According to the learned judge this was specifically a case where the plaintiff could invoke the extended *actio negotiorum gestorum*, but not the normal *actio negotiorum gestorum contraria*, having regard to the fact that it had acted in its own interests to bring about a successful sale in order to earn commission.

For present purposes it is unnecessary to analyze Van Zyl J's observations in detail. Suffice to state that the court's judgment should not be understood to mean that an estate agent mandated to find a buyer may claim reimbursement of the expenses incurred by him or her in the course of performance of the mandate. *Blesbok* concerned the classic contract of *mandatum*, that is, an agreement whereby one party (*mandatarius*) undertakes to carry out an instruction for the benefit of the other party

⁵⁴ See *Muller v Pam Snyman Eiendomsagentskap (Pty) Ltd* 2001 1 SA 313 (C). This was a contractual claim for reasonable commission, although the expression *quantum meruit* was not used. See too *Press v Jofwall Investments (Pty) Ltd* 1981 1 SA 261 (W).

⁵⁵ 1991 2 SA 712 (T).

(mandator). It is trite law that an estate agent given a mandate to find a buyer is not entitled to look to the principal for a refund of expenses incurred during the course of the execution of the mandate (for example petrol costs and advertising fees), unless otherwise agreed between the parties. In the latter instance the estate agent is not really employed in the capacity of a classic mandatary, because, unlike the true *mandatarius*, the estate agent is under no legal obligation to carry out the instruction to find a buyer. It is furthermore submitted that *Blesbok* is not to be interpreted to mean that an estate agent who markets a seller's property without having been mandated to do so may claim some payment from the seller based on enrichment should the seller eventually sell the property privately (that is, without the estate agent's intervention) to a buyer found by the estate agent. True, an enrichment action is available to a person who, without any instructions to do so, manages the affairs of another in order to gain some personal benefit (such as commission), but it is an essential requirement of such action that the plaintiff's conduct must have been reasonable.⁵⁶ The estate agent's code of conduct⁵⁷ specifically prohibits an estate agent from offering a property for sale, negotiating in connection therewith or canvassing a prospective purchaser unless he or she has been given a mandate to do so by the seller. In the circumstances it is hard to find a realistic example where one would be able to say convincingly that an estate agent had acted reasonably in finding a buyer for a seller's property knowing full well that it had no mandate to do so.

8 CONCLUSION

Disputes concerning estate agent's remuneration often arise in practice. A legal representative assisting an estate agent to pursue a claim for payment must analyze the client's cause of action carefully, mindful of the fact that not all claims for payment are necessarily commission claims based on common law. Some claims may be easier to prove than others, particularly so if the circumstances do not call for proof that the estate agent was the effective cause of the event contemplated by the mandator. In practice most claims for payment instituted by estate agents would be based on contract (or breach of contract) but an enrichment action may lie in certain (rare) instances. Claims for payment of a portion of the commission are possible but not the norm – in the majority of cases the claim would be for payment of full commission (or damages in lieu of commission) based on the all-or-nothing approach inherent to an estate agent's business.

⁵⁶ Visser 577.

⁵⁷ Clause 3.1.