



## Which Agent was the effective cause of the sale?

*Agents often ask me the following question if they introduce a Buyer to the Seller if the agent had an open mandate agreement with the Seller-*

*"I introduced the Buyer to the Seller- Am I entitled to the commission?"*

This is a question that very often arises where **open mandates** have been given to more than one estate agency.

**Having** said this one must be mindful of a ruling made by Judge Goldstone in the *Lieb NO vs I Kuper & Co* case where the judge ruled that after the expiry of a period, the initial introduction by the estate agent had ceased and that unless the agent can prove that he was the effective cause of the sale he was not entitled to commission.

Furthermore in the *Aida Real Estate vs Lipschitz* matter Judge Marais made the following ruling:

*"A provision has been added to the effect that the introduction of the able and willing buyer must have been the effective cause of the sale. If a **new factor intervenes** causing or contributing to the conclusion of a sale and the new factor is not of the making of the agent the final decision depends on the result of a further enquiry – viz, did the new factor outweigh the effect of the introduction by being more than or equally conducive to the bringing about of the sale as the introduction was, or was the introduction still overriding operative?"*



Furthermore in the matter of *Webranchek vs Lk Jacobs and Co* the judge made the following ruling when tasked with deciding on commission claims by competing agents:

*“It was common cause that where a property is listed with several agents and they compete in trying to conclude a sale by the principal to a particular third party, it is not necessarily the agent who first introduces the purchaser, who is entitled to remuneration but the agent who is the effective cause of the transaction being completed... Situations are conceivable in which it is impossible to distinguish between the efforts of one agent and another in terms of causality or degrees of causation. In such situations it may well be... that the principal may owe commission to both agents...”*

In following this decision the courts have also used the following words when considering these types of claims.

**Therefore:**

In order to entitle an estate agent to commission on the sale of a property the agent who claims the commission bears the burden of proof and must show that:

- a) that had he/she not **introduced** the purchaser to the property, the sale would not have gone through, **and**
- b) there **were no new factors** causing or contributing to the conclusion of a sale
- c) that his/her introduction was the direct and **effective cause of the sale**
- d) that the **agent's actions was a direct result to conclude the sale** and also assisted the buyer throughout the transaction



e) that the agent acted in terms of the mandate agreement.

#### Conclusion:

- Be sure that you are the effective cause throughout the sale transaction between the seller and the buyer and that no new factors stalled and or prohibited you with this relationship between the seller and the buyer before you can claim your commission.
- The onus is on the agent to prove that he/she was the effective cause of the sale transaction.
- That the commission the agent claims is agreed between the agent and the seller-it can be proved by the agent ( I often ask agents for this “open mandate agreement” and then they say we “had an oral agreement” – It will be very difficult to claim your commission on an oral agreement-
- I also see many mandate agreements where the commission clause is not completed or left open, as it will be “negotiated later”- it will be very difficult to claim commission if no commission percentage was agreed to in the mandate agreement
- Do not leave the door open- Stay away from the following phrases- “We will calculate our commission when we find a buyer”-rather calculate and agree your commission upfront to be able to claim your commission for the work you have done and do this in writing signed and accepted by the seller.



As is evident from the aforesaid, various factors play a role when a claim for commission arise where open mandates are involved. Should you encounter such a situation, please contact us for assistance as each matter must be evaluated on its own facts and merits.

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