



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 476/2018

Name of ship: **MFV QAVAK:**

In the matter between:

TWENDE AFRICA GROUP (PTY) LTD

t/a TAG MARINE

APPELLANT

and

MFV QAVAK

FIRST RESPONDENT

Neutral citation: *MFV Qavak: Twende Africa Group (Pty) Ltd v MFV Qavak* (476/2018) [2019] ZASCA 9 (12 March 2019)

Coram: NAVSA AP, WALLIS, DAMBUZA and MAKGOKA JJA
and DAVIS AJA

Heard: 26 February 2019

Delivered: 12 March 2019

Summary: Shipbroker – entitlement to commission – dependent on agreement between shipbroker and either seller or buyer to pay commission for services rendered by broker – broker advertising sale of vessel without authority from seller – prospective purchaser responding to advertisement – no contractual relationship established – no basis for inferring the existence of a tacit contract.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Goosen J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Wallis JA (Navsa AP, Dambuza and Makgoka JJA and Davis AJA concurring)

[1] Fisherman Fresh CC (Fisherman Fresh) is the registered owner of the MFV *Qavak*. It purchased the *Qavak* from an Irish company, C & M Donohue Fishing Ltd (Donohue Fishing), in terms of a Memorandum of Agreement (MOA) dated 15 August 2017 but executed by both parties on 18 August 2017. On 26 January 2018, the appellant, Twende Africa Group (Pty) Ltd t/a Tag Marine (TAG) caused the *Qavak* to be arrested in Port Elizabeth Harbour in an action *in rem* based upon a claim for broker's commission arising out of the purchase of the vessel. On 1 February 2018, Fisherman Fresh applied as a matter of urgency for the release of the vessel from arrest. Goosen J, sitting in the Eastern Cape Division of the High Court, Port Elizabeth, granted that relief on 20 February 2018 and gave leave to appeal on 17 April 2018.

TAG's claims

[2] TAG's summons, on which the arrest was based, advanced a claim for broker's commission 'arising out of ship brokerage services rendered by it' to Fisherman Fresh. Its affidavit opposing the application to set the

arrest aside repeated the claim that it had acted as a broker on behalf of Fisherman Fresh in negotiating the conclusion of the purchase of the *Qavak* and that this entitled it to claim commission, because the sale had been concluded through its instrumentality or agency.

[3] Alternatively to this claim, TAG alleged in its answering affidavit that Fisherman Fresh and Donohue Shipping agreed that they would purchase the vessel through TAG and would not employ other brokers or do anything to frustrate TAG's opportunity to earn commission. It said that there had been a breach of this obligation and claimed an amount equivalent to 10 percent of the purchase price as damages in lieu of the lost commission.

[4] Over and above this damages claim, and in the event of the court holding that TAG only had an agreement with Donohue Fishing, it contended that Fisherman Fresh interfered unlawfully with that relationship by clandestinely concluding the sale through a different broker, thereby causing TAG to suffer damages in the amount of the lost commission. Although this claim was based on an agreement with Donohue Fishing and not Fisherman Fresh, it was alleged that 'if sellers and buyers are permitted to employ brokers who did not introduce them, the business of shipbrokers will suffer massive uncertainty, and their goodwill will be significantly eroded.' The affidavit alleged that Fisherman Fresh owed a legal duty to TAG to respect its right to its goodwill.

[5] Neither of these damages claims was mentioned in the summons, or formed the basis for the arrest, but in the *Thalassini Avgi* this court held that it was open to a party that obtained an arrest *in rem* on one

ground, to rely on other grounds where it was sought to set the arrest aside.¹ It is therefore necessary to consider all three claims in deciding whether the arrest was correctly set aside by the high court.

[6] In terms of s 3(4)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA) an action *in rem* in pursuit of a maritime claim may be instituted by the arrest of a vessel, where the owner of the vessel to be arrested would be liable *in personam* in respect of the claim giving rise to the arrest. In order to sustain its arrest of the *Qavak*, TAG bore the onus to prove that it had a personal claim against Fisherman Fresh and that the claim was a maritime claim. The standard of proof required to discharge that onus was no more than a prima facie case, a test that is satisfied if there is evidence, which, if accepted, will establish a cause of action.²

[7] TAG's contractual claim for broker's commission was a maritime claim in terms of sub-para (p)(ii) of the definition of a maritime claim in s 1 of the AJRA, as a claim 'arising out of or relating to . . . the remuneration of . . . any person appointed to act or who acted . . . as a broker in respect of any . . . sale . . . relating to a ship'. Its alternative claim based on a breach of the alleged brokerage agreement was also a maritime claim in terms of that section. It is less clear that a claim for damages for interference with the broker's contract with a third party is a maritime claim, but in view of the fact that TAG failed to make out a prima facie case under this head it is unnecessary to express a conclusive view on the point.

¹*Cargo Laden and Lately Laden on Board The MV Thalassini Avgi v MV Dimitris* 1989 (3) SA 820 (A) (*Thalassini Avgi*) at 834F-G; *MV Wisdom C: United Enterprises Corporation v STX Pan Ocean Co Ltd* [2008] ZASCA 21; 2008 (3) SA 585 (SCA) para 16.

² *Thalassini Avgi* at 831G-832C.

The contractual claim for commission.

[8] It is apposite to preface the consideration of the evidence on this claim by reminding ourselves of the basic principles applicable to a broker's entitlement to commission. These are summarised in the following passage from *The Law of Agency in South Africa*:³

‘The broker is remunerated by commission. But it is essential that he prove that there was an express or an implied contract of employment as broker and an express or implied promise to pay remuneration.’

No entitlement to commission can arise in the absence of an agreement between the broker and one, other or both of the parties to a particular transaction that commission will be paid to the broker in the event of a particular outcome being achieved as a result of the broker's efforts on behalf of the client. In the absence of some such contract, the broker's involvement in negotiations, however successful, does not give rise to a right to claim commission.

[9] In the summons and the answering affidavit the contractual claim against Fisherman Fresh was advanced on the basis that the evidence disclosed, on the requisite prima facie basis, that Fisherman Fresh appointed TAG as its agent to find a fishing vessel for it, in return for which it would pay TAG commission. TAG did not rely on an express agreement to this effect, for there was none. Its case was that such an agreement was capable of being inferred from the following dealings that it had with Fisherman Fresh.

³ De Villiers and Macintosh *The Law of Agency in South Africa* 3 ed (J M Silke) 237. See also Lawsa Vol 17, part 1 (2 ed) sv ‘Mandate and Negotiorum Gestio’ para 15; Kerr *Law of Agency* 4 ed (2006) 48 and 157.

[10] In June 2017 TAG listed the *Qavak* for sale on its website. On 10 August 2017, Mr van Heerden, acting on behalf of Fisherman Fresh, enquired whether the vessel was still for sale and, if so, the price. Mr Cilliers replied on behalf of TAG saying that he had spoken to the owners a month previously and they ‘will take USD 500 000’. Mr van Heerden responded immediately and asked whether the vessel was still available so that ‘we’⁴ could fly over to view it. Mr Cilliers then sent Mr van Heerden draft wording of a letter of intent to be placed on a Fisherman Fresh letterhead and signed on its behalf. This was done at 1.02 p.m. that afternoon. The exchange of emails between Mr van Heerden and Mr Cilliers lasted two hours from start to finish.

[11] The letter of intent, addressed to TAG, said that, on acceptance of the vessel, after inspection and agreement on a negotiated price, Fisherman Fresh intended to purchase the vessel ‘offered to us on your ID Code: MFV Qavak’. This descriptive phrase conveyed that TAG was offering the vessel for sale on behalf of the seller. The letter reinforced this impression with a request for confirmation that the vessel was available for sale. A further request for ‘her owners’ to permit it to be inspected by marine surveyors on behalf of Fisherman Fresh, strengthened the impression that TAG was representing the owners of the vessel. It must be borne in mind that this was TAG’s wording.

[12] Mr Cilliers forwarded the letter of intent to Mr Donohue that same day, 10 August. In response he received the unwelcome news that the vessel was in the process of being sold and the only thing holding up the deal was an issue over delivery. He was also told that if the sale fell

⁴ This referred to his wife, who was the sole member of the close corporation and heavily engaged in the business, and himself.

through there were three other buyers waiting in the wings. Undeterred, he went back to Mr van Heerden at 1.48 a.m. the following morning, 11 August, and suggested that Fisherman Fresh should make an offer subject to inspection. Mrs van Heerden replied shortly before 9.00 a.m. the same day, saying that they would make an offer of USD 500 000. Mr Cilliers said he would submit that offer and provided a draft offer to purchase to be placed on a Fisherman Fresh letterhead and signed on its behalf. This was done and Mrs van Heerden returned the signed offer to him that same day.

[13] The offer to purchase, sent to TAG and received and forwarded by it, without demur, to Donohue Fishing, was entirely destructive of TAG's case that it was acting as broker on behalf of Fisherman Fresh in this transaction. It was addressed to TAG itself and the opening section read as follows:

'OFFER TO PURCHASE MFV Qavak

Dear Stephen,

On behalf of *our buyers* Fisherman Fresh Fish SA, we would like to offer *your sellers* 500 000 (Five Hundred Thousand United States Dollars) for the purchase of MFV Qavak. Should *your sellers* accept our offer we will immediately sign a memorandum of agreement salesform 1987-2012 and proceed with the sale agreement based on the offer below.

Sellers: Coleman Donohue

Buyers: Fisherman Fresh SA' (Emphasis added.)

Mrs van Heerden signed the offer to purchase. It contained no mention of commission. The standard form sales contract referred to (Salesform 1987-2012) likewise makes no reference to commission.

[14] That the offer was inconsistent with the alleged contractual relationship between TAG and Fisherman Fresh was apparent from the

two references to ‘your seller’. These made it glaringly obvious that TAG was claiming to be the broker for the owners of the *Qavak*. Fisherman Fresh was in the same position as any potential purchaser responding to an advertisement and expressing interest in purchasing the goods advertised for sale. A comparable example would be a potential purchaser responding to an estate agent’s advertisement of a house for sale. Expressing interest, inspecting the property or submitting an offer would not give rise to a contractual relationship between the potential purchaser and the agent. The potential purchaser would believe, and be entitled to believe, that the agent had a mandate from the seller and that any question of commission would be a matter between the seller and the agent and no concern of the purchaser.

[15] The position would be different if the services of a broker were employed to find a vessel for a potential purchaser. Such a situation had occurred a few months earlier, when TAG was employed to find a vessel for another South African fishing company (J & D Ship Group). That had been at the end of May or early June 2017. That is when it discovered the *Qavak* advertised for sale on another website. This led to some communication between Mr Cilliers and Mr and Mrs Donohue, to which I will revert, but TAG’s client was not forthcoming with an offer and the matter fell away.

[16] Mr Cilliers submitted the offer to Mr Donahue, who rejected it because he had another offer for 550 000 euros. Thereafter there was an exchange of emails between Mr Cilliers and Mr Donohue. Despite his lack of success up to this stage Mr Cilliers ended this exchange by saying:

‘She is a great vessel I will try to push for 600k let’s see?’

Needless to say that was entirely inconsistent with his acting as broker on behalf of Fisherman Fresh. An agent for a potential purchaser may legitimately suggest to the client that a sale will only be possible if a higher price is offered, but an endeavour to push the offer up above the existing asking price serves only the seller's interests. Nonetheless it was what Mr Cilliers did. He wrote to Mr van Heerden informing him of the offer at 550 000 euros and said:

'If you have a budget I would suggest a strong counter?'

There was no response to this suggestion.

[17] These exchanges were inconsistent with the conclusion of a contract between TAG and Fisherman Fresh. Far from establishing a prima facie case of the existence of such a contract, they established quite clearly that there was no such contract. The additional factors referred to by counsel, such as that the Van Heerdens were aware that TAG was a broker, or that the offer provided for the deposit to be held by TAG, added nothing to the case. They were precisely what was to be expected from a ship broker acting on behalf of the owners of a vessel and trying to bring about a sale. That is what TAG said it was doing by way of the advertisement on its website. It repeated it in the letter of intent and in the offer to purchase, both of which it drafted. The inevitable conclusion is that TAG did not make out a prima facie case for the arrest of the vessel on the basis of a contractual claim for commission.

[18] TAG sought to rely upon the judgment of Wessels J in *Benoni Produce & Coal Co Ltd v Gundelfinger*⁵ and in particular the following passage:

⁵ *Benoni Produce & Coal Co Ltd v Gundelfinger* 1918 TPD 453 at 459 and 460-461. See also *Jacobs Levitatz and Braude v Kroonstad Roller Mills* 1921 OPD 38.

‘It is no doubt true that a broker who approaches a buyer or seller acts in the first instance as the agent of the person who employs him but directly the other party is aware of the fact that he is a broker, he becomes the agent of both parties not with a plenary power to bind both parties as he chooses but to communicate between them until they are *ad idem*.’

From this counsel sought to fashion an argument that, once the Van Heerdens knew that they were dealing with a broker, TAG was acting as agent for both parties and this entitled it to claim commission from them. The submission was that Fisherman Fresh had authorised TAG to represent it in negotiating the sale of the vessel and had thereby become the agent of both Fisherman Fresh and Donohue Fishing and entitled to claim commission from both.

[19] The argument was misconceived. It defied the basic principle set out in para 8 that the right to claim commission must flow from an agreement between broker and client. The *Benoni Produce* case was concerned with the legal effect of broker’s notes furnished by a broker to the seller of goods and a potential purchaser. The question was whether the broker’s notes constituted a binding contract, even if one of the parties had not expressly agreed to their terms. The court held that they were not and that it was permissible to go behind them to determine whether there was *consensus ad idem* between the parties.

[20] The statement that the broker ‘becomes the agent of both parties’ related only to the broker’s obligation to communicate to each of the parties what the other was saying. The broker was the jointly chosen channel of communication between seller and purchaser, but that had nothing to do with which of them would be liable to pay for the broker’s services. The judgment did not discuss that issue, which is hardly

surprising, as the case did not concern commission, but involved a dispute between buyer and seller about whether a binding contract had come into existence. Even where, for some limited purposes, such as communication between the parties, the broker is an agent for both parties, the position remains that brokers are primarily the agent of the party that employs them and gives them their mandate.⁶ It is to their mandator that the broker must look for their commission. If the broker is unwise enough to become involved in a transaction without securing an agreement by either party to pay commission, no right to commission will arise on the successful completion of the transaction.

The contractual claim for damages

[21] As explained by Mr Cilliers in his affidavit, TAG argued that it had concluded a brokerage agreement with Fisherman Fresh in terms of which it had the duties alleged in relation to the contract under the contractual claim. The immediate difficulty with this contention was that once one arrived at the conclusion that there was no prima facie case of the existence of any such contract, there was no basis for holding that there was a contract that could be breached.

[22] Counsel strove to overcome this hurdle by contending that, even in the absence of any contract for TAG to act as broker on behalf of Fisherman Fresh, there was what he termed a limited exclusivity agreement, not amounting to a sole mandate. The essence of this agreement was that once Fisherman Fresh and Donohue Fishing were in communication with one another over the possible purchase of the vessel, using TAG as the means of communication, they were contractually

⁶ De Villiers and Macintosh, *op cit*, 224.

bound not to employ other brokers to conclude the sale and would not do anything to frustrate TAG's opportunity to earn commission.

[23] Counsel identified certain factors that he submitted supported an inference that such a contract had been concluded at the requisite prima facie level. These were, first, the nature of TAG's business as a broker; second, that it had developed a website and a data base of vessels that were actually or potentially available for sale in the market as well as a data base of actual or potential buyers; and third, that the data base was the trigger for Fisherman Fresh and Donohue Fishing coming together. From this he sought to contend for an inference of the existence of a tacit agreement providing for limited exclusivity.

[24] None of these factors can be divorced from those already discussed in regard to the contention that Fisherman Fresh had appointed TAG as its broker to negotiate the purchase of the vessel. The argument wavered at times between a contention that limited exclusivity was a tacit term of the alleged contract for brokerage services, and one that it was an independent contract. An argument based upon a tacit term was doomed to fail in the light of the conclusion that there was no prima facie proof of the existence of a brokerage contract. One cannot have a tacit term unless there is a contract of which it forms part.

[25] Insofar as the argument was based upon a tacit agreement, the requirements for such an agreement are that the person proposed to be fixed with the tacit agreement must be aware of all the circumstances connected with the transaction; their actions must not be equivocal and

the tacit contract must not extend to more than the parties contemplated.⁷ Even at the level of a prima facie case these hurdles were not surmounted. Fisherman Fresh were not aware that TAG advertised the *Qavak* on its website without the authority of its owners, Donohue Fishing. It thought that it was communicating with the owner of the vessel via the latter's broker, when it was not. The proposed contract extended beyond anything Fisherman Fresh could have contemplated at the time of these dealings. Its only contemplation was that it was dealing with the owner's agent who was advertising the *Qavak* for sale. There was thus no unequivocal conduct by Fisherman Fresh indicating an intention to appoint TAG as its broker. The effect of the contention was that when a prospective purchaser deals with a broker of any type, once there has been some interaction the purchaser is disentitled to deal through another broker. That is manifestly not the law, as countless cases involving disputes over the obligation to pay commission to estate agents in precisely that situation demonstrate. For all those reasons the argument based upon a limited exclusivity agreement must fail. There was no evidence that, if believed at a trial, could lead a court to conclude that such an agreement existed.

Unlawful interference with TAG's contract with Donohue Fishing.

[26] A recognised form of delictual liability under this head is where a third party induces a party to a contract to breach its contract with the complainant.⁸ The cause of action advanced under this head was that by dealing with Donohue Fishing through another broker, Fisherman Fresh had unlawfully interfered with TAG's brokerage contract with Donohue Shipping. It contended that this resulted in TAG losing the sale and being

⁷ *Plum v Mazista Ltd* 1981 (3) SA 152 (A) at 164A-C.

⁸ *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* [2016] ZACC 42; 2017 (1) SA 613 (CC); 2017 (2) BCLR 152 (CC) para 3.

deprived of its commission. The lost commission was said to constitute the damages suffered.

[27] Essential to prima facie proof of this claim was prima facie proof of the existence of a contract between TAG and Donahue Fishing. Absent such a contract, the claim of unlawful interference was bound to fail. The evidence in support of it must be examined. In 2015 TAG had been asked by its Norwegian associates to list the *Qavak* on its website. There was no evidence as to the basis upon which this was done or that TAG had any dealings with either Mr or Mrs Donohue. In any event nothing came of this listing.

[28] In May or June 2017 TAG was looking for a fishing vessel for its South African client, J & D Ship Group. Mr Cilliers came across the *Qavak* on a website advertising fishing vessels and sent an email to Mr Donohue on 3 June 2017 advising that he was developing a possible purchase of the vessel for South African clients and asking for certain information. Mrs Donohue replied to his enquiry saying that the sale price was 400 000 euros or nearest offer. Mr Cilliers sent some further emails to Mrs Donohue that day, but received no reply. Nothing came of these dealings because his clients did not make an offer or seek to take the matter any further.

[29] Mr Cilliers then decided to list the *Qavak* for sale on TAG's website. There was no evidence that he did this with the consent of the Donohues or Donohue Fishing, or that they even knew about it. He furnished no explanation for having done this. Mr van Heerden responded to this advertisement in the manner already described. I will pick up the tale from the stage where Mr Cilliers submitted the offer to purchase to

Mr Donohue. Prior to that there was no evidence of any communication between Mr Cilliers and the Donohues that would support a conclusion that he had a mandate from Donohue Fishing to find a buyer for the vessel on their behalf.

[30] Mr Donohue's response to the offer to purchase was to say that he had a much larger offer on hand and another potential buyer who had indicated that he would pay 550 000 euros 'so I think we are too far apart'. Slightly aggrieved by this, Mr Cilliers responded saying that in the light of his conversation with Mrs Donohue on 3 June he had assumed that the price they were looking for was much lower and, had he known they were asking more than he had then been told, he could 'guide on the same which needed to include my commission as well'. Mr Donohue's response was to say that his wife had made a mistake and, in the light of the interest that had been shown in the vessel, the price had increased. He apologised for any inconvenience caused.

[31] This answer brought forth the spirited response by Mr Cilliers mentioned in para 16 that he would 'push for 600k'. Mr Donohue replied the following day and explained that the potential new owners of the vessel were trying to arrange for its delivery and finalising the paperwork. They were serious about the purchase and had been to Ireland three times to view the vessel. He ended his email as follows:

'I only have until maybe Tuesday to sign the agreement. So the situation I am in is if *your clients* come over and I prolong the deal it could mean the other buyers may become impatient and walk away and I can't risk that.

Sorry for any inconvenience caused.' (Emphasis added.)

Even the dogged Mr Cilliers recognised that this was the end of the road and replied:

‘Good luck with the transaction. Should anything change we can engage. In the meantime I will look for another 2 candidates similar in size.’

[32] Two things were apparent from this exchange. The first was that Mr Donohue understood that Mr Cilliers was acting as broker on behalf of Fisherman Fresh in engaging with him over the possible purchase of the *Qavak*. That is why he referred to them as ‘your clients’. The second was that Mr Cilliers intended to pursue efforts to ‘find’ a vessel for Fisherman Fresh even though they had never asked him to do so. This was of a pattern with his decision to list the *Qavak* on TAG’s website without seeking any authorisation from Donohue Fishing. Both reinforced the understanding that TAG did not have an agreement with Donohue Fishing to act as its broker to find a purchaser for the *Qavak*.

[33] Counsel submitted that the reference to the price including his commission, in Mr Cilliers’ email to Mr Donohue referred to in para 30, supported a contention that commission would be payable on a successful sale resulting from his introduction of Fisherman Fresh. The problem is that there was nothing to convey to Mr Donohue that the commission would be payable by Donohue Fishing. His understanding was clearly that Mr Cilliers was acting on behalf of Fisherman Fresh, so any reference to commission would not have been understood as referring to Donohue Fishing paying commission.

[34] A further factor on which counsel relied was that, to the knowledge of Donohue Fishing, TAG was a ship broker earning its living as such. All that is true, but the problem with the submission was that, by its own conduct in listing the *Qavak* for sale without obtaining a mandate from Donohue Fishing, TAG fell between two stools. In relation to potential

purchasers, such as Fisherman Fresh, it appeared to be the broker acting for the sellers, and in relation to Donohue Fishing, it appeared to be a broker acting on behalf of a potential purchaser. On Mr Cilliers' evidence it had not sought or obtained a mandate to act in that capacity from either of the two parties. It was submitted that Mr Donohue should have told Mr Cilliers that Donohue Fishing had employed another broker to sell the *Qavak*, or should have referred his enquiries to that broker in Norway. I can see no foundation for either contention. As to the first, Mr Donohue did not think that TAG was acting on behalf of Donohue Fishing. As to the second, unless Donohue Fishing had given an exclusive mandate to the Norwegian brokers, there was no obligation on it to refer prospective purchasers to it. Nothing prevented it from dealing with or accepting unsolicited offers from a third party.

[35] Lastly, counsel relied on what he characterised as the evasive response of both Fisherman Fresh and Donohue Fishing to emails sent to them by Mr Cilliers after the event. On 24 August Mr Cilliers sent an email to Mr Donohue saying that he received word through a Norwegian broker that the *Qavak* was still up for sale and asked whether 'your sale fell through'. Mr Donohue's response was:

'The vessel is sold, hope you manage to find another.'

[36] The suggestion in regard to this reply was that Mr Donohue was being deliberately coy in not saying that the sale had been to Fisherman Fresh, particularly in the light of the addition of the words 'hope you manage to find another', which was pointless as Fisherman Fresh was, to Mr Donohue's knowledge, no longer in the market for a vessel. Even if one accepts that he could have been more direct and forthcoming, this does not take the matter any further. It could not overcome the

fundamental stumbling block that Mr Cilliers entered into these negotiations without taking any steps to confirm with Donohue Fishing that it was willing to pay TAG a commission if it successfully introduced a purchaser who, as a result of the introduction, purchased the vessel.

[37] From the side of Fisherman Fresh, counsel pointed out that Mrs van Heerden signed the sale agreement on 18 August 2017 only three days after Mr Cillier's final communication with Mr Donohue. On 19 August Mr Cilliers sent Mr van Heerden details of a Norwegian Freezer vessel as a suggested alternative to the *Qavak*, but received no reply to his email. Three days after that he sent an email to Mr van Heerden asking if there had been any feedback on the last offers and saying that he had checked with the owners of the *Qavak*, whether they had managed to sell it.⁹ Again there was no reply. Mrs van Heerden said in her replying affidavit that she was in Ireland when the second email came in and in any event was under no obligation to respond to it.

[38] Counsel's submission was that the failure to respond to these emails and to say that Fisherman Fresh had purchased the *Qavak* through the intervention of another broker, demonstrated a 'guilty' frame of mind and knowledge that in some way they were acting in breach of TAG's rights. In my view, this is far too tenuous a connection to establish the case his client was trying to make. A prospective customer who has viewed a house with one agent is not under any obligation not to view it with a different agent or not to deal with the seller through the second agent. There are countless cases demonstrating that reality and it was not

⁹ There was no evidence that he had in fact done this and the only communication referred to in Mr Cilliers' affidavit was an email dated 24 August 2017.

suggested that ship brokers are in any different position from estate agents in that regard.

[39] To sum up, TAG failed to make a prima facie case that it had concluded an agreement with Donohue Fishing to act as broker on its behalf to find a purchaser for the *Qavak*. Its case against Fisherman Fresh for wrongful interference with that contract accordingly fell at the first hurdle. In my view it would also have fallen at the hurdle of showing that any such agreement was exclusive in either the normal sense of a sole mandate or the more restricted sense of partial exclusivity advanced by counsel. Mr Cilliers' evidence did not even attempt to establish the existence of a sole mandate and was inconsistent with it, as he knew that as recently as June 2017 the vessel had been advertised on another website and through another broker. Unless a sole mandate had been given, Fisherman Fresh were entitled to deal with Donohue Fishing through any agent acting on its behalf and that is what it did. That could not constitute the wrongful interference with contractual relations on which this claim was based. The allegations of collusion between Fisherman Fresh and Donohue Fishing to deprive TAG of its commission were not justified even on the basis of a prima facie case.

Result

[40] The appeal is dismissed with costs.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant: D Cooke

Instructed by: Thomson Wilks Inc, Cape Town;
Honey Attorneys, Bloemfontein.

For respondent: R G Buchanan SC

Instructed by: Greyvensteins Attorneys, Port Elizabeth;
Kramer, Weihmann & Joubert Attorneys,
Bloemfontein.