THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG -PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

08.01.2010
DATE
SIGNATURE

02/02/2010.

CASE NO: A750/2007

BEULAH VIVIERS

APPELLANT

V

IMPACT ESTATES CENTURION (PTY) LIMITED

RESPONDENT

APPEAL FROM MAGISTRATES' COURT

CORAM SERITI J SAPIRE AJ

Judgment

Sapire, A J:

The respondent which carries on the business of an estate agent sued the appellant in the Magistrates Court claiming commission in respect of a sale of property. The respondent further alleged that it was the effective cause of the sale having originally let the property to a party who subsequently purchased it. The purchase took place approximately months after the commencement of the lease.

The lease itself contained a clause that should the lessee later purchase the property the respondent would be entitled to the appropriate commission.

In the Magistrates Court the appellant unsuccessfully raised the point that the respondent had not proved itself to be in compliance with the provisions of section 34A and 34B read with sections 1 and 26 of the Estate Agent's Affairs Act, No 112 of 1976and thus not entitled to the commission claimed.
These sections read

> **26 Prohibition of rendering of services as estate agent in certain circumstances**
>
> No person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him or her and to every person employed by him or her as an estate agent and, if such person is-
>
> (a) a company, to every director of that company; or
>
> (b) a close corporation, to every member referred to in paragraph (b) of the definition of 'estate agent' of that corporation.

34A Estate agent not entitled to remuneration in certain circumstances

(1) No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of the definition of 'estate agent', unless at the time of the performance of the act a valid fidelity fund certificate has been issued-

(a) to such estate agent; and

(b) if such estate agent is a company, to every director of such company or, if such estate agent is a close corporation, to every member referred to in paragraph (b) of the definition of 'estate agent' of such corporation.

(2) No person referred to in paragraph (c) (ii) of the definition of 'estate agent', and no estate agent who employs such person, shall be entitled to any remuneration or other payment in respect of or arising from the performance by such person of any act referred to in that paragraph, unless at the time of the performance of the act a valid fidelity fund certificate has been issued to such person.

34B Prohibition of completion of documents by certain estate agents

(1) An estate agent who has not complied with the prescribed standard of training may not in his or her capacity as an estate agent draft or complete any document or clause in a document-

(a) Conferring any mandate on any estate agent to perform any act referred to in paragraph (a) of the definition of 'estate agent'; or

(b) relating to the sale or lease of immovable property.

(2) Any estate agent who contravenes subsection (1) shall not be entitled to any payment, remuneration or damages in respect of or by reason of any document contemplated in that subsection or for bringing about the transaction or agreement embodied in that document.

Although there was testimony that a close corporation from which the Plaintiff had earlier converted to its present status a a private company, did in fact have the fidelity certificates which are required the certificates themselves were never proved in evidence. Nor for that matter was the conversion proved by the best evidence. Fidelity certificates were mentioned by the plaintiff in its discovery affidavit but nothing was produced to establish compliance with the provisions of the act so as to entitle the Respondent to have succeeded in its claim for commission..

It was for the Respondent to have established a case that it was entitled to the relief claimed having regard to the provisions of section 34A of the Act. To do this the fidelity certificate of the company and every director should have been in evidence. In default thereof the Respondent should not have succeeded.

It is also clear that the individual who handled the transactions on behalf of the respondent was not an estate agent himself but merely a learner, or trainee. The principal who was a director of the respondent admitted that he had nothing to do with the transaction personally himself. The provisions of section 34B exclude any claim for commission in these circumstances.

The points so raised by the appellant should have been answered by the Magistrate in the appellant's favour. The magistrate however, erred in this respect, ruled in the respondent's favour, and granted judgment for the amount claimed with costs.

This judgment must be reversed.

Appellant in addition asked for the costs of a postponement of the trial on the 9th of February 2007. The magistrate had ordered that the appellant was to pay such costs as had been reserved on that occasion. His reasons for doing so are obscure. The postponement was clearly caused by the respondent which had not timeously made proper discovery.

This decision too is to be reversed.

The appeal should succeed, and the order of the magistrate should be set aside, to be substituted by

> "The Plaintiff's claim is dismissed with costs including the costs of the postponement on the 9th of February 2007."

SAPIRE, A J

I agree and it is so ordered

SERITI, J