/SG

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 11/12/2009
CASE NO: 15155/2005

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

9/12/2009 .... DATE .... SIGNATURE

In the matter between:

FAZUL HUQ SULIMAN	1ST PLAINTIFF
BLIK INVESTMENTS (PTY) LTD	2ND PLAINTIFF
PRO ONE INVESTMENTS (PTY) LTD	3RD PLAINTIFF
PRO SIX INVESTMENTS (PTY) LTD	4TH PLAINTIFF

And

ESTATE AGENCY AFFAIRS BOARD	1ST DEFENDANT
JACOBUS HENDRIKUS JANSE VAN RENSBURGH N.O.	2ND DEFENDANT
JAMES HENRY VAN RENSBURG N.O.	3RD DEFENDANT
ENVER MAHOMED MOTALA N.O.	4TH DEFENDANT
KHATHAZILE SIMON MAHLANGU	5TH DEFENDANT
BOE BANK LIMITED now NEDBANK LIMITED	6H DEFENDAN T

JUDGMENT

SERITI, J

Introduction

1. This matter came to court by way of action.

The first plaintiff is a businessman who was acting as an agent of the second, third and fourth plaintiffs who are all companies registered in terms of the laws of the Republic of South Africa.

The first defendant is the Estate Agent Board, a juristic person duly constituted and established in terms of Estate Agency Affairs Act 112 of 1976 as amended. No mention will be made about the other defendants as they are not relevant for the purpose of this judgment.

Particulars of Claim

2. The first plaintiff was at all relevant times the duly authorised agent of the second, third and fourth plaintiffs duly appointed in 2001 to purchase property on behalf of the other plaintiffs.

3. Sterling Auctions (Pty) Ltd (in final liquidation) was, at all relevant times acting as an estate agent as envisaged and pursuant to the provisions of the Estate Agency Affairs Act 112 of 1976. On or about 8 February 2002, the first plaintiff acting as an agent as mentioned above concluded written agreements of sale of Erf 499 and the Valgas property with the third defendant, the latter being represented by Sterling Properties and were purchased by private treaty.

4. The purchase price of the Valgas and Erf 499 properties was paid to Sterling by two cheques of R278 500.00 and R2 056 500.00 by the third plaintiff on 13 February and 5 March 2002 respectively.

Sterling has failed to pay the amounts of R2 056 500.00 and R278 500.00 to the third defendant and despite demand, Sterling has failed to repay the monies to the third plaintiff.

5. Sterling stole the money mentioned above and the plaintiffs became aware of the said theft on or about 7 May 2002. Sterling received the monies in trust and failed to comply with the provisions of section 32(1) or 32(2) of the Estate Agency Affairs Act.

6. Plaintiff lodged their claims in the total amount of R2 335 000.00 with the first defendant and the latter has failed to pay the said amounts.

7. On or about 20 February 2002 and at a public auction at Middelburg conducted by Sterling, duly instructed by the second defendant, the first plaintiff purchased the Latval, Valmit, erf 142 Middelburg and Parsi properties. Pursuant to the sales written agreements of sale were signed by the first plaintiff and the second defendant duly represented by Sterling.

8. On 20 February 2002, pursuant to the written agreements the first plaintiff paid Sterling an amount of R587 250.00. The said amount was

made up as follows: R262 500.00 as a deposit on erf 142 Middelburg, R9 750.00 as deposit on the Parsi property and R315 000.00 as a deposit on the Latval and Valmit properties. Sterling received the said monies in trust and stole the deposits paid in respect of erf 142 Middelburg and the Parsi property and consequently the plaintiffs lost an amount of R272 250.00.

9. The plaintiffs demanded repayment of R262 500.00 from Sterling and on 3 May 2002 purported to repay to the plaintiffs an amount of R2 262 500.00 by cheque which cheque was dishonoured on 7 May 2002 after it was presented for payment.

<u>Special Plea</u>

10. In its special plea, the first defendant alleged that the plaintiffs have failed to comply with the provisions of section 19(1) of the Estate Agency Affairs Act 112 of 1976 in that they commenced this action without the permission of the first defendant and have failed to exhaust all relevant rights of action and other legal remedies available to them in respect of the estate agent in respect of whom the claim arose and against all other persons allegedly liable in respect of their alleged loss.

<u>First Defendant's Plea</u>

11. The first defendant denied *inter alia* that Sterling Auctions was liquidated and that it acted as an estate agent as envisaged in the

relevant Act. It also denied the existence of written sales agreements as alleged in the particulars of claim and that any payments were made by the plaintiffs to Sterling.

12. The first defendant also denied that the plaintiffs complied with the provisions of section 19 of the Act and alleged that the plaintiffs failed to pursue other remedies against persons and/or entities allegedly responsible for their loss.

Defendant's response to Plaintiffs Rule 21 Notices

13. In its reply the first defendant stated that the plaintiffs have failed to institute action against all parties that were allegedly involved in the theft of money. Plaintiffs failed to invoke the provisions of the company law pertaining to members and/or directors of Sterling and failed to go against the estates of parties who were allegedly involved in the theft of money.

14. First defendant denied that Sterling was ever duly recognised as an estate agent and that the first defendant did not at any stage issue a fidelity fund certificate to Sterling.

Plaintiff's reply to Defendant's Rule 21 Notice

15. In reply to first defendant's notice in terms of rule 21 the plaintiffs stated that after liquidation of Sterling they were awarded a liquidation

dividend of R810 062.48. The provisions of section 424 of the Companies Act were not invoked by the plaintiffs.

Plaintiff's Evidence

16. The first witness to be called by the plaintiffs was Mr F H Suliman, the first plaintiff. He testified that at the relevant times he was acting as an agent of the other plaintiffs. He testified about how he bought the different properties and that the relevant amount of monies were paid to Sterling Auctioneers. The latter failed to pay the said money over to the purchasers and the plaintiffs lost the amount of money mentioned in the particulars of claim namely R2 335 000.00 and R2 262 500.00. Plaintiff received an amount of R800 000.00 from the liquidators of Sterling which amount must be deducted from the total claims of the plaintiffs.

17. In May 2002 he ascertained that Sterling Auctioneers were in financial trouble and he was advised to go to Estate Agency Affairs Board. He contacted the latter for the first time on 22 July 2002. At the Board referred to above, he saw Mr Solomon Makenna on 16 October 2002 and the latter requested certain documents from him. He gave him a variety of documents including interdict applications instituted by the plaintiffs. He gave Mr Makenna said documents 2-3 months after their initial meeting.

18. When he saw Mr Makenna he was accompanied by a director of the three plaintiffs and Mr Makena knew that he was acting in a representative capacity. On or about 5 November 2002 he completed a claim form received from Mr Makenna which was in an affidavit form and he delivered same to the Estate Agency Affairs Board together with a variety of documents referred to in the previous paragraph.

19. After the liquidation of Sterling they initiated an enquiry in terms of section 417 of the Companies Act and they paid for the said enquiry and consequently the plaintiffs were awarded secured dividend. Mr Van der Walt's estate, one of the director's of Sterling was sequestrated and the plaintiffs received a dividend from the said estate.

20. Under cross-examination he testified that he first saw Mr Makenna in July 2002 and a few times thereafter although he cannot recall the dates. On 16 October 2002 he was advised by Mr Makenna how to lodge a claim. He had no written authority to lodge the claims on behalf of the plaintiffs but at the meetings with Mr Makenna he was accompanied by a director of all the three plaintiffs. All the directors of the plaintiffs were aware that the claim has been lodged but he is not aware if the plaintiffs adopted a formal resolution authorising the lodging of the claim.

He further testified that he laid criminal charges against Mr Van der Walt and caused the sequestration of the estate of Mr Van der Walt.

21. Under re-examination he referred to a letter dated 30 January 2004 he received from Mr Makenna, Chief Executive Officer of the Estate Agency Affairs Board. In the said letter it is stated *inter alia* "After thorough debate for a consideration time the committee concluded that the matter be postponed *sine die* for you to finalise the civil matter that is before the High Court in Pretoria wherein you are praying for the properties to be transferred into your principals names."

22. He also referred to several correspondence he addressed to Mr Makenna wherein he was giving him reports about criminal investigations, section 417 enquiry, confirming his discussions with Mr Makenna of April 2003 when Mr Makenna informed him that a new claims committee was to be established. He also referred to a letter from Mr Makenna addressed to him and dated 18 June 2003. In the said letter, amongst others, the following is stated:

> "We at this stage report that the Board Members for the Estate Agency Affairs Board has not as yet been appointed by the Trade and Industry Minister as far as we know and we are waiting on the said announcement and it is only then that we can convene a claims meeting to consider any claims."

23. Next witness to testify was Mr Abdul Hamid Kallo a director of second, third and fourth plaintiffs. He confirmed all the payments made to Sterling and that the plaintiffs lost money as a result of the actions of Sterling. Mr Suliman was acting as an agent of the other plaintiffs and he was authorised to lodge a claim with Estate Agency Affairs Board. Under cross-examination he testified that as far as he can recall, the authorisation of Mr Suliman to lodge the claim was not in writing.

Plaintiffs closed their case.

<u>First Defendant's evidence</u>

24. The first defendant's witness to testify was Mr Solomon Makenna. He testified that he is an admitted attorney although he is no longer practising. From July 2000 up to September 2007 he was the Claims Manager of Estate Agency Affairs Board and later he was appointed Litigation Manager.

25. He further testified that if a person wants to lodge a claim against the Fidelity Fund, the said claim must be lodged by way of an affidavit. After receipt of the claim, it is investigated by claim officers and thereafter the claim is put before the claims committee for a decision. Claim must be lodged within three months after claimant knew about the facts giving rise to the claim. Claimant, prior to instituting action

against first defendant, must exhaust all legal remedies against the alleged wrongdoers.

26. On 16 October 2002 he met for the first time with Mr Sulliman and the following day he sent the latter, *inter alia*, copy of affidavit which is used to lodge the claim. When he met Mr Sulliman, the latter brought him a file containing various documents. On 5 November 2002 they received a claim from Mr Sulliman.

27. In a letter dated 25 and 26 November 2002 Mr Sulliman advised him about the progress of the interdict, investigation of estates of wrongdoers and the criminal case. On 22 January 2003 he was advised about the section 417 enquiry. Again on 13 May 2003 Mr Sulliman addressed a letter to him. In the said letter the following is stated:

> "During our last tele conversation approximately 1 month ago you informed me that a new claims committee was being put into place at the E.A.A.B.
>
> Kindly inform me approximately when a decision will be made regarding the above."

He further testified that he did not respond to the letters as his view was that Mr Sulliman did not comply with procedures of lodging a claim.

28. On 18 June 2003 he wrote a letter to Mr Sulliman and advised him that the Board Members of the Estate Agency Affairs Board have not as yet been appointed and as soon as they are appointed they will convene a claims meeting to consider claims.

On 30 January 2004 he wrote a letter to Mr Sulliman advising that the committee has postponed consideration of their claim pending finalisation of a High Court matter wherein plaintiffs are praying for an order authorising transfer of the properties in question into their names. He also requested Mr Sulliman resolutions authorising him to act on behalf of the plaintiffs. He did not receive reply to the said letter and they received summons in May 2005.

29. He further testified that the plaintiffs' claim was never determined by the Board because he was unable to place the claim before the Board as necessary requirements were not complied with.

30. Under cross-examination he testified that the plaintiffs' claim was submitted in 2005 and that the date of receipt as appears on copy of claim form submitted with them is incorrect. At no stage did he inform Mr Sulliman in writing that their claim does not comply with the

necessary requirements. On 28 January 2004 the plaintiffs' claim was placed before the claims committee. From the documents Mr Sulliman gave him, he was aware that the latter is acting on behalf of certain principals.

31. Prior to the leading of any evidence counsel for the first defendant, Advocate Sibeko SC advised the court that for the purpose of this matter they accept that Sterling was an estate agent as contemplated in section 1(a)(i) of the Act.

Section 12 of the Estate Agency Affairs Act *supra* makes provisions for the establishment of Estate Agents Fidelity Fund.

Section 18 thereof provides that the fund shall reimburse persons who suffer pecuniary loss as a result of theft committed by an estate agent or by the failure of an estate agent to invest money in a trust account and deal with it in accordance with the Act.

Section 19 which deals with claims against the fund states that:

> "(1) The board may, at any time after the commission of any theft … in respect of which a claim relating to the fund arose, receive such claim and may, subject to the provisions of section 18, settle such claim: Provided that no person shall without the permission of the board

commence any action against the board, unless and until the claimant has exhausted all relevant rights of action and other legal remedies available against the estate agent in respect of whom the claim arose and against all other persons liable in respect of the loss suffered by such claimant."

32. It is undisputed that the plaintiffs paid certain amounts of money to Sterling Auctions and the said amounts are set out in the particulars of claim. They were also mentioned during the testimony of the two witnesses who testified on behalf of the plaintiffs. It is also undisputed that Sterling Auctions failed to place in trust the monies in question nor utilise them for the intended purpose. Sterling Auctions was placed in provisional winding-up on 10 May 202 and in final liquidation on 20 November 2002.

33. According to the evidence Mr Sulliman instructed the liquidators of Sterling Auctions (in liquidation) to pursue an enquiry in terms of section 417 of the Companies Act against Mr Henk van der Walt, the former director of Sterling Auctions which enquiry or bank statements of Sterling Auctions indicated that Mr Henk van der Walt was stealing money from Sterling Auctions. Again on instructions of Mr Sulliman the personal estate of Mr Henk van der Walt was sequestrated. Mr Sulliman further testified that the relevant claims were lodged with the estates and that the matter was reported to the police.

34. In the heads of arguments, the first defendant's counsel submitted that the plaintiffs have failed to comply with the provisions of section 19 of the Act in that they failed to exhaust all legal remedies available to them, eg utilising the provisions of section 424 of the Companies Act and that the board has not given permission for the commencement of this action. I do not agree with this submissions. The evidence suggests that the plaintiffs pursued all available legal remedies including laying a criminal charge. Provisions of section 424 of the Companies Act could not have assisted the plaintiffs as the estate of the director of Sterling Auctions who stole the money was sequestrated. There is no evidence which suggests that besides Mr Van der Walt, there were other directors who could be held liable for the loss suffered by the plaintiffs. After exhausting all legal remedies, there was no need for the plaintiffs to obtain permission of the Board prior to instituting this action.

35. The first defendant's counsel in his heads of argument submitted that the first plaintiff lodged the claim in his person capacity. This submission cannot be correct. Mr Sulliman testified that he lodged the claim as an agent of the other plaintiffs. The correspondence between Mr Makenna and Mr Sulliman, in my view, indicates that the Board was aware that Mr Sulliman was acting as an agent. The claim form submitted by Mr Sulliman was accompanied by a file containing the transactions from which it is clear that Mr Sulliman was acting as an

agent. Lack of written authority to act as an agent is not fatal to the plaintiffs' claims. A director of the plaintiffs in his oral testimony confirmed that Mr Sulliman had authority to act on behalf of the plaintiffs.

36. At the time the plaintiffs issued summons, their claims were about to prescribe. The plaintiffs' counsel in my view correctly so submitted that the plaintiffs were forced to issue summons at the time they did, in order to interrupt prescriptions. If the first defendant had any desire to settle the matter it could have done so after receiving documents it alleges were outstanding. After receipt of the summons it must have become clear that Mr Sulliman was acting in a representative capacity.

37. My view is that the plaintiffs have succeeded to make out a case against the first defendant.

In the heads of argument the plaintiffs' counsel mentioned the amounts of money the plaintiffs will be entitled to if they succeed in this matter. The first defendant's counsel did not suggest that they said figures are incorrect. I am not going to make any calculations and I am going to rely on the figures contained in the heads of argument of the plaintiffs' counsel.

38. The court therefore makes the following order:

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38.1 Claim A

The first defendant is to pay plaintiffs an amount of R1 553 200.00 plus interest at the rate of 15.5% per annum calculated from 6 May 2005 to date of payment.

38.2 Claim B

The first defendant is to pay plaintiffs an amount of R1 452 437.52 plus interest at the rate of 15.5% per annum calculated from 6 May 2005 to date of payment.

38.3 The first defendant is to pay the Plaintiffs' costs on a party and party scale.

W L SERITI
JUDGE OF THE NORTH GAUTENG HIGH COURT

15155/2005/sg

Heard on:	2 December 2009
For the Plaintiffs:	Adv N A Casim SC
Instructed by:	Geyser & Associates, Pretoria
For the Defendants:	Adv L T Sibeko SC
Instructed by:	Mphahlele Attorney, Pretoria
Date of Judgment:	