REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION (JOHANNESBURG)

CASE NO: A5058/2017

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

3/12/2018
DATE   SIGNATURE

In the matter between:

PG SHAREDEALING (PTY) LTD **Appellant**

and

FIRST REALTY RANDBURG (PTY) LTD **Respondent**
t/a CHAS EVERITT INTERNATIONAL PROPERTY GROUP

JUDGMENT

WANLESS AJ:

[1] This is an appeal by PG Sharedealing (Pty) Limited (hereafter referred to as "the Appellant") against the whole of the judgment granted by Moshidi J, in this Court, on the 29th of September 2016.The aforesaid judgment arose pursuant to an opposed application in terms of which First Realty Randburg (Pty) Limited, trading as Chas Everitt International Property Group (hereafter referred to as "the Respondent"),claimed from the Appellant payment of estate agent's commission in terms of a mandate given by the Appellant to the Respondent to bring about the sale of an immovable property owned by the Appellant.[1] This mandate was contained in a written agreement of purchase and sale (hereafter referred to as "the agreement"), entered into between the Appellant (as the seller) and the "Anderson's" (as the buyer). Both Brian Peter Anderson and Nicola Anderson had been cited as Respondents in the application since they had an interest in the outcome thereof but the Respondent sought no relief against either of them. In the premises, neither of them are parties to this appeal.

[2] The court *a quo* found in favour of the Respondent and ordered the Appellant to pay to the Respondent the sum of R 299 250.00 (inclusive of VAT); interest thereon at the applicable interest rate from the date of summons to date of full payment and costs of the application on the scale as between attorney and client.[2] Leave to appeal was refused by the court a quo on the 21st of June

[1] Respondent's Notice of Motion at pages 1 to 3 inclusive of the record
[2] Paragraph [24] of the judgment at pages 100 and 101 of the record

2017[3]. Thereafter, the Appellant petioned the Supreme Court of Appeal which, on the 6th of September 2017, granted the Appellant leave to institute this appeal before the full bench of this Court.[4]

[3] In the first instance the Appellant relies on the non-fulfilment of a suspensive condition contained in the agreement as to why it cannot be liable to pay any commission to the Respondent.[5] In addition thereto, it was submitted on behalf of the Appellant in this court, that the court *a quo* erred by affording weight to conduct after the lapsing of the agreement which conduct could not, as either a matter of fact or a matter of law, constitute either a valid waiver of the suspensive condition or reinstatement of the agreement.[6]

[4] The Appellant also averred that the court *a quo* erred in affording weight to the provision in the agreement which gave the Appellant a discretion to extend the period for the fulfilment of the suspensive condition by a further ten days.[7] Finally, the Appellant relied on the submission that the entire judgment of the court *a quo* was, in effect, unsustainable, in light of the fact that the Respondent had failed to prove due compliance with the provisions of Section 34A(1)(b) of the Estate Agency Affairs Act 112 of 1976 (hereafter referred to as "the Act").[8]

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[3] Judgment and order refusing leave to appeal at pages 108 to 111 of the record.
[4] Order of the Supreme Court of Appeal at page 112 of the record
[5] Paragraph 4 of the Appellant's Notice of Full Court Appeal at pages 114 and 115 of the record
[6] Paragraph 5 of the Appellant's Notice of Full Court Appeal at pages 115 and 116 of the record.
[7] Paragraph 6 of the Appellant's Notice of Full Court Appeal at pages 116 and 117 of the record.
[8] Paragraph 7 of the Appellants Notice of Full Court Appeal at pages 117 of the record

[5] The Respondent's right to claim payment of commission to it by the Appellant must be determined in accordance with the mandate granted to the Respondent by the Appellant as contained in the agreement and read with the applicable terms of that agreement. In this regard the following clauses of the agreement are relevant for the purposes of deciding whether or not, on the application papers before the court *a quo*, the learned Judge in the court *a quo* was correct in holding that the Respondent had lawfully earned the commission payable to it, by the Appellant, in terms of that agreement.

[6] Clause 8 of the agreement[9] deals specifically with "AGENTS COMMISSION" and reads as follows:-

"a) The **Seller** shall pay the Agent commission equal to 7.5% of the purchase price, plus VAT on such commission.

b) Agent's commission is earned and payable on transfer of the Property into the name of the Purchaser **or** upon cancellation of this agreement for any reason whatsoever (including any mutual cancellation).........

c)..................................

d)...................................

e)...................................

f)....................................

g) The provisions of this clause are intended as a contract for the benefit of the Agent and may be enforced by the Agent, who accepts the benefits conferred upon it in terms thereof.

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[9] Pages 18 and 19 of the record

h) The Purchaser and the Seller hereby warrant that the Agent is the sole and effective cause of the sale and

*(i) the Purchaser warrants to the Seller that he was not introduced to the Property or the Seller by any other person other than the Agent;"

[7] Together with the aforegoing clause of the agreement, it is necessary to consider the provisions of clause 2 of the agreement.[10] Clause 2 deals with "BOND FINANCE" and the relevant provisions thereof are the following:-

" 2.1 This offer is subject to the **suspensive condition** that the Purchaser (or the Seller or the Agent on the Purchaser's behalf) is able to raise a loan upon the security of a mortgage bond to be passed over the Property by a bank or other financial institution for the sum of not less than Three Million Rand R3,000,000-00 within 30 days of acceptance of this agreement, **(which time may be extended by the Agent at the Agent's sole discretion for a further period not exceeding 10 days).The parties hereto specifically agree that such extension will be of full force and effect and binding on both the Purchaser and the Seller irrespective of whether such extension is communicated to either the Purchaser or the Seller.** "

[8] Within this contractual context, it then becomes necessary to consider those facts which are common cause in this matter. These may be summarised as follows:-

[10] Page 15 of the record , clause 2

1. The agreement was entered into on the 30th of June 2015 when the offer to purchase the property, made by the Purchaser (the "Anderson's"), was accepted by the Appellant;[11]

2. The Respondent, as a party to the agreement, accepted the benefits in favour of and accruing to the Respondent in terms thereof.[12]

3. The date by which the suspensive condition had to be fulfilled in terms of clause 2.1 of the agreement was the 30th of July 2015.

4. There is no evidence that the Purchaser was able to raise a loan as contemplated by clause 2.1 of the agreement on or before that date. In the premises, the suspensive condition was not fulfilled and, *prima facie,* the sale was "cancelled and the agreement of no further force or effect".[13]

5. On the 3rd of August 2015, one Morrow, an employee of Mercantile Bank contacted one Visser, a conveyancing secretary employed at the firm of attorneys appointed in terms of the agreement to effect the transfer of the property, namely Gert Venter Attorneys and informed Visser that a mortgage bond had been granted in favour of the Purchaser.[14]

6. That same day (the 3rd of August 2015) Visser sent an email to Morrow confirming the contents of the aforesaid telephone call and requesting the name and contact details of the attorneys who would be instructed to attend to the mortgage bond on behalf of the Purchaser.[15]

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[11] Page 25 of the record

[12] Page 25 of the record.

[13] Clause 2.2 of the agreement at page 16 of the record.

[14] Paragraph 7 of the First Respondent's "Opposing" Affidavit at page 41 of the record.

[15] Paragraph 7 of the First's Respondent's "Opposing" Affidavit at pages 41 and 42 of the record. Annexure A1 to the First Respondent's "Opposing" Affidavit at page 51 of the record.

7. On the 4th of August 2015, Gert Venter Attorneys received an email from Morrow on behalf of Mercantile Bank advising that Savage, Jooste and Adams Attorneys would be attending to the registration of the aforesaid mortgage bond over the property and that one Marleen Greese would be in contact with Gert Venter Attorneys shortly, pertaining to same.[16]

8. During or about the period 22 August 2015 to 31 March 2016, certain correspondence was entered into and a telephone conversation took place, between representatives of Gert Venter Attorneys; Savage, Jooste and Adams Attorneys and Mercantile Bank. This correspondence and at least one telephone conversation all pertained to the registration of the mortgage bond over the property.[17]

9. On the 4th of September 2015, one Gert Venter, a representative of the Appellant, addressed a letter on behalf of the Appellant to the Purchaser (the Anderson's).In this letter the Appellant advises that, *inter alia*, should the agreement be cancelled by mutual consent the Appellant would be liable to pay the Respondent's commission and any wasted costs incurred by the Purchaser in respect of the attorneys who were registering the mortgage bond.[18]

10. On the 1st of October 2015 the Appellant and the Purchaser entered into a written "CANCELLATION OF SALE AGREEMENT" in terms of which, *inter*

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[16] Paragraph 8 of the First Respondent's "Opposing" Affidavit at page 42 of the record Annexure A2 to the First Respondent's "Opposing" Affidavit at page 51 of the record.

[17] Paragraphs 9 to 17 inclusive of the First Respondent's "Opposing" Affidavit at pages 42 to 44 inclusive of the record. Annexures B1 to D3 inclusive, to the First Respondent's "Opposing" Affidavit at pages 53 to 60 inclusive of the record.

[18] Paragraph 19 of the Founding Affidavit at page 10 of the record. Annexure FA3 to the Founding Affidavit at page 32 of the record

alia, the agreement was cancelled and the Appellant indemnified the Purchaser in respect of any claim for commission by the Respondent.[19]

[9] Against these facts, it is the Appellant's case, before this Court, that once the period of 30 days expired on the 30th of July 2015 the non-fulfilment of the suspensive condition resulted in the agreement being of no further force and effect. In amplification of this argument the Appellant relies on the fact that the agreement makes no provision for a scenario where it may be agreed (presumably between the parties) that non-fulfilment of the suspensive condition would not render the agreement void *ab initio* and, further, that the contract specifically provides that in the event of non-fulfilment of the suspensive condition the agreement will no longer be of any force or effect.[20]

[10] The former submission, whilst technically correct, takes the present matter no further and, unless it was made to somehow place emphasis on the latter, may safely be ignored. Having regard to the latter, it is patently clear that the agreement provides for the case where the suspensive condition is not fulfilled and places beyond doubt that in the event of such non-fulfilment the agreement would no longer be of any force or effect. Following the argument as postulated on behalf of the Appellant, this being the case and there being no valid agreement of sale in existence, there would be no grounds upon

[19] Paragraph 21 of the Founding Affidavit at pages 10 and 11 of the record. Annexure FA4 to the Founding Affidavit at pages 33 and 34 of the record.
[20] Clause 2.2 of the agreement at page 16 of the record.

which the Respondent would be entitled to claim payment of commission which could only be earned in terms of that agreement.

[11] These submissions, viewed in isolation, would, undeniably, carry some weight. However, when viewed in the context of the agreement, together with the facts which are common cause, they carry very little weight, if any weight at all. This is in light of the clear and unambiguous provisions of the agreement as set out in clause 2.1 thereof.[21] Clearly, the provisions of this clause, with particular reference to the provision that the Appellant could, at its sole discretion, extend the period for the fulfilment of the suspensive condition for a further period not exceeding 10 days, which extension would be of full force and effect and binding on both the Purchaser and the Seller irrespective if same was not communicated to either of the said parties, constitutes a *stipulatio alteri* in the truest sense, being a benefit to the Respondent (or third party).

[12] Following thereon, it was incumbent upon the Respondent, having elected to institute its claim for the payment of commission by way of application proceedings, to show not only that it had accepted the benefit in terms of the agreement but that it had exercised its discretion to extend the requisite period by a further 10 days and that the suspensive condition had been fulfilled within this extended period. It is important to note that the point taken on appeal by the Appellant that the Respondent had waived the right to rely

[21] Page 15 of the record.

on this benefit was not pursued by Counsel on behalf of the Appellant who conceded, quite correctly, that there were no grounds therefor.

[13] Acceptance by a third party may be express or implied and, where the contract is a beneficial one, strong evidence will not be required to support it.[22] If, in a contract for sale of land, a clause providing for payment of the estate agent's commission is analysed as a contract for the benefit of the estate agent, he may accept that benefit at the outset by presenting the contract for signature.[23]

[14] As set out earlier in this judgment the agreement clearly provides for a benefit to the Respondent by giving it a **sole** discretion to extend the period for a further 10 days, thereby increasing the opportunity to satisfy the requirements of the suspensive condition. This, in turn, gives rise to a valid agreement in terms of which it is entitled to receive commission (it being clear that the Respondent would **not** be entitled to payment of commission in the event of non-fulfilment of the suspensive condition and the agreement being automatically cancelled and of no force or effect in terms of clause 2.2 of the agreement). The commission becomes payable when the property is transferred into the name of the Purchaser **or** upon cancellation of the agreement for any reason whatsoever (including any mutual cancellation) in terms of clause 8(b) of the agreement.[24]

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[22] RH Christie: The Law of Contract (5th Edition) hereafter referred to as "Christie", at page 268.
[23] Christie at pages 268 and 269. *George Ruggier & Co v Brook* 1966 (1) SA (NPD) at 22H-25D.
[24] Page 18 of the record.

[15] There can be no doubt that the aforesaid benefit extended to the Respondent in terms of the agreement was accepted by it. This is so, since not only did the agreement "presented" to both the Purchaser and the Seller for signature include the benefit as set out therein but it was also accepted on behalf of the Respondent who was a party thereto (the agreement being signed on behalf of the Respondent).[25] Indeed, this Court did not understand it to be part of the Appellant's case that the *stipulatio alteri,* as contained in the agreement, had not been accepted by the Respondent. This was never disputed in the court *a quo.*

[16] Having satisfied the requirement of proving that it had accepted the benefit in terms of the agreement it is now necessary to consider whether the Respondent had shown that it had exercised its discretion to extend the requisite period by a further 10 days and that the suspensive condition had been fulfilled within this extended period.

[17] On this point the Appellant submits that the agreement did not provide for an "automatic extension" but provided for the exercise of "a contractual discretion". In this regard, it was submitted, on behalf of the Appellant, that there was no evidence that the Respondent had exercised such a discretion at all. No mention of any extension of the relevant period was made in the Founding Affidavit. Further, it was submitted that in sub-paragraph 9.2 of its

[25] Page 25 of the record

Replying Affidavit the Respondent (as the holder of the discretion) had wrongly stated that the practical effect of the clause which created this discretion was that the 30 days were **automatically** extended to 40 days.[26] So, argues the Appellant, this attitude demonstrates that the Respondent did not exercise the requisite discretion.

[18] It is fairly trite that the rule in application proceedings is that the necessary allegations upon which an applicant relies must appear in the founding affidavit, as the applicant will generally not be allowed to supplement the founding affidavit by adducing supporting facts in a replying affidavit.[27] This is, however, not an absolute rule for the court has a discretion to allow new matter in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits.[28] Thus, a distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence, or possible existence, of a further ground for relief sought by the applicant. In the latter type of case the court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.[29]

[26] Sub-paragraph 9.2 of the Applicant's Replying Affidavit Page 71 of the record.
[27] Rees v Harris 2012 (1) SA 583 (GSJ) at 595H-596A
[28] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 (2) SA 204 (SCA) at 591C-F
[29] Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd (supra) at 212C-E; Erasmus: Superior Court Practice (Second Edition), hereafter referred to as "Erasmus", at D1-66

[19] It is true that in its founding affidavit the Respondent did not specifically deal with and rely upon, clause 2.1 of the agreement. Rather, what the Respondent did in its concise founding affidavit of some 9 pages, is to set out its cause of action and, where relevant thereto, attach certain documentation as annexures in support thereof. In so doing the Respondent put up the entire agreement as an annexure which, obviously, contained clause 2.1.[30] Furthermore, in setting out its cause of action, it referred specifically to the agreement, upon which its cause of action was primarily based, together with the relevant clauses thereof.[31] It is further clearly stated that the Purchasers complied with all of their obligations in terms of the agreement.[32] .

[20] In the premises, in the first instance, the Respondent has fully complied with the "criteria" as set out, *inter alia*, in the matter of *Reynolds NO v Mecklenberg (Pty) Limited* 1996 (1) SA 75 (WLD) at 781, that the facts must be set out simply, clearly and in chronological sequence and without argumentative matter, in the affidavits which are filed in support of the notice of motion. Secondly, it is clear from the aforegoing that this is not a case where the Respondent is seeking to bring to light new matter for the first time in its replying affidavit. Rather, the provisions of clause 2.1 of the agreement, having been pertinently raised by the Appellant in its answering affidavit and relied upon in its defence to the Respondent's claim for commission, correctly

[30] Annexure FA2 to the Founding Affidavit at pages 14 to 31
[31] Paragraph 15 of the Founding Affidavit at pages 7 to 9 inclusive thereof. Also, in paragraph 17 of the Founding affidavit
[32] Page 10 of the record.

elicited a reply from the Respondent in its replying affidavit. Insofar as this is a matter where facts alleged in the Appellant's answering affidavit reveal the existence, or possible existence, of a further ground for relief sought by the Respondent there can be no complaint on behalf of the Appellant that the Respondent should be entitled to utilise and enlarge upon what was revealed by the Appellant in its answering affidavit and to set up such additional grounds for relief as might arise therefrom. Certainly, there was no substantive objection thereto on behalf of the Appellant, accompanied by an application to serve and file a further set of answering affidavits dealing more fully with this aspect as raised by it in its "opposing affidavit" in the court *a quo*.

[21] Returning to the Appellant's other criticism of the Respondent's reply to the issue as to whether the Respondent had exercised its discretion at all in terms of clause 2.1 of the agreement, it is clear, upon a proper reading of sub-paragraph 9.2 of the Respondent's replying affidavit that what is stated therein cannot be said to be interpreted as to the Respondent averring, or attempting to rely upon, the said clause providing an automatic extension of the relevant period. Rather, in this sub-paragraph the deponent to the Respondent's replying affidavit, with reference to clause 2.1 of the agreement, simply states, firstly, "that the purchaser's 30-day period to obtain a loan can be extended by a further period of 10 days at the Agent's sole and absolute discretion irrespective of whether such extension is communicated to either the purchasers or the First Respondent." Secondly, it is stated that "The practical effect of this clause is that the purchasers had 40 days to obtain a loan, which

period would only have expired on 10 August 2016." It is clear therefrom that a distinction is drawn in this sub-paragraph between the discretion given to the Agent in terms of the agreement and the practical effect thereof. Moreover, it is clear that it was intended to deal with the practical effect of the Respondent in this matter having exercised its discretion to extend the relevant period to a date which resulted, on the Respondent's version, in the fulfilment of the suspensive condition. Finally, the sub-paragraph in question does not use the word "automatic". Under the circumstances, it would not be proper (in addition to the reasons set out above) to impute such an interpretation to the contents of this sub-paragraph of the Respondent's replying affidavit.

[22] It is however true that in its replying affidavit, having specifically raised the fact that the agreement makes provision for the extension of the period within which the suspensive condition is to be fulfilled to be at the sole discretion of the Respondent (as set out above)[33] the Respondent, in that replying affidavit, makes no specific averment or averments that the Respondent exercised that discretion. Rather, the Respondent relies on the events which took place on the 3rd and 4th of August 2015.[34] It is also true that the Respondent appears to rely on events which transpired after the extended period.[35] However, since, on an ordinary grammatical interpretation of clause 2.1 of the agreement, it is clear that the discretion vested upon the Respondent in terms thereof must be exercised within 10 days of the expiry of the 30 day period, as set out therein,

[33] Paragraph 8 of the Applicant's Replying Affidavit at page 70 of the record
[34] Sub- paragraph 11.4 t page 73 of the record
[35] Sub- paragraph 11.5 at page 73 of the record.

little or no cognisance should be taken thereof. Likewise, the failure of the Appellant to avail itself of the provisions of the "breach clause"[36] (an argument put forward on behalf of the respondent in support of its claim), as set out in the agreement, does not have any bearing on the issue at hand.

[23] The court *a quo*, in accepting that it was never in dispute on the application papers before it that the Purchaser had obtained the required loan from Mercantile Bank, which fact was communicated to the Appellant on the 3rd and 4th of August 2015 and rejecting the Appellant's version that only upon receiving the bond confirmation from Mercantile Bank did the Appellant thereafter react to ascertain whether there had been compliance with the suspensive condition, as being fabricated and incorrect, came to the finding that the suspensive condition in the agreement had been fulfilled.[37] The reasons therefor and upon which the court *a quo* based its judgment in this regard are not only sound in law but accord with the facts which the learned Judge in the court *a quo* was entitled to accept on the application papers before him. There was no evidence whatsoever before the court *a quo* that would have raised any doubt as to whether the Respondent exercised the discretion available to it to extend the period in which the suspensive condition was to be fulfilled by a further 10 days and, certainly, until after the 4th of August 2015.

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[36] Clause 9 of the agreement at page 19 of the record

[37] Paragraph [18] of the judgment at pages 94 to 96 inclusive, of the record.

[24] The suspensive condition having been fulfilled the Respondent would be entitled to receive payment of commission, in terms of the agreement, either upon the registration of the transfer of the property or upon cancellation of the agreement.[38] In the premises, the Respondent became entitled to receive payment of the commission when the agreement was cancelled on the 1st of October 2015 by the Appellant and the Purchaser entering into a written "CANCELLATION OF SALE AGREEMENT" in terms of which, *inter alia*, the agreement was cancelled and the Appellant indemnified the Purchaser in respect of any claim for commission by the Respondent.[39]

[25] Of course, the liability of the Appellant to pay the said commission to the Respondent is dependent upon whether or not the Respondent had complied with all relevant statutory provisions, with particular reference to section 34A(1)(b) of the Act. This issue was raised by the Appellant by virtue of a bare denial in its "opposing" affidavit to the averments contained in paragraph 6 of the founding affidavit to the effect that the Respondent "...is an estate agent who, at all relevant times, was the holder of a valid fidelity fund certificate issued to it in terms of section 26(a) of Act 112 of 1976 and who has fidelity insurance in terms of section 26(b) of Act 112 of 1976."[40] In response thereto the Respondent attached, as annexures to its replying affidavit, copies of

[38] Clause 8 b) of the agreement at page 18 of the record.

[39] Paragraph 21 of the Founding Affidavit at pages 10 and 11 of the record. Annexure FA4 to the Founding Affidavit at pages 33 and 34 of the record.

[40] Pages 5 and 46 of the record

Fidelity Fund Certificates for the years 2015 and 2016.[41] These periods would obviously cover those when the agreement was entered into and when the agreement was cancelled. Both of the aforesaid certificates, issued by the Estate Agency Affairs Board" reflect the following:-

" This is to certify that subject to the provisions of act 112 of 1976 the entity whose name appears on this certificate has complied with the provisions of section 16 of act 112 of 1976 and the regulations promulgated in terms of the said section. "

The name which appears on both certificates is that of the Respondent, namely "FIRST REALTY (RANDBURG) (PTY) LTD".

[26] In its application for leave to appeal to this court[42] it was stated that:-

"The judgment is contrary to section 34A(1)(b) of the Estate Agency Affairs Act 112 of 1976 in that the applicant **is a company** and there is no evidence that a valid fidelity fund certificate has been issued to every **director** of the applicant company."

Having been granted leave to appeal to this court by the Supreme Court of Appeal the Appellant, in repeating verbatim the above as a ground of appeal, went on to state:-[43]

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[41] Paragraph 13 of the Applicant's Replying Affidavit at page 74 of the record; Annexure RA2 and RA3 at pages 79 and 80 of the record.
[42] Pages 106 of the record.
[43] Page 117 of the record.

"The correct outcome in this regard should have been that, in the absence of proof that a valid fidelity fund certificate has been issued to every **director,** the application is dismissed with costs."

In the Heads of Argument served and filed by the Appellant's erstwhile Counsel the same ground was put forward as to why the judgment of the court *a quo* should be set aside. Paragraph 21 of those Heads of Argument reads as follows:-

"No fidelity fund certificates of the **director/s** of the applicant is before court. **Applicant** as a result thereof is not entitled to payment of any commission. "

However, when this matter came before this court on appeal, Counsel for the Appellant, De Koning SC, sought to expand the Appellant's argument in this regard by submitting that it was incumbent for the Respondent to have placed before the court *a quo* proof that, in addition to the fact that every director of the Respondent had been issued with a Fidelity Fund Certificate that every employee of the Respondent company had as well. In this regard, he seemed to focus upon the fact that the identity of the person representing the Respondent when the agreement was entered into had not been disclosed by the Respondent in its affidavits which, in turn, gave rise to the fact that no certificate issued in the name of that person formed part of the application papers before the court *a quo.* In passing, Counsel for the Appellant sought to criticise the Respondent for this lack of particularity in both the founding and replying affidavits.

Of course, it is open to the Appellant to rely on this additional argument on appeal and the Appellant is not confined to the grounds as set out in the documents referred to above.[44]

[27] The first fact worthy of note is that the commission payable in terms of the agreement is payable to the Respondent company (FIRST REALTY (RANDBURG) (PTY) LTD) and not to any individual or employee of the Respondent.[45] Secondly, the preamble to the Act, reads as follows:-

"To provide for the establishment of an Estate Agency Affairs Board and an Estate Agents Fidelity Fund: for the control of certain activities of estate agents ***in the public interest***; and for incidental matters."

As held by the Supreme Court of Appeal in the matter of *Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd and Others* (39/2016) [2016] ZASCA 175 (25 November 2016) at paragraph [15] of the judgment the general object of the Act was described by that court in the matter of *Rogut v Rogut* 1982 (3) SA 928 (AD) at 939C in the following terms:-

" The general object of the Act was to protect the public against some persons by requiring all estate agents, **as defined**, to take out a fidelity fund guarantee (which is not granted automatically); and to pay the levies and contributions; and by requiring all estate agents to keep necessary accounting records and to cause them to be audited by an auditor, and by obliging every estate agent

[44] *Leeuw v First National Bank Limited* 2010 (3) SA 410 (SCA) at paragraphs [2] and [5] of the judgment.
[45] Page 14 of the record.

to open and keep a separate trust account with a bank and forthwith to deposit therein the moneys held or received by him on account of any person."

Further, in paragraph [16] of that judgment, it was held:-

" The objectives of the Act with regard to the issue and validity of certificates are encapsulated in several of its provisions, namely ss 1,16,26 and 34A which, in their relevant parts, provide as follows:

"Section **1**

"estate agent"-

(a) Means any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person-

  (i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser therefor; or. . .

(b) for purposes of section 3(2)(a), includes any director of a company or a member who is competent and entitled to take part in the running of the business and the management, or a manager who is an officer, of a close corporation which is an estate agent as defined in paragraph (a);

(c) for purposes of sections 7, 8, 9, 12, 15, 16, 18, 19, 21, 26, 27, 30, 33 and 34A includes-

(i) any director of a company, or a member referred to in paragraph (b), of a close corporation which is an estate agent as defined in paragraph (a); and

(ii) any person who is employed by an estate agent as defined in paragraph (a) and performs on his behalf any act referred to in subparagraph (i) or (ii) of the said paragraph.

16 Applications for and issue of fidelity fund certificates and registration certificates.

(1) Every estate agent or prospective estate agent, excluding an estate agent referred to in paragraph (cA) of the definition of "estate agent" in section 1, shall, within the prescribed period and in the prescribed period and in the prescribed manner, apply to the board for a fidelity fund certificate, and such application shall be accompanied by the levies referred to in section 9(1)(a) and the contribution referred to in section 15.

(2) . . .

(3) Subject to sections 28(1), 28(5) and 30(6), if the board upon receipt of any application referred to in subsection (1) or (2) and the levies and contribution referred to in those subsections, is satisfied that the applicant concerned is not disqualified in terms of section 27 from being issued with a fidelity fund certificate, the board shall in the prescribed form issue to the applicant concerned a fidelity fund certificate or a registration certificate, as the case may be, which shall

be valid until 31 December of the year to which such application relates.

(4) No fidelity fund certificate or registration certificate shall be issued unless and until the provisions of this Act are complied with, and any fidelity fund certificate and registration certificate issued in contravention of the provisions of this Act shall be invalid and shall be returned to the board at its request.

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 the 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. "

In paragraph [17] of *Brodsky (supra)* the Supreme Court of Appeal held the following:-

"[17] A company or a close corporation may accordingly fall within the definition of an "estate agent" in terms of s 1(a) read with ss 1(b) and (c). In addition, a clear distinction is drawn in ss 26 and 34A between companies and close corporations that are estate agents and the requirement that directors of companies and members of close corporations, be in possession of valid certificates."

It is common cause in this matter that the Respondent is an estate agent as defined in, *inter alia*, s 1(a) read with ss 1(b) and (c) of the Act. As such and in terms of ss 26 and 34A of the Act the Respondent, as a company, will not be entitled to commission in the event of a valid fidelity fund certificate not having been issued to every director of the Respondent. There being a clear distinction (for obvious reasons) between a company which carries on business as an estate agent and a natural person or persons carrying on business as such, there is clearly no requirement in the Act that every employee of the Respondent company be issued with the requisite certificate. It follows therefrom that the Respondent will be entitled to earn commission without showing that the person who entered into the agreement on behalf of the Respondent had, at that time, been issued with same. This disposes of the "additional" argument placed before this court on behalf of the Appellant during the hearing of the appeal and as set out above.

[28] Turning to the question as to whether the failure of the Respondent to place before the court *a quo* fidelity fund certificates for every one of its directors disqualifies the Respondent from receiving payment from the Appellant of commission in terms of the agreement, it has long been part of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.[46]

[29] However, this does not mean that our courts must slavishly (and narrowly) apply the provisions of a statute without having regard to, *inter alia*, the nature and purpose of the statute itself and the effect of a strict or literal interpretation of the provisions thereof. In the matter of *Sutter v Scheepers* 1932 AD 165,

[46] Schierhout v Minister of Justice 1926 AD 99 at 109

Wessels JA, at page 174, held that a court should consider the objects and scope of a statutory provision and if its terms were strictly carried out, this would lead to injustice, then that provision should be interpreted as being directory rather than peremptory. Further, in the matter of *Pottie v Kotze* 1954 (3) SA 719 (AD) at 727B-C, Fagan JA, dealing with a Transvaal Ordinance which forbade the sale of a motor vehicle without a valid roadworthy certificate, referred to "serious inequities [that] might be caused", by the invalidation of the contract and declined to vitiate the agreement in question.

[30] Further, in the matter of *Swart v Smuts* 1971 (1) SA 819 (AD), Corbett JA held (at 829E-F) that when the statutory provision in question does not itself expressly provide that a transaction is null and void and of no force and effect, the validity thereof depends, in the last resort, on the intention of the legislature. In this matter the court held that a deed of sale in conflict with the provisions of s 23(1)(b) of the Agricultural Credit Act 28 of 1966 was not invalid because it did not have a certificate that there was a reasonable prospect that the Land Bank would grant the buyer credit.

[31] The full bench of the erstwhile Transvaal Provincial Division, in the matter of *Noragent (Edms) Bpk v De Wet*1985 (1) SA 267 (TPD), referred to *Swart v Smuts (supra)* and held that an agreement between an estate agent and an owner of land was not invalid merely by reason of the fact that the estate agent had failed to comply with the provisions of s 26 of the Estate Agents Act 112 of 1976.

[32] The aforesaid decision was approved in the matter of *Taljaard v TL Botha Properties* 2008 (6) SA 207 (SCA) where the court dealt with a similar matter. In paragraph [8] of the judgment, Nugent JA held that "it is well established that legislation is to be construed so as to interfere as little as possible with established rights".

[33] As noted by Willis AJA in the matter of *Hubbard v Cool Ideas 1186 CC 2013* (5) SA 112 (SCA), at paragraph [43], one of the "tools" in the interpretation of statutes, as decided in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), is to look at the purpose to which the section is directed. Finally, as also noted by the learned Judge, in the same paragraph, it has been held by the Constitutional Court, in the matter of *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) that our courts should avoid "legislative sledgehammers".

[34] From the preamble of the Act and the provisions contained therein, it is clear that the purpose thereof and the intent of the legislature in promulgating same, was to control certain activities of estate agents in the public interest. Most importantly, it is clear that the Act is there to create a fund (the fidelity fund) from which any claims made by members of the public against registered estate agents may be paid. In order to raise monies for this fund, it is a criteria that a fidelity fund certificate will not be issued to an estate agent, as defined in the Act, unless that estate agent has, *inter alia*, complied with

the requirements as set out in the Act which includes making payment of a stipulated amount into the fund. In this manner, not only does the Estate Agency Affairs Board obtain a record of and have control over, all estate agents as defined in the Act but this also means that the fidelity fund receives contributions from those estate agents. In order to enforce the registration of all estate agents with the board the Act contains certain "penalty" provisions. For present purposes the relevant sections are s 26 which prohibits the rendering of the services of an estate agent under certain circumstances and s 34A where an estate agent is not entitled to remuneration in certain circumstances. Both sections require that the estate agent be in possession of a valid fidelity fund certificate at the relevant time and that where the estate agent is a company, every director of that company also be in possession of a valid fidelity fund certificate.

[35] As noted earlier in this judgment, the averment on behalf of the Respondent in the founding affidavit that the Respondent is an estate agent who, at all relevant times, was the holder of a valid Fidelity fund certificate issued to it in terms of s 26(a) of the Act was met with a bald denial by the Appellant in its answering affidavit.[47] In its replying affidavit the Respondent put up the fidelity fund certificates for the Respondent for the years 2015 and 2016.[48] It did not place before the court *a quo* certificates in respect of any of its directors. The Appellant never sought to take this issue any further by seeking leave from

[47] Paragraph 6 of the Found Affidavit at page 5 of the application papers; paragraph 21 of the First Respondent's Opposing Affidavit at page 46 of the application papers.
[48] Paragraph 13 of the Applicant's Replying Affidavit at page 74 of the application papers; Annexure RA2 and RA3 at pages 79 and 80 of the application papers.

the court *a quo* to serve and file a supplementary affidavit dealing specifically therewith.

[36] Further, as set out earlier herein, on the face of both certificates is the following certification, namely:-

"This is to certify that subject to the provisions of act 112 of 1976 the **entity** whose name appears on this certificate has complied with the provisions of section 16 of act 112 of 1976 and the regulations promulgated in terms of the said section."

Section 16 of the Act has been fully set out earlier in this judgment and will not be repeated herein. What is clear from the aforegoing is that the Respondent, having been issued with the said certificates, had, in compliance with ss 9(1) and 15 of the Act, *inter alia*, paid all prescribed levies to the board and annual contribution to the fund, which had to be paid by estate agents. In the premises, the underlying purpose of requiring an estate agent to make payment of such levies and contributions (as dealt with above) before an entity could be registered as an estate agent and be issued with a fidelity fund certificate, had been fulfilled. On that basis, it would have to be accepted that the Respondent was entitled to render the services of an estate agent (s 26 of the Act) and receive remuneration therefor (s 34A of the Act).

[37] No reference is made on either of the aforesaid certificates in this matter as to whether or not fidelity certificates had been issued to every director of the Respondent. Further, this issue was never one which was pertinently raised in

the application papers before the court *a quo*. In the event that every director of the Respondent had not been issued with a certificate at the relevant time it would appear that, by virtue of the fact that the Respondent had been issued with such a certificate, the Respondent had complied substantially with s 16 of the Act. In this regard, it is improbable that the board, when issuing the Respondent, a company, with a certificate (which, upon a literal interpretation of the relevant sections of the Act is not necessary), would not have done so if it had not also issued certificates to every director of the company. On the other hand, if certificates were not issued to every director but only to the Respondent, it may well be the practice of the board, as a matter of convenience, to issue one certificate to the entity rather than to every director thereof. This is quite likely having regard to, *inter alia*, the fact that (as set out above) the Respondent had paid all levies and contributions; the board was satisfied that the Respondent could render the services of an estate agent and receive remuneration in respect thereof, together with the fact that the issue of a single certificate to a company, rather than to every director, lessened the administrative duties of the board, particularly since there could well be a change of directors during the period for which a certificate is issued.

[38] The Respondent was the entity identified in the agreement as the entity who was entitled to estate agent's commission. It was never contemplated by any of the parties to the agreement that the Respondent would not be entitled to receive that commission on the basis that the Respondent had a valid fidelity fund certificate issued to it by the board in terms of the Act following

compliance by it of all of the relevant provisions of the Act but may not be in possession of such certificates for every director. Further, it had never been a real issue on the application papers before the court *a quo*, that the Respondent had been the effective cause of the sale and (apart from the defence that the suspensive condition had not been fulfilled) was therefore entitled, in terms of the agreement, to be paid the estate agent's commission.

[39] Taking all of the aforegoing into account, s 34A of the Act should be construed, as far as possible, not to interfere with the Respondent's established rights. These rights are in terms of both the Act and the agreement. In the premises, I find that the appeal should be dismissed, with costs.

[40] Both s 26 and s 34A of the Act have been subjected to amendments since the commencement of the Act and/or pursuant to their introduction into the Act. It would appear that these amendments have arisen as a result of the Legislature deeming it necessary to meet changes in the "property industry", with particular reference to services rendered by estate agents and/or as a result of judicial pronouncements in relation thereto. It would appear that the time may well have come for the legislature to, once again, direct its attention to both of these sections of the Act. I say this because, in the first instance, there can be little purpose served (particularly when one has regard to the intention and purpose of the Act) by making it a requirement for a company or close corporation to apply to the board for a fidelity fund certificate in respect

of every director or member. If the company or close corporation is required to register as an estate agent and apply for a fidelity fund certificate (which clearly took place in the present matter) then there is no advantage to members of public if the Act further requires every director or member to also apply for and be issued with, such a certificate. Not only does this simply add an extra burden on the board when carrying out its administrative duties but it serves no real purpose. The levies and contributions would have been paid by the company or corporation, thereby satisfying the purpose of the Act. Further, if a company or corporation did not have a fidelity fund certificate, it would, in the normal course, be unable to render the services of an estate agent and would not be entitled to be remunerated in respect thereof. Secondly, whilst directors and members may come and go, an entity, created for the purpose of carrying on the business of an estate agent, would remain until it no longer carried on that business or was deregistered so that it ceased to exist. At the same time, amendments to the Act whereby the entity rather than the directors or members is required to comply with the provisions of the Act would not only provide certainty as to whether or not that entity could render the services of an estate agent and be remunerated in respect thereof but would also avoid any of the parties to an agreement involving the payment of estate agent's commission attempting to avoid the payment thereof by relying on the failure (administrative or otherwise) of an entity to ensure, at all times, that its directors or members (who could be numerous and who could be scattered around the world or country) had each been issued with fidelity fund certificates by an administrative body such as the board. Of course, the requirement that an entity must apply for a fidelity fund certificate remaining a provision of the Act would satisfy the intention and purpose of the Act, in that an entity who wishes to carry on the business of an estate agent would have to pay the levies and contributions in terms of the Act and members of the public would continue to receive the protection in respect of that entity as afforded by the Act.

[41] The Respondent has asked that the Appellant be ordered to pay the costs of this appeal on a punitive scale. In this regard, it was submitted that the Appellant had raised spurious defences to the Respondent's claim. Further, the fact that the court *a quo* had ordered the Appellant to pay the costs of the application and the application for leave to appeal (which was refused) on the scale of attorney and client, was relied upon as another reason why this court, in the exercise of its discretion, should follow that trend and once again punish the Appellant with a punitive costs order. In the first instance, it cannot be said that the defences raised were spurious, certainly not to the extent that they would deserve special sancture by way of a punitive costs order. Secondly, it is common cause that the Supreme Court of Appeal granted the Appellant leave to appeal to this court. By doing so the learned Judges of that court held that there was a reasonable possibility that this court could come to a different decision than that of the court *a quo*. Also, in paragraph 2 of the Order of the Supreme Court of Appeal[49] the order made by the court *a quo* in respect of costs on a punitive scale, when dismissing the application for leave to appeal, was specifically set aside and the costs of the application for leave to appeal were ordered to be costs in the appeal. By implication, those learned Judges

[49] Page 112 of the application papers

did not agree that the defences raised by the Appellant were completely without merit. Hence, in the exercise of this court's discretion, the invitation to make a punitive costs order when dismissing the appeal is declined.

[42] In the premises, the following Order is made, namely:-

1. The appeal is dismissed, with costs.

2. The costs to be paid by the Appellant (on a party and party scale) are to include the costs of the application for leave to appeal to the Full Court of the Gauteng Local Division of the High Court, Johannesburg and the costs of the application for leave to appeal in the Supreme Court of Appeal of South Africa.

Wanless AJ

Judge of the High Court

I agree

Ismail J

Judge of the High Court

I agree

Twala J

Judge of the High Court

<u>Appearances</u>

For the Appellant	:	De Koning SC
Instructed by	:	Mills and Groenewald Attorneys C/O H Venter Attorneys
For the Respondent	:	Advocate Tessa Halgryn
Instructed by	:	Pev Smith Inc.