



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5583/2018

In the matter between:

**TRIA REAL ESTATE (PTY) LTD t/a PAM GOLDING
BLOEMFONTEIN**

Applicant

and

MANDY LABUSCHAGNE

1st Respondent

**METRO REALTORS (PTY) LTD t/a METRO
REAL ESTATE**

2nd Respondent

HEARD ON: 16 NOVEMBER 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 06 DECEMBER 2018

[1] This matter served before me as an opposed urgent motion. The applicant seeks to interdict and restrain the first respondent from utilising and/or communicating confidential information relating to its business affairs, property listings, pricing, valuations etc. In

addition from operating in any capacity in the residential property market in the suburbs of Universitas, Universitas Ridge and Langenhoven Park, Bloemfontein for a period of six (6) months from the date of the order of this court. The order sought against the second respondent is the interdict to utilise any information referred to above obtained from the first respondent. Essentially it is an interdict from employing the first respondent until the period of six (6) months has elapsed.

- [2] The applicant is Tria Real Estate (Pty) Ltd trading as Pam Golding Bloemfontein. Pam Golding is one of the leading brands in the property industry in this country. The first respondent is an Intern Agent whose ultimate goal is to qualify as an Estate Agent. The second respondent is a company with limited liability operating as an Estate Agency situated at 6 Badenhorst Street in the suburb of Universitas, Bloemfontein.
- [3] On 4 May 2017 the applicant represented by its manager Hennie Aucamp concluded an Intern Agency Agreement with the first respondent. It was specifically mentioned in the agreement that it is governed by the provisions of the Estate Agency Affairs Act 112 of 1976. It was also stated that the applicant has met the necessary requirements to enter into such an agreement as a qualified Estate Agent holding the valid Fidelity Fund Certificate. As stated in paragraph two (2) above the ultimate goal was to enable the first respondent to qualify as an Estate Agent.
- [4] The agreement also contained a restraint of trade clause barring the first respondent from engaging or participating in the property industry for a period of six (6) months after the termination of the

agreement between the parties. It was also provided that the applicant had the power to lift the restraint or shorten the period thereof. Further, in the event of any breach the applicant could take legal steps against the first respondent.

- [5] On 12 October 2018 the first respondent resigned as an employee of the applicant effectively terminating the agreement. Despite persuasion from the director of the applicant, she could not change her mind. Later she joined the second respondent as an intern agent. It was at this point that the applicant invoked in particular clause 16 of the agreement dealing with the restraint as alluded to in paragraph one (1) above.
- [6] There are several contentious issues that are raised by both parties in this matter. The pertinent one is the legality or validity of the agreement entered into by them. I intend to deal first with this aspect. The contention of counsel for the applicant is that the applicant has a valid Fidelity Fund Certificate as it appears on page 80 of the papers. Also that the first respondent is not bona fide in her contentions as she entered into an agreement with the applicant without raising the issues she is relying upon. During this period (approximately eighteen months) she gained knowledge of valuable importance pertaining to the business of the applicant. To that extent this matter was of cardinal importance to the applicant.
- [7] The contention of counsel for the respondents is that the applicant is a company with limited liability operating as a estate agency. This is different to an entity in whose name the Fidelity Fund Certificate has been issued. In addition, the agreement is

void and unenforceable because all directors of the company did not possess the aforementioned document.

- [8] There are two (2) fundamental flaws that render the agreement between the parties to be invalid therefore unenforceable. Firstly, the applicant is cited as Tria Real Estate (Pty) Ltd trading as Pam Golding Bloemfontein. This means that it is a company with limited liability registered in accordance with the Laws of the Republic. It is a legal entity that can sue and be sued in its own right. In short, it has a legal personality separate from that of its directors. Its core business is that of an estate agency.
- [9] The Fidelity Fund Certificate referred to on page 80 of the papers is issued to Tria Real Estate CC. A close corporation is also an entity with separate identity to that of its members. It has its own legal personality and can sue and be sued in its own name. Strictly speaking it is a different entity to a company cited as the applicant in this matter.
- [10] These two (2) entities cannot be the same and be equated as such. They are separate entities. In this matter the close corporation was converted into a company in December 2013. This means that the close corporation ceased to exist as far back as December 2013. So, the Fidelity Fund Certificate was issued to a non-existing entity. The submission that the new Companies Act did not envisage a shutdown of the operations of an entity during conversion does not hold water at all. I was not referred to any authority to support that proposition. There is no plausible explanation as to why five (5) years later after the conversion of the close corporation to a company, the certificate is still issued in

the name of a non-existing entity. The assurance (if any) by the officials of the Estate Agency Affairs Board that there is nothing wrong in such conduct despite a glaring transgression of the law is unacceptable.

- [11] I come to this conclusion because Section 29B of the Companies Act 61 of 1973 provides that:-

“When a company is converted into a close corporation in terms of the Close Corporation Act, 1984, the Registrar shall, simultaneously with the registration of the founding statement of the close corporation by the Registrar of Close Corporations in terms of the said Act, cancel the registration of the memorandum and articles of association of the company concerned.”

This will likewise apply when the conversion is from a close corporation to a company. A new entity is formed and the previous one simply ceases to exist.

- [12] The second issue concerns the regulation of the property industry and the requirements to practice the profession. The regulator of all estate agents is the Estate Agents Affairs Board. In terms of Section 26 of the Estate Agency Board Act 112 of 1976 any person is prohibited from performing any act as an estate agent unless a valid Fidelity Fund Certificate has been issued to him or her. In the event that such a person is a company, each and every (my emphasis) director of that company must also possess a valid Fidelity Fund Certificate. The same applies to the close corporation that each and every member must possess one. This also extends to every person employed by such an entity as an estate agent. It is not enough that the application is being

processed or some other hiccup is in the process of being solved. The provisions are clear and peremptory.

- [13] These requirements were emphasised and the courts concluded that it is the transgression of the law not to adhere to section 26.¹ The issuing of Fidelity Fund Certificates to Estate Agents is to ensure that the public is not hard done by unscrupulous elements within the property industry. It is a controlling measure to minimise or eliminate the risk that the unsuspecting public may be exposed to. In short, it is a licence to practice without which you cannot practice.
- [14] The contention that the certificate issued to a close corporation should be deemed to have been issued to a company because it is the “same” entity has no merit. As stated earlier I have not been referred to any legal authority and despite diligent search I could not find any to sustain this argument. In this matter the applicant was not in possession of a valid Fidelity Fund Certificate and therefore not in compliance with the governing Act. This means that the applicant could not act as an Estate Agent. This failure to comply as stated above renders the agreement entered between the parties null and void thus unenforceable.
- [15] It stands to reason that this application ought to fail. The applicant as the losing party must pay the costs of the respondents. In the exercise of my discretion, I do not deem it appropriate that it should be on a punitive scale. There is nothing in my view that the conduct of the applicant pursuing this matter justify such an order.

¹ Enelon CC t/a Realnet Nilgers and Sound v Marianne Nortje and another [2013] JOL 30479 (GNP)
Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd and Others [2016] JPL 36938 (SCA)

[16] In the circumstances the order is as follows:-

16.1 The application is dismissed with costs.

MATHEBULA, J

On behalf of applicant: Adv. J J F Hefer SC assisted by

Adv. J J Buys

Instructed by:

Willers Attorneys

BLOEMFONTEIN

On behalf of respondents:

Adv. M. Louw

Instructed by:

Hugget Retief Attorneys

BLOEMFONTEIN