

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

Case No. : 2557/2012

In the matter between:-

ABEL HENDRIK ERASMUS N.O. 1st Applicant/Defendant

ABEL HENDRIK ERASMUS JNR N.O. 2nd Applicant/Defendant

and

VERNA VAN DEN BLINK PROPERTIES CC Respondent/Plaintiff

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 30 OCTOBER 2014

LEAVE TO APPEAL

- [1] This is an application for leave to appeal against a judgment by Acting Judge I.M.M. Motlounge delivered on 26 August 2014 wherein he granted judgment in favour of the plaintiff against the defendants for payment of estate agent commission and costs. The applicants are the unsuccessful defendants in the matter and ask leave to appeal to the Full Bench of the Free State High Court. For purposes of this judgment I will refer to the applicants as defendants and the respondent as plaintiff.

[2] The grounds on which leave to appeal are sought, as far as relevant, are the following:

- (1) That the plaintiff, being a close corporation, was not in its own name in possession of the necessary Fidelity Fund Certificate in terms of the Estate Agency Affairs Act 112 of 1976.

It appears to have been common cause that the sole member of the plaintiff was indeed at all relevant times in possession of the necessary Fidelity Fund Certificate. The Act, read as a whole, does not provide for a juristic person to be issued with a Fidelity Fund Certificate. In the case of a company such certificate is required to be issued to each and every director and managing officer and in terms of the Act, as far as a close corporation is concerned, such certificate is required to be issued to each member or management officer of such corporation.

Since it appears to have been common cause that the sole member of the corporation has been issued with such certificate at all relevant times, this ground of attack appears to be unfounded.

- (2) That the estate agent in the employ of the plaintiff, Snyman, was not in possession of a valid Fidelity Fund Certificate at the time of accepting the mandate to find a lessee for the premises and only was issued with such certificate effective from the 29th April 2011. It

appears that the mandate was obtained by the said Snyman in February 2011 and that he did quite some negotiations to find a lessee for the premises from then on up to the effective date of his certificate being the 29th April 2011 and beyond that up to October 2011 when the plaintiff was effectively circumvented and prevented from fulfilling the mandate, according to the judgment.

- [3] After finding, in accordance with the decision in **Wakefields Real Estate (Pty) Ltd v Attree and Others** 2011 (6) SA 557 (SCA), that the absence of a Fidelity Fund Certificate for Snyman does not invalidate the mandate, the trial court dealt with the payment of commission as follows:

“However, the commission payable could not be enforced by the plaintiff unless and (until) Snyman had been issued with his certificate on the 29th May 2011.” (The insertion is mine.)

The trial judge also found as follows:

“Snyman, and by necessary implication the plaintiff (as the employer and real party to the mandate agreement), was therefore entitled to enforce payment of the commission for services rendered after being issued with the Fidelity Fund Certificate, being since the 29th May 2011.”

- [4] The impression gained from the judgment is that the learned judge was of the view that it was only the enforcement of payment of commission that was in issue and that, if an estate agent was not in possession of a valid certificate at

the time of performing the necessary acts as described in the definition of estate agent, once he obtains such certificate, the commission already owned, can be enforced, but not before the issue of such certificate.

- [5] That stance of the trial court appears to me to be questionable. In terms of section 34A it is clearly stipulated that no estate agent shall be entitled to any remuneration or other payment in respect or arising from the performance of any act referred to in the definition unless, at the time of the performance of that act, a valid Fidelity Fund Certificate has been issued. It is not the enforceability of payment of remuneration, but the entitlement thereto that is at issue.
- [6] In the present matter the *novel* situation arises that the acceptance of the mandate and some preliminary negotiations were done by Snyman, whilst not being in possession of such certificate, but after the obtaining of such certificate, the negotiations continued up to October 2011 so that he indeed did some negotiations before and some after the obtaining of the certificate. Whether, in a situation like this, it disentitles the plaintiff completely from any remuneration, is questionable. It might be that the plaintiff would be entitled to at least part of the remuneration for the services rendered after the obtaining of the Fidelity Fund Certificate by Snyman.
- [7] However, of importance is that the trial court did not really pay attention to this last question and there does appear to be a reasonable possibility that a court of appeal may come

to a different conclusion, if not completely disentitling the plaintiff to commission, at least there remains a possibility that a court of appeal might find that the plaintiff would not be entitled to full remuneration for the services rendered before Snyman obtained the necessary certificate.

[8] Usually and in accordance with the usual practice of the business of estate agents, commission is only earned and claimable if effect is given to the mandate in that a valid agreement comes into being and the estate agent being the effective cause thereof. It may be that remuneration can be claimed for certain work done or not, but I find that highly improbable. In view of that fact, the fact that (accepting that plaintiff was the effective cause of the eventual agreement) the agreement was only negotiated and concluded after further negotiations which were done after Snyman became entitled to act as an agent with a valid certificate namely after the 29th April 2011, may be a sound basis for finding that the plaintiff is indeed entitled to the full commission as agreed upon or as granted by the court *a quo*.

[9] Although I have grave doubt that a court of appeal will come to a different conclusion from the trial court, I cannot exclude that as a reasonable possibility.

[10] In the result leave to appeal to the Full Bench of this division is granted. The costs of this application shall be costs in the appeal.

A.F. JORDAAN, J

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