

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 37135/2012

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
22/08/2025	
DATE	SIGNATURE

In the matter between:

DURRANVALE TRADE AND INVESTMENTS (PTY) LTD

Plaintiff

and

ESTATE AGENCY AFFAIRS BOARD

Defendant

JUDGMENT

MINNAAR AJ:

Introduction:

[1] The plaintiff instituted an action against the defendant in which the plaintiff claims delictual damages. The plaintiff is suing the defendant as cessionary of Mr Graham Carl Guthrie ("Guthrie").

[2] At the commencement of the trial, it was ordered that the issue of liability (merits) be separated from the issue of quantum.

[3] In broad terms, it is the plaintiff's pleaded case:

- a. During the period 1 January 2007 to 31 December 2009, Guthrie and CRS Brokers CC ("CRS") were each qualified and entitled to be issued with a Fidelity Fund Certificate ("FFC").
- b. Both Guthrie's and CRS's respective FFCs were renewed annually by the defendant from 1 January to 31 December of each year.
- c. Guthrie and CRS were each Estate Agents as defined in section 1(c) of the Estate Agency Affairs Act, No 112 of 1976 ("the Act"), and Guthrie conducted CRS's business as such on its behalf according to their said FFCs.
- d. The defendant owed Guthrie and/or CRS a duty of care not to decline or fail to renew Guthrie's and/or CRS's FFCs without justification.
- e. During December 2009, the defendant wrongfully, unlawfully and without just or any other cause, refused to renew Guthrie's and/or CRSs said FFCs, notwithstanding that it was obliged in fact and in law to do so.
- f. As a result of this refusal to renew the FFCs, since 1 January 2010, both Guthrie and CRS were precluded from carrying on business as, and/or from performing the act of, an Estate Agent and they did not do so. This resulted in CRS's business ceasing to exist and both Guthrie and CRS accordingly lost all benefits arising therefrom. The value of Guthrie's members' interest in CRS was diminished. Guthrie permanently lost his entitlement to his salary being paid from CRS, and he lost all benefits that he would otherwise have received from the conduct by him of business as an Estate Agent.
- g. On or about 15 September 2012, Guthrie sold, ceded, assigned, transferred and made over unto and in favour of the plaintiff all his rights, title and interest in and to his claim against the defendant, for value received.

[4] In summary, it is the defendant's pleaded case:

- a. During 2009, Guthrie disclosed to the defendant that he had been convicted of an offence involving an element of dishonesty in the Pietermaritzburg Magistrates Court in 2005.
- b. On 14 April 2009, Guthrie was deregistered in the defendant's records as he was disqualified from holding an FFC in terms of section 27 of the Act as a result of the conviction.
- c. On or about 16 November 2009, CRS was placed in deregistration by the Companies and Intellectual Property Commission ("CIPC"). On or about 16 July 2021, CRS was deregistered by the CIPC.
- d. The defendant was precluded from issuing an FFC for 2010 to Guthrie, as he was disqualified in terms of section 27 of the Act from being issued with an FFC due to the said conviction.
- e. The defendant was precluded from issuing an FFC for 2010 to CRS, as for an FFC to be issued to CRS, an FFC had to be issued to the principal agent, which could not be complied with, as the principal agent, Guthrie, was disqualified from being issued with an FFC.
- f. The defendant was precluded in terms of section 28(5)(b) of the Act from issuing an FFC for 2010 to CRS as CRS had been deregistered by the CIPC on 16 November 2009, alternatively, 16 July 2010 and remained deregistered thereafter and was in law not capable of performing any juristic act, including obtaining an FFC or carrying on business or performing the act of an Estate Agent.
- g. The defendant was precluded from issuing an FFC to Guthrie as for an FFC to be issued to Guthrie as an employee of an Estate Agent, the Estate Agent (CRS) was required to hold an FFC which could not be complied with, as CRS could not be issued with an FFC as they were deregistered as a Close Corporation.
- h. In the premises, the defendant denies that its refusal to renew FFCs for Guthrie or CRS was wrongful, unlawful or without just cause and denies that it was obliged in law or fact to issue the said FFCs for 2010.

[5] In the alternative to the defence pleaded in paragraph 4 above, the defendant pleaded that the defendant refused to issue an FFC to Guthrie and CRS for the 2010 period on the basis as set out in paragraph 4 above. This refusal

constituted a decision taken by the defendant. This decision amounts to “administrative action” as defined in the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”). Until an administrative act, such as the decision, is set aside by a court of law in judicial review proceedings, it exists in fact and remains legally effective. Neither Guthrie nor CRS instituted an application to review the decision, either in terms of PAJA or the principle of legality. Accordingly, the decision remains legally valid and effective until properly set aside in court proceedings. In the premises:

- a. Unless and until a court sets aside the defendant’s decision as invalid, the decision exists in fact and accordingly gives rise to valid legal consequences.
- b. The defendant’s refusal to issue the said FFC is regarded as presumptively valid and must accordingly be adhered to.
- c. The defendant denies that its refusal to renew Guthrie and/or CRS FFCs was wrongful, unlawful or without just cause and denies that it was either obliged in law or fact to do so.

[6] In the further alternative to the defence pleaded in paragraph 4 above, the defendant pleaded that the defendant refused to issue an FFC to Guthrie and CRS for the 2010 period on the basis as set out in paragraph 4 above. This refusal constituted a decision taken by the defendant. This decision amounts to “administrative action” as defined in PAJA. The plaintiff seeks relief on the basis that the defendant negligently breached a statutory duty and improperly performed an administrative function in deciding to refuse the issue of the said FFCs, which led to it suffering delictual damages in the form of pure economic loss. The said decision was made bona fide. There are no policy considerations of fairness and reasonableness which result in the breach of the statute being wrongful in delict. In the premises, Guthrie and CRS have no claim in law against the defendant and had no right against the defendant which could be ceded to the plaintiff.

[7] It is denied that Guthrie suffered damages as alleged. In the alternative to this denial, it is pleaded that the decision taken by the defendant constituted “administrative action” as defined in PAJA. At the time of the decision, Guthrie

or CRS (and thus the plaintiff in terms of the cession, should the court find the cession legally valid) could have and should have applied in the appropriate forum within the applicable time periods to remedy the defendant's alleged wrongful and unlawful conduct by seeking "any order that is just and equitable" under section 8 of PAJA, alternatively, "any order that is just and equitable" under section 172(1)(b) of the Constitution. Guthrie or CRS culpably and unreasonably failed to do so. In the premises:

- a. Guthrie or CRS (and thus the plaintiff, should it be found that there is a valid cession) have no remedy other than that provided for in section 8 of PAJA, alternatively section 172(1)(b) of the Constitution.
- b. These remedies amounted to appropriate relief.
- c. The failure of Guthrie or CRS (and thus the plaintiff if a valid cession is in place) to exercise the remedies available to them now forms the plaintiff's basis of the damages suffered by Guthrie or CRS.
- d. By the time this action was instituted on 2 October 2012, Guthrie or CRS (and the plaintiff if a valid cession exists) had become time-barred pursuant to the provisions of section 7(1) of PAJA¹, alternatively, the common law.
- e. Having been entitled to appropriate relief and having culpably and unreasonably failed to exercise the remedies at the time that Guthrie or CRS (and thus the plaintiff premised thereon that a valid cession is in place) was entitled to them, the plaintiff is not entitled to be awarded monetary compensation to remedy the defendant's alleged wrongful and unlawful conduct.
- f. In the premises, there is no legal basis for this court to grant the plaintiff the monetary damages it seeks.

¹ 7 Procedure for judicial review

(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

- (a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

[8] The defendant further denies that Guthrie and CRS concluded a valid deed of cession with the plaintiff on 15 September 2012. The essence of this denial is:

- a. CRS was deregistered on 16 November 2009, alternatively on 16 July 2010 and accordingly ceased to exist with effect from either of the said dates. From that time, it could not, in law, perform any juristic act. As such, CRS lacked the legal capacity to hold any legal rights or obligations or perform any juristic acts and could not have ceded any rights, title and interest.
- b. In the alternative, at the time the deed of cession was signed, the claim that forms the basis of the present proceedings had not been instituted against the defendant, the defendant had no knowledge of the cession, no obligatory agreement had been concluded between the plaintiff and CRS and Guthrie and the amount of amounts due and/or payable by the defendant stated in the deed of cession did not exist, nor had these amounts accrued or become due and payable. The legal effect of the foregoing is that at the time the plaintiff instituted the present action, the cession relied on failed to comply with the necessary legal requirements to validly cede to the plaintiff Guthrie's or CRS' claim against the defendant, and the plaintiff lacked the standing required to institute the present action.
- c. In the further alternative, it is pleaded that the deed of cession relied upon by the plaintiff is tantamount to a legally impermissible champertous agreement.

[9] The plaintiff did not file a replication to the defendant's plea.

[10] The plea dealing with the applicability of PAJA is crucial. Should it be found that the provisions of PAJA apply, it will dispose of the action.

PAJA's applicability:

[11] In terms of the relevant parts of section 1 of PAJA, 'administrative action' means *"any decision taken, or any failure to take a decision, by-*
 (a) *an organ of state, when-*

- (i) *exercising a power in terms of the Constitution or a provincial constitution; or*
- (ii) *exercising a public power or performing a public function in terms of any legislation; or*
- (b) *a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect."*

[12] It is not my understanding that it is the plaintiff's case that the defendant is not an entity to which PAJA is applicable. But insofar as I misunderstood the plaintiff's case in this regard, I am satisfied that PAJA applies to the defendant as it is an organ of state as defined in section 239 of the Constitution. The defendant is a functionary or institution exercising a public power or performing a public function in terms of the Act.

[13] The next step is to determine whether a 'decision', as defined in PAJA, was taken.

[14] Section 1 of PAJA defines 'decision' to mean "*any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-*

- (a) *making, suspending, revoking or refusing to make an order, award or determination;*
- (b) *giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
- (c) *issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;*
- (d) *imposing a condition or restriction;*
- (e) *making a declaration, demand or requirement;*
- (f) *retaining, or refusing to deliver up, an article; or*
- (g) *doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly."*

[15] Section 1 further provides that "*'failure' in relation to the taking of a decision includes a refusal to take the decision."*

[16] In *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ), Claasen J stated as follows:

“[6] The existence of a decision as a prerequisite for any judicial review thereof was reiterated by Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) (2005 (10) BCLR 931; [2005] 3 All SA 33) at para 22:

'At the core of the definition of administrative action is the idea of action (a decision) of an administrative nature taken by a public body or functionary.'”

[17] The determination as to whether administrative action has been taken is fact dependent. In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC), the Constitutional Court held as follows:

“[37] PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect. This includes 'action that has the capacity to affect legal rights'. Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case.”

[18] On the applicability of PAJA, it is the plaintiff's case that the defendant led no evidence to prove that it took a decision to refuse to issue the FFCs. It is the plaintiff's case that the defendant had the onus of proving that a decision was taken. It is argued on behalf of the plaintiff that the defendant has failed to discharge this onus.

[19] The defendant's pleaded case and argument is that the refusal to issue an FFC to Guthrie and CRS for the 2010 period is premised on the disqualification in terms of section 27 of the Act. This constituted a decision taken. The decision and disqualification stem from the plaintiff being convicted of an offence involving an element of dishonesty in the Pietermaritzburg Magistrates' Court in 2005. Although the plaintiff attacks the reference to a 2005

conviction in argument, I am not convinced that much turns on the reference to a 2005 conviction. The conviction was in November 2007 on charges that stemmed from 2005.

[20] Section 27 of the Act deals with disqualifications relating to FFC. Of relevance, section 27(a)(ii) provides that no FFC shall be issued to any estate agent who has at any time been convicted of an offence involving an element of dishonesty.

[21] Section 27 also has the rider that if, in respect of any person who is subject to any disqualification referred to in this section, the defendant is satisfied that, with due regard to all the relevant considerations, the issue of a fidelity fund certificate to such person will be in the interest of justice, the defendant may issue, on such conditions as the defendant may determine, a fidelity fund certificate to such person when he or she applies therefor.

[22] Guthrie was the only witness to testify in the trial. Of relevance are the criminal charges that were levied against Guthrie and his wife in 2006.

[23] According to Guthrie, a criminal trial took place around November 2007. Mr Clive Ashpol and Me Portia Sali attended on behalf of the defendant. Guthrie testified in the trial. On the outcome of the trial, Guthrie testified that the charges against Me Guthrie were dropped. The main charge of fraud was dropped against Guthrie, and he was charged with the alternate charge: trading without a valid FFC.

[24] On 15 November 2007, Guthrie deposed to a statement in terms of section 112 of the Criminal Procedure Act. He pleaded guilty to the alternate charge.

[25] Trading without a valid FFC is catered for in section 26 of the Act, dealing with the prohibition of rendering of service as an estate agent without a valid fidelity fund certificate.

[26] Guthrie was found guilty and convicted of the statutory offence of trading without a valid FFC. He was fined R3,000.00 or 12 months' imprisonment, all of which is suspended for 5 years on condition that Guthrie is not again convicted of contravening section 29(b) of the Act, which offence is committed during the period of suspension.

[27] Despite this conviction, FFCs were issued for 2008 and 2009.

[28] On 28 October 2009, Guthrie applied to be issued FFCs for 2010. Despite the application, no FFCs were issued. Guthrie testified that he contacted the defendant on various occasions through the switchboard to enquire. He testified that he was acutely aware of his suspended sentence. It was further his testimony that, because he did not receive the FFCs, he immediately shut down the business. On 15 June 2010, he addressed an email to Me Xolani Msomi, about the non-issue of the 2010 FFCs. Further correspondence was exchanged between Guthrie and the defendant.

[29] On 24 June 2010, Me Xolani Masemola, whom Guthrie testified he believed to be the CEO of the defendant at the time, sent an email to Guthrie. In this email, Me Masemola referred to Guthrie's criminal record in the Maritzburg court in 2005, noting that Guthrie was deregistered on 14 April 2009. It is further stated that the defendant cannot issue a certificate to Guthrie.

[30] On the same day, Guthrie addressed an email to Mr James Ellis ("Ellis"), legal counsel at the defendant, seeking his advice. In his responding email, Ellis referred to the provisions of section 27 of the Act. Ellis also raised his concern that FFCs were issued after the conviction. Ellis undertook to investigate and revert.

[31] On 7 July 2010, Ellis wrote an email to Guthrie in which the following was stated:

"The Board's [the defendant's] position is that the conviction in 2005 falls within the ambit of Section 27, hence you are automatically disqualified from practising as an estate agent." ("the Ellis email").

[32] Various further emails were then exchanged between Guthrie and Ellis, Me Una Julius, and the defendant's CEO, Me Mapetla.

[33] On 29 October 2010, Guthrie applied in terms of the rider in section 27 to be re-admitted as a full-status estate agent. On 19 November 2010, the Advisory Committee of the defendant held a meeting. The Advisory Committee found that Guthrie was never found guilty of fraud, but that he was found guilty of the technical charge of breaching section 29(b) of the Act. It was further found that Guthrie was wrongly penalised for not having been issued a certificate. The Advisory Committee recommended that an FFC be issued immediately to Guthrie. This recommendation could only have been made to the defendant, as the defendant is solely responsible for issuing FFCs.

[34] Despite this recommendation, no FFC was issued, and on 21 November 2010, Guthrie threatened legal action and sought a round table. On 24 November 2010, Ellis stated that the defendant is still to consider the recommendation and, as such, that any threatened legal action would be deemed premature. The defendant was to convene on 8 December 2010 to discuss the issue. From the correspondence, it is evident that the defendant did not discuss the issue on 8 December 2010. The last communication on this aspect was addressed to Me Una Julius, on 3 January 2011. According to Guthrie's testimony, he heard nothing further from the defendant.

[35] During cross-examination, Guthrie testified that he could not approach a court to compel the defendant to issue the FFC as they were financially destroyed.

[36] Section 16 of the Act deals with applications for, and the issue of, FFC and registration certificates. An application for an FFC is to be made to the defendant. It is the defendant who needs to be satisfied that the applicant complies with the requirements. No provision is made for the Advisory Committee to consider such an application and issue an FFC.

[37] The rider in section 27 of the Act provides that if the defendant is satisfied that it will be in the interest of justice, the defendant may issue, on such conditions as the defendant may determine, an FFC to an applicant. This rider does not provide that the Advisory Committee may exercise such powers.

[38] The defendant took a decision not to issue an FFC to Guthrie on the basis that the conviction in 2005 falls within the ambit of section 27. This decision was conveyed to Guthrie in the Ellis email. It is common cause that Guthrie received this email.

[39] Insofar as it is necessary, it is also evident that the defendant failed to decide on the recommendation of the Advisory Committee. This failure concerning the taking of a decision falls within the definition of 'failure' in section 1 of the Act.

[40] The defendant pleaded the administrative action. The relevant common cause facts establish the administrative action. I am satisfied that, on a balance of probabilities, the applicability of PAJA has been established. No onus had to be shed by the defendant in this regard.

[41] It follows that the provisions of PAJA therefore apply, and the plaintiff should have invoked the provisions of PAJA to seek a review and to set aside the defendant's conduct, which failed to issue an FFC. Based on this conclusion, the action stands to be dismissed.

Is it competent to claim delictual damages?

[42] The defendant is a juristic person exercising public power through an empowering statutory provision. The breach of a statutory provision does not, without more, give rise to a delictual claim.²

[43] *"Subject to the duty of courts to develop the common law in accordance with constitutional principles, the general approach of our law towards the extension of the boundaries of delictual liability remains conservative. This is especially the case when dealing with liability for pure economic losses. And although organs of state and administrators have no delictual immunity, 'something more' than a mere negligent statutory breach and consequent economic loss is required to hold them delictually liable for the improper performance of an administrative function. Administrative law is a system that over centuries has developed its own remedies and, in general, delictual liability will not be imposed for a breach of its rules unless convincing policy considerations point in another direction."*³

[44] On the evidence before me, Guthrie pleaded guilty to the charge that he carried on business as an estate agent without a valid FFC. Guthrie was convicted of this offence. According to the defendant, this conviction falls within the ambit of section 27, and it resulted in Guthrie's automatic disqualification from practising as an estate agent.

[45] Instead of invoking the provisions of section 31 of the Act⁴, Guthrie attempted to challenge the decision by his section 27 application, which

² *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA)

³ *Steenkamp* at par 27

⁴ "31. Appeal against decisions of board.-

(1) Any person who feels aggrieved by any decision taken by the board in the exercise of its powers under section 8C, 16, 27, 28 or 30 may at any time after he or she became aware of such decision but not later than one month after the board-

(a) has informed him or her in writing of such decision and upon payment of the prescribed fees, request the board in writing to furnish him or her in writing with its reasons for such decision;

resulted in the recommendation by the Advisory Committee. When there was no action on the Advisory Committee's recommendation, he failed to take any further steps to obtain an FFC. Instead, through the plaintiff, Guthrie issued this action to claim delictual damages.

[46] On the evidence before me, I am not convinced that the plaintiff showed something more than a mere negligent statutory breach by the defendant.

[47] I am further not convinced that the plaintiff's claim for loss is an appropriate remedy for the breach of administrative justice.⁵ The plaintiff did not pursue alternative remedies, such as the appeal proceedings in terms of section 31, before issuing this claim.

[48] The appeal proceedings in terms of section 31 of the Act are *sui generis*, combining certain elements of judicial review of administrative action and certain elements of civil appeal proceedings.⁶ The plaintiff elected not to invoke the provisions of section 31, either on receipt of the Ellis email or on the defendant's failure to act on the Advisory Committee's recommendation.

(b) *has in accordance with paragraph (a) furnished him or her with its reasons for such decision and after notice to the board, appeal to the court against such decision, and the court may thereupon*

(i) *dismiss the said appeal;*

(ii) *if it is of the opinion that the board has not acted in accordance with the relevant provision of this Act, give an order opposite to the decision of the board or amending the decision of the board;*

(iii) *refer the matter back to the board for further consideration; or*

(iv) *give such other order, including any order as to costs, as it may deem fit.*

(2) *A court may, on application by the board, order that a decision of, or penalty imposed by, the board not be stayed or suspended pending an appeal to the court under the provisions of this section, if the court considers such an order to be in the public interest."*

⁵ *Olitzki Property Holdings v State Tender Board & Another* 2001 (3) SA 1247 (SCA); See also *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)

⁶ *Steer Property Services (Pty) Ltd t/a Steer & Co v Estate Agency Affairs Board* [2002] 3 All SA 103.

[49] Regarding the aforementioned, the plaintiff argues that section 31 could not be invoked, as the defendant never furnished the decision in writing to the plaintiff. This court has already found that the decision was indeed conveyed to the plaintiff in the Ellis email.

[50] Section 31 does not provide for a failure to take a decision. If regard is had to the definition of 'failure' to take a decision in PAJA, then same must apply to section 31. And this would become relevant on Guthrie's election not to pursue the matter when it became evident that the defendant did not act on the recommendation by the Advisory Committee.

[51] In light of the above, it was not competent to proceed with the delictual claim. It follows that the action is to be dismissed on this basis.

Costs:

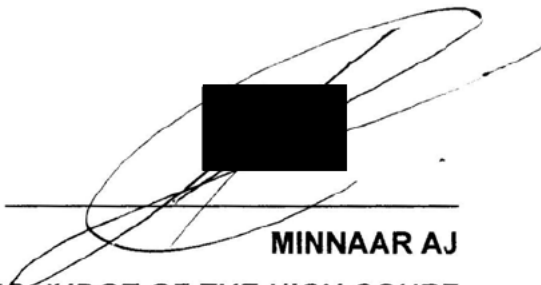
[52] The awarding of costs is in the discretion of the court. In my view, there is no basis why costs should not follow the result.

[53] The defendant employed the services of two counsel and seeks costs on scale C. I am satisfied that such costs are justified.

ORDER:

The following order is made:

1. The action is dismissed.
2. The plaintiff to pay the costs of the action on scale C, such costs to include the costs occasioned by the employment of two counsel.



MINNAAR AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Plaintiff:

Adv T Ossin instructed by Fairbridges
Wertheim Becker

For the Defendant:

Adv M P van der Merwe SC with Adv
PP Ferreira instructed by Matsobane
Ramalatso Inc.

Date of Hearing:

24 February 2025, 25 February 2025,
14 May 2025

Date of Judgment:

22 August 2025