EAAB TAKEN TO TASK TO ISSUE FFCs ON TIME

Real Estate Business Owners of South Africa NPC and Others v Estate Agency Affairs Board and Another (3968/2021) [2021] ZAGPJHC (15 March 2021)

Persistent hitches at the Estate Agency Affairs Board with the timeous issuing of estate agents' Fidelity Fund certificates gave rise to this urgent application. For the estate agent industry the successful outcome was a life line, as they may not practice without this certification. Apart from highlighting the challenges agents face, the Court also ordered the Board to revert with a report on its IT functions within 30 days, the latter identified as the cause for the delays.

The Judgment can be viewed here.

FACTS

Real Estate Business Owners of South Africa ("REBOSA") and certain estate agents brought an urgent application for mandatory relief against the Estate Agency Affairs Board ("EAAB"), a statutory regulatory body for the real estate agency profession, established by the Estate Agency Affairs Act 112 of 1976 ("the Act"). (In this application, REBOSA acts in its own interest, in the interests of 624 of its members and in the public interest in terms of section 38 of the Constitution.)

The application arises from the failure of the EAAB to timeously issue Fidelity Fund Certificates ("FFCs") for 2021 to the estate agents who had duly and timeously applied for them. The failure to issue the certificates is very problematic as the Act criminalises acting as an estate agent unless a valid FFC has been issued to him or her. An estate agent is not entitled to any remuneration for acting as such unless at the time of so acting, a valid FFC has been issued to him or her. Every estate agent with an FFC must, by not later than 31 October of each year, apply to the EAAB Board for the issue to him/her of an FFC in respect of the immediately succeeding calendar year. The Act obliges the EAAB to issue an FFC to a qualifying person who makes a proper application and meets the statutory requirements.

The problems experienced by the estate agents in obtaining FFC renewals is a recurring issue. It has not been denied that year after year, come January, large numbers of FFCs have simply not been issued to estate agents who qualify for them. REBOSA had over the years tried to assist the EAAB directly by providing it, on an ongoing basis, with updated lists of "queries" submitted by estate agents to REBOSA. These lists are updated and submitted to the EAAB at weekly and bi-weekly intervals. However, even where these lists are submitted to the EAAB, the EAAB often makes inadequate effort to resolve the queries and FFCs remain unissued. The problem had become so severe that REBOSA had for the past six years employed an individual exclusively for the purpose of going into the offices of the EAAB on a regular basis to help the EAAB resolve these issues.

The EAAB had, over the years, publicly acknowledged at meetings of the Parliamentary Portfolio Committee, that delays in issuing FFCs timeously was caused by its outdated and inadequate IT system and its own internal problems brought on by unskilled and/or unenthusiastic staff.

Notwithstanding the challenges with the EAAB's IT system coupled by poor administration, on 21 January 2021 the Property Professional magazine, an industry publication, reported that the EAAB had claimed that all compliant FFCs for 2021 had been timeously issued by 31 December 2020 and that all industry bodies had confirmed this. This according to REBOSA was simply not true because a week later, on 28 January 2021 the 209 individual applicants in this application as well as 624 REBOSA members (listed in an annexure to the case), had still not received their FFCs.

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Hence the urgent application to court.

HELD

- The Act stipulates that an FFC is required for each individual estate agent as well as for corporate entities carrying on the business of estate agents, by directors of those corporate entities, and by their managers and officers. Thus, if the corporate entity concerned or any of its directors or managers or officers do not hold an FFC, the entire business is precluded from operating as an estate agency.

- Section 34 of the Act criminalises a person who carries on the activities of an estate agent without an FFC having been issued to them. Section 34A of the Act provides that an estate agent is not entitled to remuneration unless an FFC had been issued to them at the time of performance of the act in question.

- Section 16(3) further provides that subject to certain provisions relating to the lapsing, withdrawal and suspension of FFCs, if the EAAB upon receipt of an application for an FFC together with payment of the relevant levies and contributions is satisfied that the applicant concerned is not disqualified from being issued with an FFC, "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." FFCs expire on 31 December of each year and application for an FFC must be made by the preceding 31 October.

- The EAAB is thus under a statutory obligation to issue an FFC to every qualifying estate agent who not later than 31 October makes application to it for an FFC in respect of the succeeding year. It is also under an obligation to issue the FFC to every qualifying agent before the commencement of the new year for which it is applied i.e., not later than 31 December of that year.

- The overwhelming majority of individual estate agent applicants herein, as well as the REBOSA members, are qualifying estate agents who timeously and properly submitted applications for 2021 FFCs, but who were not issued with same.

- In court, the EAAB could not provide any substantiated facts proving that their failure to issue the certificates related to defects in the applications submitted by the relevant estate agents.

- The application for mandatory (compulsory) relief therefore had to succeed as the requirements for a final mandatory order had been met. (These are that: (a) the applicant must have a clear right; (b) there must be a reasonable apprehension of harm to the applicant if the interdict is not granted; and (c) the applicant must have no other appropriate remedy except the interdict.)

CONCLUSION

The Court ordered that:

(i) within certain strict time periods, the EAAB had to issue the FFCs or advise why these could not be issued; and

(ii) the EAAB must file a report with the Court within 30 days setting out the extent of the continuing failure to issue FFCs.

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