FFC OBTAINED HALFWAY THROUGH MANDATE – ENTITLED TO ANY COMMISSION?

Van Den Blink Properties CC v Erasmus N.O and Another (2557/2012) [2014] ZAFSHC 182 (26 August 2014)

This matter was an appeal against a judgment granting an agent full commission despite the fact that the agent, at the time of accepting the mandate, was not in possession of a Fidelity Fund Certificate and only obtained it later on in the course of performing his mandate. The court allowed the client to take the outcome on appeal, holding that another court could find that the agent is not allowed to claim all, or at least part, of the commission in such an instance.

The Judgment can be viewed here.

FACTS

Erasmus gave a mandate to Verna Van Den Blink Properties CC (Van Den Blink Properties) to find a tenant for a property he owned.

At the time the mandate was granted (February 2011), the sole member of Van Den Blink Properties was in possession of a valid Fidelity Fund Certificate (FFC). The agent assisting Erasmus and who was employed by Van Den Blink Properties, one Snyman, was however not in possession of such certificate. He did obtain one subsequently, effective from 29 April 2011.

Snyman performed quite a lot of negotiations on behalf of Erasmus since the granting of the mandate in February 2011, up to the date the FFC was issued and also beyond that date, up to October 2011. However at this stage, Van Den Blink Properties was effectively circumvented and prevented from fulfilling the mandate although an agreement was concluded with a lessor.

Erasmus ultimately refused to pay commission to Van Den Blink Properties and the latter issued summons to claim commission. The claim was successful and Erasmus appealed, arguing that:

1) Van Den Blink Properties, being a close corporation, had to have a FFC in its own name before it could be successful in a claim for commission; and

2) as Snyman was not in possession of a valid FFC at the time of accepting the mandate and was only issued with such certificate effective from the 29th April

2011, he was also not entitled to any commission.

HELD:

Was the agency obliged to hold an FFC in its own name?

- The Estate Agency Affairs Act 112 of 1976 (the Act) does not provide for a juristic person to be issued with an FFC.

- In the case of a company, such certificate is required to be issued to each and every director and managing officer and, as far as close corporations are concerned, such certificate is required to be issued to each member or managing officer of such corporation.

- Since it was common cause that the sole member of Van Den Blink Properties had been issued with such certificate at all relevant times, this ground of attack was unfounded.

Was the agent precluded from claiming commission for all his work due to absence of a valid FFC at the time of concluding the mandate?

- The facts showed that the mandate was obtained by Snyman in February 2011 and that he did quite extensive negotiations to find a lessee for the premises from then onwards up to the effective date of his certificate, being the 29th April 2011, and beyond that up to October 2011 when Erasmus was effectively circumvented and prevented from fulfilling the mandate.

- The absence of a FFC for Snyman did not invalidate the mandate.

- The trial court however deducted from this that the payment of commission could accordingly be enforced by Snyman and Van Den Blink Properties from the time when Snyman had been issued with his FFC on 29 May 2011.

- The impression gained from the judgment is that the trial court 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 FFC at the time of performing the necessary acts, once he obtains such certificate, the commission already owned, can be enforced, but not before the issue of such certificate.

- That stance of the trial court was questionable, as in terms of section 34A of the Act it was clearly stipulated that 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 the definition unless, at the time of the performance of that act, a valid FFC has been issued.

- It was thus not the enforceability of payment of remuneration, but the entitlement thereto that was at issue.

- The facts here presented a novel situation in 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. As a result, some negotiations and performance of tasks by virtue of the mandate were performed before, and some after the obtaining of the FFC.

- Whether, in a situation like the present, it disentitled Van Den Blink Properties completely from any remuneration, as Erasmus argued, was questionable. However, it was also not clear that Snyman was entitled to his full commission, as the trial court found.

- It was a possibility that Van Den Blink would be entitled to at least part of the remuneration for the services rendered after the obtaining of the FFC by Snyman.

- The trial court did not really deal with this latter question and there does appear to be a reasonable possibility that a court of appeal may come to a different conclusion.

In the result, leave to appeal the judgment of the court a quo was granted.

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