

NO FFC, NO COMMISSION - UNLESS YOUR DUCKS WERE IN A ROW

Signature Real Estate (Pty) Ltd v Charles Edwards Properties and Others (415/2019) [2020] ZASCA 63 (10 June 2020)

In this important judgment handed down by the Supreme Court of Appeal, it was held that in certain very narrow instances, an estate agent will not be precluded from claiming commission where the Fidelity Fund Certificate was not in place at the relevant time. The matter relates to an instance where the estate agent had timeously submitted all documents to the Estate Agency Affairs Board, the latter however accidentally issuing an incorrect certificate in the name of a non-existing entity. This error was subsequently corrected, with retrospective effect. The Court held that their claim for commission in this instance could not be thwarted by the argument that they were not in possession of a valid Fidelity Fund Certificate at the time.

The Judgment can be viewed [here](#).

FACTS

In April 2018 Signature Real Estate (Pty) Ltd (Signature) and Atlantic Seaboard Realty (Atlantic) jointly brokered a lease agreement in terms of which they were each to receive 50% of the commission due in terms of that agreement. After the full amount of the commission was paid to Atlantic, it refused to pay Signature the latter's share of the commission. Signature launched an application in the Cape Town High Court (Court *a quo*) seeking, among others, payment of the commission.

Atlantic opposed the application and also launched a counter-application challenging Signature's *locus standi* on the basis that, at the time the lease agreement was brokered, Signature was not in possession of a fidelity fund certificate. In this regard, Signature responded and advised that on 9 January 2017 Hidicol CC, which had traded as Signature Real Estate CC, had been converted into a company (Signature). On 10 May 2017 the Estate Agency Affairs Board (the Board) was informed of the conversion, which was duly recorded in its records and Signature complied with all the Board's requirements in relation to changes in entities that hold fidelity fund certificates. An application was made to the Board in the name of Signature for fidelity fund certificates to be issued to it, its directors and its agents. On 1 January 2018 the Board erroneously issued certificates in the name of Hidicol CC instead of Signature, and similarly, to its directors and agents, but in their former capacities as members and agents of Hidicol CC. Signature further explained that, after being made aware of these errors, on 8 May 2018, the Board issued new certificates to Signature, its directors and agents. The certificates were later withdrawn and replaced with ones backdated to 1 January 2018. The Registration Manager of the Board confirmed that Signature, its directors and agents were entitled to be issued with fidelity fund certificates on 1 January 2018, but due to the Board's oversight, the certificates were issued in the name of Hidicol CC, which error was rectified in May 2018. The certificates issued in May 2018 were later withdrawn and replaced with ones backdated to 1 January 2018. Signature claimed that it was at all times entitled to be issued with a certificate, as it had complied with the requirements of the Act, and that the reason the certificate in its possession contained a wrong description was due to an error on the part of the Board. The Board conceded this.

Atlantic countered that, given how the online applications for renewal of fidelity fund certificates worked, and the fact that the certificates were issued in the names of Hidicol CC and its former directors and agents, the 2018 applications were probably erroneously submitted in the name of Hidicol CC instead of Signature. The certificates were nonetheless invalid, having been issued to a non-existent company, its directors and agents. Atlantic accordingly contended that Signature was precluded by section 34A of the Estate Agency Affairs Act 112 of 1976 (the Act) from payment of commission.

The Court *a quo* held that Signature was not entitled to claim commission. The outcome was appealed to the Supreme Court of Appeal.

HELD

- Section 34A of the Act precludes an estate agent from claiming commission when, at the time the commission was earned, the estate agent had not been issued with a valid fidelity fund certificate by the Board.
- In this case, Signature was not in possession of a fidelity fund certificate in its name at the time the disputed commission was earned. Section 34A reads as follows:

‘(1) 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 subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of the definition of “estate agent”, unless at the time of the performance of the act a valid fidelity fund certificate has been issued –

(a) to such estate agent; and

(b) if such estate agent is a company, to every director of such company or, if such estate agent is a close corporation, to every member referred to in paragraph (b) of the definition of “estate agent” of such corporation.

(2) No person referred to in paragraph (c)(ii) of the definition of “estate agent”, and no estate agent who employs such person, shall be entitled to any remuneration or other payment in respect of or arising from the performance by such person of any act referred to in that paragraph, unless at the time of the performance of the act a valid fidelity fund certificate has been issued to such person.’

- Section 34A, must be read with section 26 of the Act, which prohibits the rendering of services as estate agent by any person, company or close corporation, unless they have been issued with a valid fidelity fund certificate at the relevant time.
- The provisions of 34A are clearly peremptory. But even peremptory provisions must yield to two interpretive imperatives. First, the injunction of section 39(2) of the Constitution, which enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. In this instance, the right implicated is one enshrined in section 22 of the Constitution, namely the right to freely engage in a trade, occupation or profession. Therefore, an application of the section that promotes, rather than impedes, the exercise of that right, is to be preferred second, due regard must be had to the purpose of the statute, more specifically, whether adopting a strict or literal interpretation of its provisions is consistent with what the Act seeks to achieve.
- In the present case one must bear in mind the general object of the Act, as set out in its long title, which is to control certain activities of estate agents in the public interest through the establishment of the Board and the Estate Agents Fidelity Fund (the fidelity fund). The fidelity fund is established in terms of section 12(1) of the Act. Its purpose is to reimburse persons who, in certain circumstances, have suffered financial loss due to misappropriation of trust monies by estate agents. The monies in this fund are, in the main, contributed by all registered estate agents who, in return, are issued with valid fund certificates. In other words, a fidelity fund certificate is issued in exchange for compliance by an estate agent with the relevant requirements set out in the Act, which include payment of a stipulated amount into the fund. In this way, members of the public are assured of reimbursement in the event of misappropriation of their monies by an estate agent.
- The Act provides a regulatory framework for estate agents. One of the key components of that framework is an estate agent’s trust account. In terms of section 32 of the Act, every estate agent is required to open and keep one or more separate trust accounts with a bank into which money held or received by or on behalf of

such estate agent shall be deposited. The estate agent is required to notify the board of the details of such a bank account or accounts.

- In terms of the Board's rules, an application for a fidelity fund certificate for the following year must be made not later than 31 October of each year. Signature had complied with this and all other requirements of the Act. But for the error on the part of the Board, Signature was entitled to, and would have been issued with, a valid fidelity fund certificate for the period 1 January-31 December 2018.
- In the present case the purpose of the Act was served. The public would have been protected. If, for example, a member of the public had suffered loss due to misappropriation by an estate agent involved in the agreement in question, the Board, in the Court *a quo's* view, would have been hard-pressed to argue that a claim against the fidelity fund should not succeed because a certificate had not physically been issued to the wrongdoer at the time of the conclusion of the agreement. Such an outcome would be contrary to the purpose of the legislation.
- Care should be taken to observe the peremptory provisions of section 34A of the Act. The facts in the present case are within a narrow compass. In both instances, very specific to their facts, the provisions of the Act in relation to a fidelity fund certificate being issued were met and in both the estate agents were rightly considered to have been in possession of a certificate, thus meeting the requirements of the section. The Court *a quo* added that the findings in both cases should not be construed as an invitation to laxity or to a liberal approach to the application of section 34A.

CONCLUSION

It followed that the appeal succeeded.