

# SUMMARY OF THE JUDGMENT

## COMMISSION CLAIM LOST WHERE 'TRADING AS' BUSINESS WITHOUT FFC?

**Ustica 1153 CC t/a Cape Region Home Sales v Jordaan and Another (A158/2014) [2015] ZAWCHC 87 (9 June 2015)**

*What happens to the requirement to hold an FFC where a close corporation estate agency, using a trading name, holds its FFC in the name of the corporation and not the 'trading as' business? This was the issue before the court here as the seller cancelled the sale agreement and denied liability for commission, arguing that he transacted with the 'trading as' business which did not have an FFC.*

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

### FACTS

In March 2012, Jordaan gave a mandate to Cape Region Home Sales (CRHS) to find a purchaser for his home. In pursuance hereof, Gordon of CRHS introduced Ismail to the property and a month later, a sale agreement was concluded between Jordaan and Ismail. The agreement contained a clause pertaining to the commission that is payable to CRHS as sole and effective cause of the sale. It provided also that should the sale be cancelled due to breach of the agreement by the seller, the seller remained liable for payment of the commission to the estate agent.

Gordon signed in respect of the benefits of this agreement on behalf of CRHS.

Jordaan subsequently cancelled the agreement but refused to accept liability for payment of the commission. In dispute was the existence of a valid fidelity fund certificate (FFC) for CRHS.

The relevant background details were that Ustica 1153 CC (Ustica), the claimant (plaintiff) in the matter, was in fact a close corporation trading as CRHS. It was, however, CRHS that alleged that it was the effective cause of the sale, had performed its obligations in terms of the mandate and was entitled to commission. Ustica alleged that it was an estate agent which at all relevant times acted through its member, Gordon. Both it and Gordon held FFCs and had fidelity insurance at all relevant times. No FFC existed for CRHS.

Ustica argued further that CRHS was its trading name. Gordon testified that Ustica is a shelf company, that he never used that name and that people knew the trading name CHRS.

When he had dealings with clients and with Jordaan, he would introduce himself as Mr Gordon from CRHS. As such, the sale agreement was at all relevant times facilitated under the name and style of CRHS. Gordon was the sole member of Ustica and in this matter he acted in his capacity as an agent of Ustica. He has applied to the Estate Agency Affairs Board (EAAB) to have the trading name changed. He has written letters and emails to have the trading name changed but the EAAB has not done so. The EAAB however is aware of CRHS because they have to send financial documents to it under that name. Gordon was of the opinion that he did not need a FFC for CRHS as he had one for Ustica.

Jordaan however argued that:

- Ustica had no *locus standi* to claim for commission. Jordaan denied having mandated or concluded any agreement with Ustica or that Gordon acted for Ustica; rather, that he acted on behalf of CRHS. As such, Ustica, the plaintiff, was not entitled to any benefit in terms of an agreement to which it was neither a party nor a beneficiary. On all documentation, including the agreement as well as CRHS' website, no mention was made of Ustica and the latter is therefore unknown to Jordaan.
- Jordaan alleged in addition that Ustica did not comply with:
  - section 22 of the Close Corporations Act.
  - section 26 of the Estate Agency Affairs Act that requires anyone performing an act as an estate agent, to be in possession of a valid FFC. (Jordaan argued that Ustica could not prove that each of its members, who was authorised and took part in management, was in possession of a FFC. This sprouted from the fact that one Ms Day, an administrative employee seemingly in the employ of CRHS, who Jordaan alleged facilitated the sale agreement, was not in possession of the necessary FFC although she performed acts which, so it was argued, fell within the definition of an estate agent as envisaged in the Estate Agency Affairs Act.)

In addition:

- Jordaan alleged that Ustica could not show a link between CRHS and Ustica, and accordingly that CRHS was in breach of section 26 of the Estate Agency Affairs Act and was not entitled to commission.

The relevant provisions of the estate Agency Affairs Act (the Act) provide as follows:

*26 Prohibition of rendering of services as estate agent in certain circumstances. – No person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him or her and to every person employed by him or her as an estate agent and, if such person is –*

- (a) a company, to every director of that company; or*
- (b) a close corporation, to every member referred to in paragraph (b) of the definition of “estate agent” of that corporation*

*34 A. Estate agent not entitled to remuneration in certain circumstances. – (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 ... 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 is a company, to every director of such company of, 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 fund certificate has been issued to such person.’*

#### HELD:

- Essentially, the issue before this court was whether CRHS and Ustica were one and the same, so that the FFC issued in respect of the one, covered the other as well.

#### **Interpretation of sections 26 and 34A**

- Regarding section 26 (rendering services prohibited in absence of FFC): In the 2001 judgment in *Ronstan Investments (Pty) Ltd and Another v Littlewood*, the court confirmed that where section 26 is contravened, the agent was not entitled to remuneration for the performance of the act and also commits a criminal offence in terms of section 34 of that Act.
- Regarding section 34A (not entitled to remuneration if no FFC in place): In the 2008 judgment in *Taljaard v TL Botha Properties* the Supreme Court of Appeal considered the purpose of the introduction of section 34A and held that the section does not in terms invalidate the contract of mandate of an estate agent who acts in conflict with section 26. An estate agent who claims remuneration in conflict with section 34A

might expose himself or herself to criminal sanction, and will be prevented from enforcing his or her claim, but it does not necessarily follow that a client who has settled his or her contractual obligation is accorded a right of action for its return.

- What section 34A seeks to address is to penalise the estate agents who have breached section 26.

#### ***On the facts***

- Gordon's testimony that CRHS was only a trading name with Ustica as the legal entity behind it, was convincing, despite there being no formal document confirming the link between Ustica and CRHS.
- His testimony linking CRHS as the trading name of Ustica should not be rejected only on the basis that it is not supported by any documentary evidence. Gordon's testimony under oath was clear and not disproved by Jordaan. Other facts also supported Gordon's testimony: he was involved and signed the offer to purchase on behalf of CRHS during its dealings with Jordaan and he was the member of Ustica as reflected in the FFC. Furthermore, both Gordon and Ustica had valid FFCs.
- As such, the conclusion that a link between CRHS and Ustica 1153 CC existed was warranted.
- This conclusion was aligned with case law, such as *Hillview Properties (Pty) Ltd v Strijdom and Another*, where a company prematurely and *bona fide* used a name that it intended to adopt. The court there held that it did not constitute an error *in persona*.
- In the present matter, accepting that Ustica and CRHS were one and the same, the conclusion would be too that there is no error *in persona*. An agreement entered into by the entity known under different names is valid and binding if unaffected by fraud. The validity thereof does not depend on whether it is as well known by that name as by its true name, but whether the name is used in good faith by the party adopting it as description *personae*.
- Here there was no evidence to suggest that the name CRHS was used in bad faith or with the intention to defraud. There is also no indication that it would have mattered to Jordaan if they were told that the true name and thus the identity of the party they were contracting with was Ustica.

***Alleged non-compliance with section 23 of the Close Corporations Act, i.e. the requirement to make known the identity of the corporation to third parties***

- Section 22(1) of the Close Corporation Act requires that the abbreviation 'CC', in capital letters, must be subjoined to the name used by a corporation.
- Section 23 of the Close Corporations Act (read with section 32 of the Companies Act) requires that persons who have dealings with a close corporation must be afforded details of the corporation's identity and that of its members. A person who fails to comply with section 23 commits a criminal offence. An offence is committed irrespective of whether the third party knows about the true facts of the corporation.
- Sections 22 and 23 of the Close Corporations Act, as with sections 26 and 34A of the Estate Agency Affairs Act, are there to protect the public. Non-compliance with these provisions may in some instances result in criminal offences. There may also be, in some instances, personal liability imposed on members in terms of the Close Corporations Act.
- Contravention of the Close Corporation provisions, however, does not affect the validity of a transaction between contracting parties. It also does not disentitle a party to a benefit flowing from an act performed in terms of a valid contract.
- Infringement of these provisions, if it was shown, would therefore not affect Ustica's claim for commission and may, at most, subject it to sanction.
- The allegation that Day held herself out as an estate agent by performing duties which fell within the ambit of the acts of an estate agent as defined in the Estate Agency Affairs Act, whilst not being in possession of the necessary fidelity fund certificate, was unconvincing. Both Gordon and Day testified that she was not an estate agent but an office administrator employed by Ustica. She accordingly was not required to have a FFC.

The appeal against the order in the Magistrates Court that found that Ustica had failed to prove its claim was therefore successful and Jordaan was ordered to pay the commission.

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