



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 978/2018

In the matter between:

ATLANTIC BEACH HOMEOWNERS ASSOCIATION NPC

FIRST APPELLANT

HARRY WHITE

SECOND APPELLANT

ELMARIE CAMPBELL REAL ESTATE (PTY) LTD

THIRD APPELLANT

ELMARIE CAMPBELL

FOURTH APPELLANT

and

THE ESTATE AGENCY AFFAIRS BOARD

RESPONDENT

Neutral citation: *Atlantic Beach Homeowners Association NPC v The Estate Agency Affairs Board* (978/2018) ZASCA 112 (16 September 2019)

Coram: Navsa, Wallis, Mbha and Dambuza and Van Der Merwe JJA

Heard: 15 August 2019

Delivered: 16 September 2019

Summary: Estate Agents – whether the first and second appellants operated as estate agents in terms of the Estate Agency Affairs Act 112 of 1976 – court held that by concluding and implementing a property partner agreement the first and second appellants did not hold themselves out or advertise themselves as estate agents – appeal upheld with costs.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Steyn J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with the following:

‘a) The respondent’s decision to charge the appellants as communicated to the appellants on 11 April 2016 is hereby reviewed and set aside.

b) The respondent is interdicted from proceeding with the prosecution of the said charges against the appellants.

c) The respondent is ordered to pay the applicants’ costs.’

JUDGMENT

Mbha JA (Navsa, Wallis, Dambuza and Van Der Merwe concurring):

[1] This appeal is against the judgment and order of the Western Cape Division of the High Court, Cape Town (per Steyn J), in terms of which the Court dismissed the appellants’ application for an order: declaring that the first and second appellants were not estate agents as defined in s 1 of the Estate Agency Affairs Act 112 of 1976 (the Act); reviewing and setting aside the decision of the respondent to charge the

appellants with contraventions of the Act; and interdicting the respondent from proceeding with the prosecution of the disciplinary proceedings against the appellants. The basis of the judgment was that it was inappropriate for the Court to intervene in untermiated disciplinary proceedings. This appeal is with leave of the Court a quo.

[2] The first appellant, Atlantic Beach Homeowners Association NPC (ABHOA) is the home owner's association for the Atlantic Beach Estate (the estate), situated in Melkbosstrand on the West Coast outside Cape Town. Its membership consists of owners of immovable property within the estate and its object is the control over and maintenance of buildings, services and amenities within the estate. The second appellant, Harry White (Mr White) is ABHOA's chief executive officer. The third appellant, Elmarie Campbell Real Estate (Pty) Ltd (Pam Golding), a franchisee of the Pam Golding Group, is an estate agent as defined in the Act. The fourth appellant, Elmarie Campbell (Ms Campbell) is the managing director of Pam Golding. The respondent is the Estate Agency Board (the Board) established under s 2 of the Act.

[3] During August 2015, the respondent charged the appellants with certain alleged contraventions of the Act. The charges emanated from an agreement that had been concluded between ABHOA represented by Mr White and Pam Golding, duly represented by Ms Campbell, on 9 July 2015. The agreement, styled Property Partner Agreement (PPA), was for a three year period and provided for the appointment of Pam

Golding as ABHOA's property partner, on a non-exclusive basis,¹ for the marketing of properties forming part of the estate.

[4] In terms of the agreement, ABHOA agreed to grant Pam Golding certain marketing benefits which were described in clause 4 of the agreement. These included that ABHOA would, at its cost and expense: display Pam Golding's name and branding on ABHOA's marketing pamphlet and map of the estate; on a weekly basis cause one property to be advertised in a local newspaper and in ABHOA's newsletter; display a 'for sale' sign branded with Pam Golding's name and corporate logo on the relevant property; provide access to ABHOA's electronic media advertising template; entitle Pam Golding to indicate on its corporate stationery that it was associated with ABHOA; provide residents of the estate with a fridge magnet which included Pam Golding's contact details, provide a link from ABHOA's website to that of Pam Golding in respect of properties for sale; and display Pam Golding's contact details and logo at all entrances to the Estate.

[5] As a consideration for these marketing benefits, Pam Golding would pay ABHOA a marketing fee equal to 1%, excluding value-added tax, of the gross purchase price of each property sold by Pam Golding up to a purchase price of R5 million, and 0.5% of anything above that price. In addition to payment of the marketing fee, Pam Golding would be obliged at all times to use its best endeavours to promote and extend sales of properties in the estate and enhance its reputation by making all efforts to

¹ Clause 3.2 of the agreement expressly recorded that it was not intended that the relationship created in terms of thereof was to be that of a partnership or joint venture and that the agreement was not to be so construed.

promote it. Pam Golding also warranted that its sole business was to operate as an estate agency and that all the necessary licences, certificates and permits necessary to operate the business of an estate agency were in place.

[6] What precipitated the charges against the appellants was a complaint lodged with the Board by attorneys representing certain estate agents, against Pam Golding and Ms Campbell. In essence, the complaint was that ABHOA granted to Pam Golding the exclusive right to market properties within the estate, in consideration for commission of 1% of the purchase price of any property sold in the estate through Pam Golding. Significantly, no complaint was laid against ABHOA and Mr White.

[7] ABHOA and Mr White were charged on three counts. Count 1 was an alleged contravention of s 26 of the Act, which requires any person who performs any act as an estate agent to be a holder of a valid fidelity fund certificate. It was alleged that during July 2015 ABHOA and Mr White, without holding a valid fidelity fund certificate issued by the Board, operated or held themselves out to be estate agents and signed the PPA in terms of which they agreed to act as 'spotters'. Listed under this general charge were various alleged transgressions which were in effect obligations undertaken by ABHOA in terms of clause 4.2 of the PPA.

[8] Count 2 was an alleged contravention of s 34A of the Act read with regulation 2.4 of the code of conduct published on 24 December 1992,² in that during the relevant period ABHOA and Mr White received or contracted for remuneration or other payment as an estate agent, without holding a valid fidelity fund certificate. This charge arose from the stipulation for remuneration in clause 5 of the PPA.

[9] Count 3 was an alleged contravention of regulation 2.4 of the code of conduct and regulation 2(c) of the Specifications of Service 1981. The allegation was that during the relevant period, ABHOA and Mr White had charged for and received a consideration of 1% of the gross purchase price of each property sold by Pam Golding and Ms Campbell in respect of canvassing the sellers or purchasers of immovable property situated within the estate, in exchange for the marketing benefits and other estate agent facilities afforded to Pam Golding.

[10] The single charge against Pam Golding and Ms Campbell was based on clause 5 of the PPA. It was alleged that in breach of regulation 2.1 of the code of conduct,³ read with regulation 2(c) of the Specifications of Services 1981, Pam Golding and Ms Campbell undertook to pay ABHOA the marketing fee of 1% of the gross purchase price of each property sold by Pam Golding or Campbell of sales value up to R5 million and

² GN R3415 in GG 14489: In terms of the s8(b) of the Act, the Board has the power to frame and publish, with the approval of the Minister of Trade, a code of conduct which shall be compiled with by estate agents and to take such steps as may be necessary or expedient to ensure such compliance.

³ Regulation 2.1 of the code of conduct provides that an estate agent shall not in or pursuant to the conduct of his business do or omit to do any act which is or may be contrary to the integrity of estate agents in general.

0,5% (percentage) of the sale value and above R5 million, for the duration of the PPA, at a time when the latter had not been issued with a valid fidelity certificate.

[11] Upon receipt of the charges, the appellants approached the court a quo seeking a declarator that ABHOA and Mr White were not estate agents as defined in the Act. They also sought an order reviewing and setting aside the Board's decision to charge them, averring that the charges against Pam Golding and Ms Campbell were based on what the appellants contended to be the Board's misapprehension that ABHOA and Mr White had been conducting themselves as estate agents. The appellants further sought an order interdicting and restraining the Board from proceeding with the prosecution of the charges against them.

[12] On 20 April 2018, the court a quo decided the application on the basis that the question whether ABHOA and White had operated as estate agents, was one which properly fell to be determined by the Board's committee of enquiry and that it would be inappropriate for the court to decide this issue and to grant the consequential review and interdictory relief. In arriving at this conclusion, the court a quo held that no exceptional circumstances had been shown to justify the intervention of the court at that stage of incomplete disciplinary proceedings.

[13] Before us, the appellants' initial stance was to attack the court a quo's approach that it was inappropriate to intervene in undetermined disciplinary proceedings. They did however argue that the issue of jurisdiction of the Board was a threshold question that

had to be determined in advance of the disciplinary proceedings in question. The Act did not empower the Board to decide whether or not someone fell within the definition of an estate agent and therefore, so the argument continued, this was a matter of statutory interpretation that only a court could decide. In the light of the conclusion that I have reached, it is not necessary to express a view on the latter argument.

[14] Ultimately, Counsel for both parties agreed that the matter fell to be resolved by determining whether or not ABHOA or Mr White, on the evidence relied upon by the Board, performed any act as an 'estate agent' as defined. Only para (a) of the definition of 'estate agent', as set out in the Act is presently relevant. It provides that estate agent:

'means any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person –

(i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor; or

(ii) lets or hires immovable property . . .; or

(iii) collects or receives any moneys payable on account of a lease of immovable property . . . ;

or

(iv) renders any such other service as the Minister on the recommendation of the board may specify from time to time in the Gazette.'

[15] In *Rogut v Rogut*⁴ Holmes AJA stated that the words ‘for the acquisition of gain’ modify the holding out or the advertising, rather than the selling, buying or letting of property. He said that this connotes that an estate agent, as defined, is a person who is, inter alia, looking for business. Thus, a person who merely does one or more of the acts listed in subparagraph (i) to (iv) of the definition, does not thereby bring himself or herself within the definition, unless he has also held himself out or so advertised, for the acquisition of gain, that he is a person who does these things. Holmes AJA also observed that if the legislature had intended that the performance *simpliciter* of any act listed in paras (a)(i)(ii), (iii) and (iv) of the definition of ‘estate agent’ should render the person performing it subject to the Act, he would have expected it to say so. It follows that the key words in the definition of estate agent are ‘holds out’ or ‘advertise’. Clearly, they must precede the instructions or mandate and without such ‘holding out’ or ‘advertising’, there cannot be an ‘estate agent’ as defined.

[16] In the result, the issue to be decided in this case crystallised to whether ABHOA or Mr White has in any manner, directly or indirectly, held themselves out as persons who sell properties of others for commission or advertised themselves as persons who do so. In this regard, the Board highlighted the obligations of ABHOA which are set out in various clauses of the PPA, and submitted that the terms of the PPA and its implementation demonstrated that for the acquisition of gain, ABHOA had held itself out to be a property partner of Pam Golding for the sale of immovable properties in the estate, which constituted conduct of an estate agent as defined in the Act.

⁴ *Rogut v Rogut* 1982 (3) SA 928 (AD) at 937H-938A-C.

[17] It is common cause that ABHOA had implemented the PPA, in the following manner:

(i) In the property section of the Sunday Times Neighbourhood Marketplace publication of 31 January 2017, the 'Agency Guide' referred to 'Atlantic Beach Estate', as appearing on page 19 thereof. On this page, however, properties were advertised for sale by Pam Golding and ABHOA was only indicated as its 'sole property partner'.

(ii) ABHOA allowed Pam Golding to advertise estate properties for sale in the weekly newsletter distributed by ABHOA to residents;

(iii) The relevant 'For Sale' signs, 'Sold' signs and displays at the entrance to the estate displayed the names and logos of the estate and Pam Golding. On all of these it was in some or other manner indicated that Pam Golding was a 'property partner' in relation to the estate. This also applied to the fridge magnets.

(iv) Under the words 'Property for Sale' ABHOA's website provided a link to the website of its property partner, Pam Golding.

[18] A careful perusal of the property partner agreement and the evidence of implementation thereof does not reveal that ABHOA or Mr White in any manner held themselves out or advertised that they sought mandates to sell property. There is no evidence that ABHOA or Mr White solicited approaches from the general public to purchase or sell properties on their behalf for commission. The property partnership agreement involved nothing more than the provision by ABHOA to Pam Golding of marketing benefits, which are specified in the agreement in return for the consideration specified in the PPA.

[19] For these reasons, I am satisfied that there is nothing placed before this court that suggests that, by concluding and implementing the property partner agreement, ABHOA or Mr White held themselves out or advertised themselves as persons that seek to sell the properties of others for commission. Thus there is no evidence that they acted as estate agents as defined. In the result they should not be subjected to the envisaged disciplinary proceedings. As the charge against Pam Golding and Ms Campbell is entirely dependent on ABHOA or Mr White having acted as estate agents, the same applies to them. I find, accordingly, that the appellants have made out a case for the grant of the orders in paragraphs 2 and 3 of the Notice of Motion. In the circumstances the following order is made:

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside and replaced with the following:

‘a) The respondent’s decision to charge the appellants as communicated to the appellants on 11 April 2016 is hereby reviewed and set aside.

b) The respondent is interdicted from proceeding with the prosecution of the said charges against the appellants.

c) The respondent is ordered to pay the applicants’ costs.’

B H Mbha

Judge of Appeal

APPEARANCES:

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