THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 415/2019

In the matter between:

SIGNATURE REAL ESTATE (PTY) LTD	**APPELLANT**

and

CHARLES EDWARDS PROPERTIES	**FIRST RESPONDENT**
CHARLES EDWARDS PROPERTIES CC	**SECOND RESPONDENT**
ATLANTIC SEABOARD REALTY (PTY) LTD	**THIRD RESPONDENT**
THE ESTATE AGENCY AFFAIRS BOARD	**FOURTH RESPONDENT**

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

Coram: NAVSA, CACHALIA, DAMBUZA, MAKGOKA AND SCHIPPERS JJA

Heard: The matter was disposed of without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 10th day of June 2020.

Summary: Estate Agent – entitlement to claim commission – application of ss 34A and 26 of the Estate Agency Affairs Act 112 of 1976 – whether estate agent in possession of a fidelity fund certificate which erroneously described the estate agent was precluded by s 34A from claiming commission.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (D M Davis AJ sitting as court of first instance):

The appeal is upheld. The order of the court a quo is set aside and replaced with the following:

'1. The third respondent (Atlantic Seaboard Realty (Pty) Ltd) is ordered to pay the applicant:

1.1 the amount of R13 440;

1.2 interest on the above amount at the prescribed rate from 13 June 2018 to date of payment; and

1.3 the applicant's costs, including the costs reserved on 17 July 2018.'

JUDGMENT

Makgoka JA (Navsa, Cachalia, Dambuza and Schippers JJA concurring)

[1] Section 34A of the Estate Agency Affairs Act 112 of 1976 (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 regulatory statutory body, the Estate Agency Affairs Board (the Board), the fourth respondent.

[2] In this case, the appellant, Signature Real Estate (Pty) Ltd (Signature) was not in possession of a fidelity fund certificate in its name at the time the disputed commission between it and the third respondent, Atlantic Seaboard Realty (Pty) Ltd (Atlantic), was earned. Signature claimed, however, that it was entitled to be issued with the certificate, as it had complied with the requirements of the Act, and that the reason the certificate in its possession contained a misdescription was due to an error on the part of the Board. The Board concedes this.

[3] The court a quo, the Western Cape Division of the High Court, Cape Town, held that Signature was not entitled to claim commission in the circumstances. It accordingly dismissed Signature's application against Atlantic for payment of commission, but subsequently granted leave to Signature to appeal to this court. Atlantic and the rest of the respondents do not take part in the appeal. The court a quo's decision is in conflict with that of the Gauteng Division of the High Court, Johannesburg, in *Crous International (Pty) Ltd v Printing Industries Federation of South Africa* [2016] ZAGPJHC 391; [2017] 1 All SA 146 (GJ), where Coppin J held a contrary view. *Crous* was only brought to the attention of the court a quo during the application for leave to appeal. Given the conflict between the two decisions, and the importance of the issue for estate agents' profession, Signature was granted leave to appeal to this Court, pursuant to s 17(1)*(a)*(ii) of the Superior Courts Act 10 of 2013.[1]

[4] The facts are briefly these. During April 2018, Signature and Atlantic jointly brokered a lease agreement in terms of which they were each to receive 50 per cent 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 court a quo seeking, among others, payment of the commission.

[5] Atlantic opposed the application, and also launched a counter-application seeking certain relief against Signature, which is not germane to this appeal. In its answering affidavit, which also served as its founding affidavit in its counter-application, Atlantic challenged Signature's locus standi, alleging that at the time the lease agreement was brokered, Signature was not in possession of a fidelity fund certificate.

[6] In its replying affidavit, which also served as its answering affidavit in Atlantic's counter-application, Signature denied Atlantic's allegations and explained that on

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[1] Section 17(1)*(a)*(ii) provides:
'Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
(a) (i) . . .
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration'.

9 January 2017 Hidicol CC, which had traded as Signature Real Estate CC, had been converted into a company (the appellant). On 10 May 2017 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.

[7] 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. In support of the above, Signature attached an affidavit deposed to by the Registration Manager of the Board, in which the above was confirmed. Importantly, the manager 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.

[8] In its replying affidavit in its counter-application, Atlantic averred 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. Thus, said Atlantic, the certificates were invalid, having been issued to a non-existent company, its directors and agents. Atlantic accordingly contended that Signature was precluded by s 34A of the Act from payment of commission.

[9] The matter came before D M Davis AJ, who delivered judgment on 12 December 2018. She dismissed Signature's application. First, she accepted Atlantic's argument that because the fidelity fund certificates were issued in the name

of Hidicol CC, the application for their issue must have been erroneously made in that name, and that the certificates were, to that extent, invalid. For this conclusion, the learned judge sought reliance on the decision of this Court in *Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd and Others* [2016] ZASCA 175; 2017 (4) SA 610 (SCA). Consequently, she held, absent a valid certificate, an estate agent was precluded, in terms of s 34A, from claiming commission.

[10] 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 s 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.[2]

[11] Atlantic's version that the application for the 2018 fidelity fund certificates had probably been made in the name of Hidicol CC and not of Signature, was considered by the court a quo to constitute a genuine dispute of fact. According to the learned judge, it had to be resolved in favour of Atlantic, purportedly on the application of the

[2] Section 34A was introduced in response to *Noragent (Edms) Bpk v De Wet* [1985] 3 All SA 153 (T); 1985 (1) SA 267 (T), where the Transvaal full court held, with reference to *Swart v Smuts* [1971] 2 All SA 153 (A); 1971 (1) SA 819 (A), that an agreement between an estate agent and an owner of land was not invalid merely by reason of the fact that the estate agent had failed to comply with the provisions of s 26 of the Act and that the estate agent was entitled to enforce a contractual claim for commission. Thus, viewed in this context, s 34A simply made explicit, what is implicit in s 26.

Plascon-Evans[3] principle. She therefore concluded that the certificates were invalid, and within the scope of *Brodsky*. With respect, that principle was misapplied. There was no dispute of fact. Atlantic's version as to how the certificate was issued was not based on any facts or first-hand knowledge, but was purely speculative.

[12] Signature, on the other hand, stated that it had complied with all the formalities and was entitled in terms of the provisions of the Act to be issued with the proper certificate in its own name and that the misdescription was due to an error on the part of the Board. And once this was acknowledged by the Board, Atlantic's averment lost impetus. The court a quo failed to consider all these. On the evidential material before it the court below came to the wrong conclusion on the facts.

[13] In the light of the above, the court a quo's reliance on *Brodsky* must be examined. There, a company which operated as an estate agent had been converted into a close corporation. There was no notification to the Board of the conversion, and consequently no request for new certificates to be issued in the name of the new entity. As a result, the Board continued to issue fidelity fund certificates in the name of the (non-existent) company and to the former director of the converted company in his capacity as such. No certificates were issued to the close corporation and its member. It was held that the close corporation was precluded by s 34A of the Act from claiming commission. It was explained (at para 22):

'This is not simply an issue of nomenclature, or a misdescription in the name of the certificate holder, but one of substance. The objectives of the Act are not fulfilled by the issue of invalid certificates by the Board as they play a central role in ensuring that estate agents comply with its provisions. There was accordingly no basis for the court a quo to conclude that the appellant had substantially complied with its requirements'.

[3] In accordance with the well-known principle enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634E-635C, which is this: in motion proceedings where disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order. This is so, unless the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[14] The court a quo seemingly considered the facts of the present case analogous to those in *Brodsky*. They are not. The two cases are clearly distinguishable in the following respects. First, in *Brodsky*, the Board was not informed of the conversion, whereas in this case, the Board was timeously informed. Second, in *Brodsky*, the converted close corporation never applied to the Board for fidelity fund certificates to be issued for it and its member. In this case, the converted company did make such application timeously, and complied with all the requirements for such certificates to be issued. Third, in *Brodsky* it was the fault of the converted close corporation that the certificates were issued in the name of a non-existent company, whereas in this case, the fault lies squarely and solely with the Board. So viewed, the issue in this case, unlike in *Brodsky*, was simply one of nomenclature, or a misdescription in the name of the certificate holder, rather than of substance. *Brodsky* is therefore of no assistance to Atlantic. It follows that the court a quo's reliance on *Brodsky* was misconceived.

[15] I referred earlier to *Crous*, where an estate agent company had not been issued with fidelity fund certificates for 2008 and 2009. However, its directors had been issued with certificates for those years. The company had complied with the legal requirements and the failure to issue the certificate was due to a technical glitch at the Board, resulting in the certificate of the company not being printed, a fact confirmed by a representative of the Board. At para 98, Coppin J concluded that the purpose of ss 26 and 34A had been achieved, holding that 'in substance (though not form) the plaintiff was authorised by the Board to perform acts as estate agent for payment' and that the company was entitled to payment of commission.

[16] In the present case, the court a quo deemed it irrelevant that Signature and its estate agents might well have been entitled to be issued with fidelity fund certificates as at 1 January 2018. The court a quo said:

'The wording of s 34A is clear. The section does not require mere entitlement to be issued with a valid [fidelity fund certificate] in order to be able to claim commission; it requires a valid [fidelity fund certificate] actually issued at the time when the commission is earned. To adopt the interpretation of s 34A contended for by Mr Kantor would do violence to the clear wording of the section: it would cross the divide from statutory interpretation to impermissible judicial legislation (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18).'

And in the judgment granting leave to appeal:

'I am of the respectful opinion that the court's reasoning in *Crous* fails to take into account that the purpose of ss 26 and 34A is not only to ensure that estate agents have met the requirements of the Act to practise as such, but also that estate agents can demonstrate proof to any interested party of compliance with the requirements of the Act. In other words, part of the function of a [fidelity fund certificate] is to serve as public proof of an estate agent's status. This element of publication was ignored in *Crous*'.

[17] The provisions of 34A are clearly peremptory. But even peremptory provisions must yield to two interpretive imperatives. First, the injunction of s 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 s 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.

[18] 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 s 12(1) of the Act. Its purpose is to reimburse persons who, in certain circumstances, have suffered financial loss due to missappropriation 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.

[19] 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 s 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.

[20] In *Rogut v Rogut* 1982 (3) SA 928 (A) at 939C the object of the Act was summed up as follows:

'The general object of the Act was to protect the public against some persons by requiring all estate agents, as defined, to take out a fidelity fund guarantee (which is not granted automatically); and to pay the levies and contributions; and by requiring all estate agents to keep necessary accounting records and to cause them to be audited by an auditor, and by obliging every estate agent to open and keep a separate trust account with a bank and forthwith to deposit therein the moneys held or received by him on account of any person'.

[21] 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.

[22] The court a quo suggested that where the Board delays in issuing a fidelity fund certificate to a compliant estate agent, such an estate agent should apply to court in terms of s 6(3) of the Promotion of Administrative Justice Act 3 of 2000 for a mandamus compelling the Board to issue the certificate. That attitude was clearly incorrect. On the other hand, estate agents should not adopt a supine attitude in the face of the Board's errors. They should do what is reasonably within their power to have the situation rectified. In the meantime their compliance with the requirements should be a primary factor in the determination of disputes that arise before the error is rectified.

[23] 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 my 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.

[24] I agree that care should be taken to observe the peremptory provisions of s 34A of the Act. The facts in the present case and in *Crous* 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 findings in both cases should not be construed as an invitation to laxity or to a liberal approach to the application of s 34A.

[25] It follows that the court a quo should have found in Signature's favour. The appeal must thus succeed. Atlantic is liable for the costs in the court a quo. There is no costs order in this court as none of the respondents participated in the appeal.

[26] The following order is made:

The appeal is upheld. The order of the court a quo is set aside and replaced with the following:

'1. The third respondent (Atlantic Seaboard Realty (Pty) Ltd) is ordered to pay the applicant:

1.1 the amount of R13 440;

1.2 interest on the above amount at the prescribed rate from 13 June 2018 to date of payment; and

1.3 the applicant's costs, including the costs reserved on 17 July 2018.'

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T M Makgoka

Judge of Appeal

APPEARANCES:

For appellant:	A Kantor SC
Instructed by:	Frank Biccari, Cape Town
	Van der Merwe & Sorour, Bloemfontein