

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: 7909/21P

In the matter between:

SCZ INVESTMENTS (PTY) LTD

EXCIPIENT/DEFENDANT

and

SWINDON PROPERTY SERVICES (PTY) LTD

RESPONDENT/PLAINTIFF

Coram: Koen J

Heard: 16 August 2022

Delivered: 27 October 2022

ORDER

The following order is granted:

- (a) The exception is upheld with costs;
- (b) The plaintiff is afforded the opportunity to amend its particulars of claim within 20 days from the date of the grant of this order, failing which the plaintiff's claim shall be dismissed with costs.

JUDGMENT

Koen J

[1] This judgment deals with an exception taken to the plaintiff's claim for estate agents commission, on the basis that the particulars of claim do not disclose a valid cause of action.

[2] The plaintiff's claim arises in respect of an agreement of letting of immovable property (the agreement) concluded on 4 or 7 June 2021 between the defendant and a tenant. Mr Thor-Christian Schwanzer (Mr Schwanzer), an estate agent, represented the plaintiff in negotiating the conclusion of the agreement. The agreement contained a *stipulatio alteri* providing for the payment of commission by the defendant in favour of the plaintiff. The benefit of the *stipulatio* was accepted by Mr Schwanzer on behalf of the plaintiff on 7 June 2021.

[3] The exception is to the effect that in negotiating the conclusion of the agreement during June 2021 Mr Schwanzer was an estate agent and rendering services as an estate agent as provided in the Estate Agency Affairs Act 112 of 1976 ('the Act'), but that he was, in terms of s 34A of the Act not entitled to remuneration as he did not hold a valid fidelity fund certificate.

[4] The definition of estate agent in the Act, is as follows:

"estate agent" –

(a) 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 or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or

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

(iv) renders any such other service as the Minister on the recommendation of the board may specify from time to time by notice in the *Gazette*;

(b) for purposes of section 3(2)(a), includes any director of a company or a member who is competent and entitled to take part in the running of the business and the management, or a manager who is an officer, of a close corporation which is an estate agent as defined in paragraph (a);

(c) for purposes of sections 7, 8, 9, 12, 15, 16, 18, 19, 21, 26, 27, 30, 33 and 34B, includes –

(i) any director of a company, or a member referred to in paragraph (b), of a close corporation which is an estate agent as defined in paragraph (a); and

(ii) any person who is employed by an estate agent as defined in paragraph (a) and performs on his behalf any act referred to in subparagraph (i) or (ii) of the said paragraph; . . .’

[5] The contention in the exception initially was that the provisions of paragraphs (a) and (b) of the definition of estate agent applied to Mr Schwanzer. At the commencement of argument, the defendant’s counsel however said that he would also be relying on the provisions of paragraph (c) of the definition of ‘estate agent.’ The plaintiff agreed that the defendant could rely on the provisions of sub-paragraph (c). Paragraph 19A of the particulars of claim, set out below, was also amended by consent, to allege positively that at the material time when negotiating the conclusion of the agreement Mr Schwanzer acted as an ‘employee’ of the plaintiff.

[6] An amendment was also effected to the exception by consent, by the concluding paragraph thereto, being paragraph 10, being amplified by the words indicated in bold below, to read:

‘In the premises, no valid cause of action is disclosed by the Plaintiff, **as envisaged in terms of section 26 read with section 34A(1) or (2) of the Act.**’

[7] Section 26 of the Act provides:

‘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.'

[8] Section 34A of the Act provides:

'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 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.'

[9] The allegations in the particulars of claim specifically implicated by the exception, as amended during argument, read as follows:

'19A The Plaintiff, every director of the Plaintiff as well as Thor-Christian Schwanzer, an employee of the plaintiff, were all in possession of valid fidelity

fund certificates at the time of the conclusion of the Agreement. Copies of the fidelity fund certificates are annexed hereto, marked "POC 6" to "POC 12".¹

[10] Annexure "POC 11" is a fidelity fund certificate issued to Mr Schwanzer as 'Non-Principal at firm, professional practitioner in real estate' in respect of a close corporation, Hancock and Pavlou CC, by the Estate Agency Affairs Board, valid from 11 January 2021 to 31 December 2021. Annexure "POC 12" is similarly a fidelity fund certificate issued by the Estate Agency Affairs Board to Mr Schwanzer as 'Non-Principal at firm, professional practitioner in real estate,' but in respect of the plaintiff, except that it is valid only from 6 September 2021 to 31 December 2021. It does not cover the period when the agreement was negotiated and concluded. The fidelity fund certificate, annexure "POC12", was not a valid fidelity fund certificate at the time that either the lease agreement was concluded or the benefits of the *stipulatio alteri* were accepted by Mr Schwanzer.

[11] It was submitted by the plaintiff that the fidelity fund certificate, annexure "POC11" issued in respect of the Close Corporation 'Hancock and Pavlou CC', which did cover the period when the agreement was concluded, was a valid fidelity fund certificate which had been issued to Mr Schwanzer, having regard to the objects and purpose of the Act, and that it complied with the provisions of s 34A(2) of the Act, accordingly that Mr Schwanzer and the plaintiff were entitled to claim the commission. This is disputed by the defendant as a matter of law.

[12] It is the answer to that issue that forms the crux of this judgment. If annexure "POC 11" is not a valid fidelity fund certificate as required by law, then Mr Schwanzer and the plaintiff will not be entitled to the commission claimed.

¹ Annexures "POC6", "POC7", "POC8", "POC9" and "POC10" are not relevant to the exception. Annexures "POC6" and "POC7" are copies of fidelity fund certificates issued to the respondent on 1 January 2021, annexure "POC8" is a fidelity fund certificate issued to Dewey Andrew De Villiers of the respondent on 1 January 2021, annexure "POC9" is a fidelity fund certificate issued to Te Vaarwerk Marcus Engelbertus of the respondent on 1 January 2021, and annexure "POC10" is a fidelity fund certificate issued to Van Schoor Michael-John of the respondent on 1 January 2021

[13] The Act does not require an express provision that a fidelity fund certificate required to be held by an employee estate agent needs to refer to the identity of his/her employer in order to be valid. The defendant however argues that having regard to the objects of the Act, its provisions, and the requirements in regulations issued pursuant to the Act, that this is clearly required.

[14] Applications for and the issue of fidelity fund certificates are regulated in terms of s 16 of the Act and the regulations published pursuant to the provisions of s 33 of the Act.

[15] Section 16 of the Act requires that:

‘(1) Every estate agent or prospective estate agent, . . . shall, within the prescribed period and in the prescribed manner, apply to the board for a fidelity fund certificate, and such application shall be accompanied by the levies referred to in section 9(1)(a) and the contribution referred to in section 15.

(2) . . .

(3) Subject to sections 28 (1), 28 (5) and 30 (6), if the board upon receipt of any application referred to in subsection (1) or (2) and the levies and contribution referred to in those subsections, is satisfied that the applicant concerned is not disqualified in terms of section 27 from being issued with a fidelity fund certificate, the board shall in the prescribed form issue to the applicant concerned a fidelity fund certificate or a registration certificate, as the case may be, which shall be valid until 31 December of the year to which such application relates.’

[16] The current regulations² do not prescribe a set form which the fidelity fund certificate has to follow, or what it has to contain. Some assistance can however be obtained from regulations which preceded the current regulations, which although repealed by subsequent regulations, in part contained similar, if not identical provisions

² Promulgated in GN R2a, GG 39743 of 26 February 2016.

to those which applied when a standard form was specifically prescribed for fidelity fund certificates.

[17] Annexure 'A' to the regulations in Government Notice R1798 of 1986, published in *Government Gazette* 10403 of 29 August 1986, prescribed the form which a fidelity fund certificate had to follow. Apart from the full names of the agent having to be reflected, the form provided for the 'Name of firm/company/close corporation' and an address to be specified. Regulations 10 and 12 thereof provided as follows:

'10 The holder of a fidelity fund certificate or a registration certificate shall inform the board within 14 days of any change in the information supplied to the board at the time of applying for the issue to him of such certificate and, if the information appearing on the certificate is no longer applicable or has changed, such certificate shall forthwith be forwarded to the board for appropriate amendment thereof or for the issue of a new certificate in substitution therefor.'

and

'12(1) If a fidelity fund certificate was issued to an independent contractor or any person referred to in paragraph (c)(ii) of the definition of "estate agent" in section 1 of this Act, and such person ceases to be employed by or associated with the employer mentioned in such certificate that employer shall, within 14 days of such person ceasing to be in his employ, or to be thus associated, return such certificate to the board together with a letter informing the board of such fact and, if such information is available, stating with whom that person is taking up employment or becoming associated.

(2) The provisions of subregulation (1) shall *mutatis mutandis* apply to a registration certificate issued to any person referred to in paragraph (cA) of the definition of "estate agent" in section 1 of this Act.

(3) If the employer concerned is unable for any reason to return the certificate as required by subregulation (1) or (2), as the case may be, the employer shall within 14

days of the termination of employment or ceasing to be associated, inform the board of that fact, stating the reasons why it is unable to return such certificate as well as furnishing all available information concerning the whereabouts of such employee or independent contractor.'

[18] The regulations published in Government Notice R1798 were withdrawn by Government Notice 373 of 2006 published in *Government Gazette* 28588 of 2 March 2006. These regulations did not prescribe a form, and did not specifically require in express terms that a fidelity fund certificate had to be issued to an estate agent employed by a company with specific reference to that company only. It however contained regulations 10 and 12 in terms essentially similar to that in Government Notice R1798.

[19] The current relevant regulations governing the issuing of fidelity fund and registration certificates promulgated in Government Notice R2a published in *Government Gazette* 39743 of 26 February 2016, do not expressly require that the fidelity fund certificate must be issued to an estate agent specifically in regard to a particular firm. Nor is a set form prescribed in the regulations as to what a fidelity fund certificate should contain. The regulations however contain provisions in regulations 9 and 11(2) that are similar to regulations 10 and 12(3) of the prior regulations. Regulations 9 and 11(2) read:

'9. The holder of a fidelity fund certificate or a registration certificate, as the case may be, shall inform the Board within fourteen (14) days of any change in the information supplied to the Board at the time of applying for the issue to him/her of such certificate and, if the information appearing on the certificate is no longer applicable or has changed, such certificate shall forthwith be forwarded to the Board for the appropriate amendment thereof or for the issue of a new certificate in substitution therefor.'

and

‘11(2) If the employer concerned is unable, for any reason, to return the certificate as required by sub-regulation (1) or (2), as the case may be, the employer shall within fourteen (14) days of the termination of employment or ceasing to be associated, inform the Board of that fact, stating the reasons why it is unable to return such certificate as well as furnishing all available information concerning the whereabouts of such employee or independent contractor.’

[20] The former regulation 12(1) is omitted from the present regulations, however the fact that the present regulation 11(2) still refers to such certificates issued to an employee and imposing duties on the employer must be interpreted with the aid of sections 11 and/or 12 of the Interpretation Act 33 of 1957, and the operational obligations under regulation 12(1) of the previous regulations must be regarded as those still in force.

Sections 11 and 12 of the Interpretation Act provide:

‘11. Repeal and substitution. — When a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.

12. Effect of repeal of a law. — (1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.

(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not —

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.'

[21] These provisions all have significance only in the context of the fidelity fund certificate held by an employee estate agent being specific to his/her employer. Any possible casus omissus by the legislation no longer prescribing the actual form which a fidelity fund certificate should follow, should be avoided. It is possible to do so by a purposive interpretation of the terms of the previous and current regulations. The inference that the legislation had left a gap intentionally in not prescribing a form for fidelity fund certificates to follow as indicating a change in intention, is not justified or sufficiently justified.³ Indeed the contrary is the case.

[22] Section 32A(1)(b)(i) of the Act furthermore provides:

'Any inspector furnished with inspection authority in writing by the board may conduct an investigation to determine whether the provisions of this Act are being or have been complied with and may, subject to subsection (5), for that purpose, without giving prior notice, at all reasonable times –

³ See LM du Plessis 'Statute Law and Interpretation' in WA Joubert (founding ed) 25(1) *LAWSA* 2ed paras 342 and 358, and M van Staden 'A Comparative Analysis of Common Law Presumptions of Statutory Interpretation' (2015) 26 *Stellenbosch L Rev* 550 at 562.

(a) . . .

(b) order any estate agent or the manager, employee or agent of any estate agent –

(i) to produce to him the fidelity fund certificate of that estate agent . . .'

If an inspector is to be in a position to order an employer to produce the fidelity fund certificate of an employee, it follows that the inspector must be in a position to know who the employer of the employee is in any given estate agency relationship.

[23] Regulation 11 of the Code of Conduct 1992, contained in Government Notice R3415 published in Government Gazette 14489 of 24 December 1992, provides:

'Every estate agent who is the sole proprietor of an estate agency business or a partner in a partnership or a director of a company or a member of a close corporation contemplated in paragraph (b) of the definition of "estate agent" in section 1 of the Act carrying on the business of an estate agent, shall be held responsible for any contravention of or failure to comply with this code of conduct by any other partner, director, or member or by any estate agent in the service of such sole proprietorship, partnership, company or close corporation, unless he has prior to such contravention or failure to comply taken all reasonable steps to prevent the same and could not in the circumstances have prevented such contravention or failure to comply.'

[24] If the name of the employer of the employee estate agent is reflected on the fidelity fund certificate, then there can be no doubt as to the identity of the employer implicated by any contravention or failure on the part of an employee estate agent to comply with the provisions of the Act, the regulations, or the Code of Conduct, as the employment relationship will appear ex facie the fidelity fund certificate.

[25] The standing of an employer of an estate agent employee furthermore appears intrinsically linked to the protection of the public and the validity of an employee's fidelity fund certificate. Should it happen that an employer no longer has a valid fidelity fund

certificate, it cannot be suggested that the fidelity insurance remains in place to cover the employees of the employer.

[26] It is accordingly not surprising that as a matter of practice the fidelity fund certificate form which the Board continues to issue pursuant to applications in terms of s 16 of the Act provides for the identity of the employer and its address to be stated. If the employer's details change, then the certificate must be surrendered and amended. And it is significant that s 16 of the Act requires that an application for a fidelity fund certificate has to be made 'in the prescribed manner.'

[27] The above considerations all point to a valid fidelity fund certificate being required to be issued in respect of an employee estate agent specifically with reference to the employer which employs him or her.

[28] The prohibition against receipt of remuneration in s 34A(2) extends to both the employee and his/her employer where the employee does not have the required fidelity fund certificate. This makes it clear that the fidelity fund certificate must attach to the employee estate agent in the context of his employment with a particular employer whose name is required to be stipulated on the certificate.

[29] The objects of the Act, with reference to its preamble, are:

'To provide for the establishment of an Estate Agency Affairs Board and an Estate Agents Fidelity Fund: for the control of certain activities of estate agents in the public interest; and for incidental matters.'

[30] The above interpretation and the conclusion I have reached is purposive and also consistent with the context within which provision is made for the prohibition against the receipt of remuneration and the requirement for a valid fidelity fund certificate to be held by an employee agent. It is also consistent with the objects and purpose of the Act.

[31] The requirement of a fidelity fund certificate is also a measure of protection for the public. The requirements for the issue of a valid fidelity fund certificate are stringent and apply, in the context of the prohibition in s 34A(2) of the Act, also in respect of employees, being a 'person referred to in paragraph (c)(ii) of the definition of "estate agent."' The prohibition is not confined to the employee, but also to an 'estate agent who employs such a person', both of whom are precluded from being:

'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 had been issued to such person.'

[32] The failure on the part of Mr Schwanzer to have alleged and annexed a fidelity fund certificate issued to him covering the relevant period when he rendered services as an estate agent to the defendant, disclosing the name of the plaintiff as his employer, is accordingly fatal to the plaintiff's claim as presently pleaded. The exception must therefore succeed. In accordance with accepted practice, a time period will be specified to allow the plaintiff to amend its particulars of claim to cure the cause of the exception, if possible.

[33] Regarding the costs of the exception, the basis on which the exception succeeds only became firmly crystalized following the amendments to the particulars of claim and the exception. The underlying argument throughout however always was that the plaintiff's claim was not competent because Mr Schwanzer did not hold a valid fidelity fund certificate in respect of his employment with the respondent. As is evident from the allegations in the particulars of claim, even prior to amendment, the plaintiff has always accepted that Mr Schwanzer would require a valid fidelity fund certificate. If it contended that no such certificate was required, and the amendment to the exception made it evident, from that point in time, that a fidelity fund certificate was required, the plaintiff could then have conceded the exception. In that event an order that each party pay its own costs, or some other order, might have been appropriate.

[34] That was however not the stance adopted by the plaintiff. It persisted with its opposition to the exception on the basis that annexure "POC11" satisfied such requirement. I have concluded that it does not. In those circumstances the defendant has been successful and there is no reason why it should not be awarded its costs of the exception.

[35] The following order is granted:

- (a) The exception is upheld with costs;
- (b) The plaintiff is afforded the opportunity to amend its particulars of claim within 20 days from the date of the grant of this order, failing which the plaintiff's claim shall be dismissed with costs.

KOEN J

APPEARANCES

For the excipient:	Mr H.P van Nieuwenhuizen
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For the respondent:	Ms B Brown
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