



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A158/2014

In the matter between:

**USTICA 1153 CC t/a
CAPE REGION HOME SALES**

Appellant

And

AMANDA JORDAAN

First Respondent

STEPHANUS JORDAAN

Second Respondent

Coram: Ndita et Boqwana JJ

JUDGMENT DELIVERED ON 9 JUNE 2015

BOQWANA, J

Introduction

[1] This is an appeal from the Goodwood Magistrates Court. The appellant and respondents were plaintiff and first and second defendants respectively in the court *a quo*. The plaintiff brought an action claiming commission in the amount of R78 375.00 which it alleged was due and owing to it pursuant to the fulfilment of a mandate to find a purchaser for a property that the defendants wished to sell. The magistrate dismissed the plaintiff's claim with costs on the basis that it did not

succeed in proving that it was entitled to a commission. The reasons given by the magistrate for his finding can be summed up as follows:

- 2.1 A party is only entitled to a commission if it is a holder of a fidelity fund certificate. In this instance a mandate was concluded with Cape Region Home Sales [and not with the plaintiff].
- 2.2 Parties to a contract must be clearly identified [in the agreement] in order to ensure legal protection. The defendants dealt with Cape Region Home Sales and nowhere [in the documents] is any mention of USTICA 1153 CC. USTICA 1153 CC is a legal entity and thus it is important as required by law that its name be clearly reflected on all documentation. For that reason, the magistrate was persuaded by the defendants' submission that they never dealt with the plaintiff.
- 2.3 Jeffrey Erle Gordon ('Gordon') should have been cited as the second plaintiff in the matter as he was personally involved with the transaction.

Common cause facts

[2] It is common cause that during March 2012, the defendants gave a mandate to Cape Region Home Sales to find a purchaser for them, in respect of their home situated at Erf 7738, also known as 70 Smart Rd, Goodwood ('the property'). Following the acceptance of this mandate, the defendants were introduced by Cape Region Home Sales to one Mohammed Igshaan Ismail ('Ismail'). On 13 April 2012 an offer to purchase agreement ('the agreement') was concluded between the defendants and Ismail.

[3] The agreement contained a clause pertaining to a commission that would be payable to Cape Region Homes Sales as a sole and effective cause of the sale. The relevant clause 15 read as follows:

'15. AGENT AND COMMISSION

15.1.1(*sic*) The Seller and the Purchaser acknowledge that CAPE REGION HOME SALES was the sole and effective cause of this sale. The Purchaser warrants that he/she was not introduced to the Property for the purpose of this sale by any other agency or agent.

15.2 The Seller must pay the agent's commission of 5% (five percent) of the Purchase Price plus VAT, the total being R78, 375 to CAPE REGION HOME SALES.'

.....

15.4 If this agreement is cancelled because the Purchaser failed to comply with his/her obligations or through any fault on the part of the Purchaser, the Purchaser will be liable to pay the agent's commission. In such event, any commission paid by the Seller to the agent shall be recoverable from the Purchaser on demand. If this agreement is cancelled as a result of a failure on the part of the Seller, the Seller must pay the Agent's commission in terms of this agreement.

[4] Gordon signed for the benefits of this agreement on behalf of Cape Region Home Sales on 12 April 2012.

[5] The defendants cancelled the agreement. Ismail would not accept the cancellation and instituted High Court action. After a while he decided not to proceed with such action and accepted the defendant's repudiation. Nothing turns on this issue.

[6] The defendants refused to make payment of the commission upon demand. This led to the institution of the proceedings at the Magistrates Court.

[7] It is further common cause that USTICA 1153 CC and Gordon have valid fidelity fund certificates. The certificate issued on 01 January 2012 to USTICA 1153 CC reflects USTICA 1153 CC as a close corporation and full names of Dorvon Properties. The certificate issued to Gordon on the other hand reflects the Close Corporation as USTICA 1153 trading as Dorvon Properties. Gordon is referred to as principal (member at firm).

Issues in dispute

[8] The plaintiff (i.e. USTICA 1153 CC t/a Cape Region Home Sales) alleges that it was the effective cause of the sale and as a result had performed its obligations in terms of the mandate given, and this entitled it to a commission in the amount of R78, 375 as stipulated in the agreement.

[9] The plaintiff alleges further that it is an estate agent which at all relevant times acted through its member, Gordon. Both it and Gordon held fidelity fund certificates and had fidelity insurance at all relevant times in terms of section 26 of the Estate Agency Affairs Act.¹

[10] The defendants, however, deny that the cited plaintiff had *locus standi*. They deny having mandated or concluded any contract with the plaintiff. Whilst admitting that Gordon had a fidelity fund certificate, they deny that he acted for the plaintiff but rather on behalf of Cape Region Home Sales. According to them, the plaintiff was not entitled to any benefit in terms of an agreement to which it was neither a party nor a beneficiary.

[11] Furthermore, on all documentation including the agreement as well as Cape Region Home Sales' website no mention is made of USTICA 1153 CC. The plaintiff is thus unknown to them.

[12] The defendants further challenged the plaintiff to prove that it had complied with the provisions of section 22 of the Close Corporations Act² and section 26 of the Estate Agency Affairs Act.

[13] They further called upon the plaintiff to prove that each and every member of the plaintiff who was authorised and took part in management was in possession of the fidelity fund certificate. On this issue the defendants allege that the sale agreement was facilitated, concluded and signed by one Samantha Day ('Day') who was an administrative employee seemingly in the employ of Cape Region Home Sales and who was not in possession of the necessary fidelity fund

¹ Act No. 112 of 1976

² Act No. 69 of 1984

certificate, whilst performing an act which falls within the definition of an estate agent as envisaged in the Estate Agency Affairs Act.

[14] They allege further that they were not told about certain latent defects in the property and were as a result forced to conclude an agreement with the buyer to their own disadvantage (this is however not an issue relevant for the determination).

Discussion

[15] The defendants are of the view that the plaintiff has not been able to show that it has the necessary *locus standi* as it was not the party they gave the mandate to. The agreement was, according to the defendants, concluded with Cape Region Home Sales. What seems to be the defendants' concern as submitted by their counsel, Mr Basson is that there is no documentary evidence proving that Cape Region Home Sales was indeed USTICA 1153 CC.

[16] Mr Basson submitted that Cape Region Home Sales in fact held itself out to be a firm, or a one man show or a partnership and not a close corporation ('CC') as required by law. Accordingly, the plaintiff should have asked the Court to rectify the fidelity fund certificate by substituting Dorvon Properties with Cape Region Home Sales and in fact their actions amounted to a criminal offence as contemplated by the provisions of the Estate Agency Affairs Act and the Close Corporations Act. In that regard, the defendants did not need to show that they were prejudiced.

[17] Mr Basson argued further that members of the public would be exposed if anything were to happen that required payment of the fidelity fund. In that regard the Estate Agency Affairs Board could reject any claim on the basis that they do not know who Cape Region Home Sales is.

[18] He therefore contended that because the plaintiff had not been able to show the link between Cape Region Home Sales and USTICA 1153 CC (which is a holder of a fidelity fund certificate), Cape Region Home Sales must be held to be

in breach of section 26 of the Estate Agency Affairs Act and therefore not entitled to commission as stipulated in section 34A of the same Act. The relevant provisions of that 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 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 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.’ (Own emphasis)

[19] In **Ronstan Investments (Pty) Ltd and Another v Littlewood**³, the Court confirmed that a person who contravenes section 26 of the Estate Agency Affairs Act is not entitled to remuneration for the performance of the act and also commits a criminal offence in terms of section 34 of that Act. The Supreme Court of Appeal

³ 2001 (3) SA 555 (SCA) at para 27

considered the purpose of the introduction of section 34A in the decision of **Taljaard v TL Botha Properties**⁴. It held as follows at paragraph 209 C-E:

‘Section 34A does not in terms invalidate the contract of mandate of an estate agent who acts in conflict with s 26. Bearing in mind that the section was introduced in response to the judgment in *Noragent* – which had held that a contravention of s 26 of the Act did not invalidate the contract of mandate – it is inconceivable that the section would not have provided expressly for invalidity if that had been the intention with which the section was introduced. I think it is clear – as the court below found – that the validity of a contract of mandate is unaffected by an act of the estate agent in breach of s 26. In those circumstances the payment that was made in this case was made pursuant to a valid contract and is not recoverable by the *condictio*.

.....

..It was not enacted for the benefit of clients who have incurred a contractual obligation to pay remuneration to an estate agent who has performed his or her mandate – I have already held that the contract giving rise to the obligation remains valid notwithstanding the breach of s 26 – but rather to penalize estate agents who have breached the section. An estate agent who claims remuneration in conflict with s 34A might expose himself or herself to criminal sanction, and will be prevented from enforcing his or her claim, but I do not think it follows by necessary implication that a client who has settled his or her contractual obligation is accorded a right of action for its return. (Own emphasis)

[20] As Eksteen J put it in the decision of **Warren Jack Property Brokers CC t/a Warren Jack Property Group and Another v Venter**⁵, ‘...the mischief which section 34A seeks to address is not to protect members of the public against unregistered estate agents, on the contrary such members of the public enjoy no protection as their contract giving rise to their obligation to pay commission is valid and where a member of a public, unaware of the estate agent’s default, has paid that commission he is bound by that contract. He cannot claim his money (see *Taljaard supra*). The purpose of the section is to “penalise the estate agents” who have breached section 26.’

[21] The legal requirements imposed by section 26 that any person performing the acts of an estate agent must have a valid fidelity fund certificate and the

⁴ 2008 (6) 207 (SCA)

⁵ (CA 156/2011) [2012] ZAECGHC 59 (27 July 2012) at para 20

consequences flowing from non-compliance with that section are not in dispute in the present matter, so is the validity of the agreement. The issue before this Court rests on whether Cape Region Home Sales and USTICA 1153 CC were one and the same.

[22] Gordon gave evidence during the trial that USTICA 1153 CC is a shelf company, he never used that name and people knew the trading name Cape Region Home Sales. According to him, Cape Region Home Sale was USTICA 1153 CC's trading name. It did not exist as a separate legal entity. When he had dealings with the defendants he introduced himself as 'Jeff Gordon' from Cape Region Home Sales. He admitted that the sale agreement was at all relevant times facilitated under the name and style of Cape Region Home Sales. He also confirmed that on all documents and the website there was no mention of the name USTICA 1153 CC. He however mentioned that in most cases in the real estate business, the estate agents introduced themselves with their trading names and their operations are conducted as such successfully so.

[23] Gordon testified further that he is a member of USTICA 1153 CC and in this matter he acted in his capacity as an agent. When he started as an estate agent in 2004 in Kimberly he used Dorvon Properties as a trading name. That changed when he came to Cape Town when he used the name Cape Region Home Sales. He has since applied to the Estate Agency Affairs Board to have the trading name changed. He has written letters and emails to have the trading name changed but the Estate Agency Affairs Board has not done so. The Estate Agency Affairs Board however is aware of Cape Region Home Sales because they have to send financial documents there under that name. Gordon was cross-examined extensively by Mr Basson. He maintained that he did not need a fidelity fund certificate for Cape Region Home Sales as he had one for USTICA 1153 CC.

[24] I find Gordon's testimony to be convincing. It is so that he made several admissions as indicated by Mr Basson. The admissions he made, however, did not affect the credibility of his evidence, in my view. In fact, he appeared to be a frank

witness. I did not get a sense that he deliberately withheld or hid the fact that Cape Region Home Sales was only a trading name with USTICA 1153 CC as the legal entity behind it. Gathering from Mr Basson's argument, the nub of the issue, it seems, is a lack of a document confirming the link between USTICA 1153 CC and Cape Region Home Sales.

[25] I am not persuaded that Gordon's testimony linking Cape Region Home Sales as the trading name of USTICA 1153 CC should be rejected only on the basis that it is not supported by any documentary evidence. Gordon testified under oath and there was no evidence led by the defendants to disprove his testimony.

[26] He explained why Dorvon Properties still appeared on the fidelity fund certificates as a trading company and I find his explanation to be plausible. Whilst documentary evidence would have helped to strengthen the plaintiff's case, lack thereof does not mean the plaintiff has been unable to prove its case.

[27] There are other facts which support Gordon's testimony, in my view, which are that: he was involved and signed the offer of purchase on behalf of Cape Region Home Sales during its dealings with the defendants and he was the member of USTICA 1153 CC as reflected in the fidelity fund certificate. Furthermore, both he and USTICA 1153 CC had the valid fidelity fund certificates. In my view, the link between Cape Region Home Sales and USTICA 1153 CC has been established.

[28] In support of the plaintiff's case Mr Nel, who appeared for the plaintiff, referred to the judgment of **Hillview Properties (Pty) Ltd v Strijdom and Another**⁶ where a company prematurely and bona fide used a name that it intended to adopt. In that case a resolution for a change of name from Roybent (Pty) Ltd to Finlandia had been adopted and a new name had been reserved. A lease agreement was concluded between the appellant, Hillview and Finlandia, which was not registered at that time. The Court held that the matter before it was not that of an error *in persona*. 'It was not a case of entering into a contract with A in the erroneous belief

⁶ 1978 (1) 302 (TPD)

that it is B. There was only one person involved, namely Roybent (Pty.) Ltd., and this person contracted under a name not yet his own. The applicant intended to deal with the persons who signed as lessees and the only error, which was an error common to the parties, was irrelevant because if the true name had been given the contract would also have been concluded.'

[29] The court went on to say at 304:

“Wherever the consideration of the person with whom I contract is an ingredient of the contract which I intend to make, an error respecting the person destroys my consent and consequently annuls the agreement. (Portion omitted.) On the contrary, when the consideration of the person with whom I suppose myself to contract, forms no ingredient in the contract, and I should equally have made the contract with any other person, the contract would be valid.”

A fortiori, so I believe, will the contract be valid if the error affects not even the identity of the person but only the name he used in circumstances which exclude fraud.' (Own emphasis)

[30] The Court referred to American jurisprudence and cited various American cases as authority relevant to the issues before it. It made reference to the case of **Brotherhood State Bank v Chapman (1927) 56 A.L.R. 447** where the Federal Supreme Court said:

“The general rule of law seems to be that a corporation may contract and do business in an assumed name, as well as can an individual, and be bound thereby in its corporate capacity.’

[31] The Court came to the conclusion that a contract in which a company prematurely and bona fide uses a name which it intends to adopt is, in the absence of fraud a valid contract.

[32] Mr Basson argued that the present matter is distinguishable because there is error *in persona* unlike in the **Hillview** matter. The issue is not the validity of the contract. The defendants accept that the contract is valid but it is valid between them and Cape Region Home Sales (a different party). According to Mr Basson, the defendants pleaded that a wrong party was suing them and they challenged the plaintiff to prove that it was a party that they contracted with. In this case the

validity of the agreement is not challenged unlike in **Hillview**. The issue in **Hillview** was whether contracting in the wrong name invalidated the agreement. Furthermore, he argued, the registration number of the company was in that case the same, and the entity could easily be identifiable and it could not be disputed that Roybent and Finlandia were the same entity.

[33] In my view, if it is accepted that the plaintiff and Cape Region Home Sales are one and the same there is no error *in persona*. Although the issues in **Hillview** were slightly different, that decision becomes relevant on the question of whether the plaintiff is entitled to enforce the rights flowing from a contract in which its registered name does not appear. In this regard, quoting from p. 142 of the **Brotherhood State Bank** case where reference is made to **Wm. Gilligan Co. v. Casey, (1910)**, the Court in **Hillview** goes on to state that:

“a corporation may assume or may be known by, different names, and contract accordingly, and a contract so entered into will be valid and binding if unaffected by fraud, the validity, so far as third parties are concerned, not depending 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.”

There are several well known in this country, notably two large insurance concerns, which widely use a nickname...’

[34] If one adopts the reasoning of the Court in **Hillview**, if fraud is not involved and the name was used bona fide, then the contract is valid and binding between the third party and the entity in its true name. In the present matter there was no evidence to suggest that the name Cape Region Home Sales was used in bad faith or with the intention to defraud. There is also no indication that it would have mattered to the defendants if they were told that the true name and thus the identity of the party they were contracting with was USTICA 1153 CC.⁷ Gordon testified that he was an agent acting for USTICA 1153 CC.

⁷ See *Sechold Financial Services (Pty) Ltd v Gazankulu Development Corporation Ltd* 1997 (3) SA 391 (SCA) at 403E/F and 404 A –B/C and 404E

[35] As regards to the issue of the defendants not being made aware that they were dealing with a close corporation, section 23 of the Close Corporations Act read with the section 32 of the Companies Act⁸ require that persons who have dealings with a close corporation be afforded details of the corporation's identity and that of its members.⁹ 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.¹⁰ Section 22(1) of the Close Corporation Act states that :

‘(1) The abbreviation CC, in capital letters, or its equivalent in any other official language, shall be subjoined to the name used by a corporation.’

[36] I am in agreement with Mr Basson that sections 22 and 23 of the Close Corporations Act and 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 personal liability imposed on members in terms of section 63 (a) of the Close Corporations Act, in some instances.¹¹ Contravention of the Close Corporation provisions, however, does not in my view, 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 as is the case, for instance, in section 34A of the Estate Agency Affairs Act. I also did not get an impression from Mr Basson that those provisions had that effect. Infringement of those provisions, if any, would therefore not affect the plaintiff's claim.

[37] It would be recalled that earlier on in this judgment I indicated that one of the issues raised by the defendants was 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

⁸ Act No. 71 of 2008

⁹ See Henochberg on the Close Corporations Act, [Issue 26], Com-52, Vol 3. In terms of section 23 of the Close Corporations Act 'Section 32 of the Companies Act⁹, read with the changes required by the context, applies to a corporation, but a reference in that section to a company must be regarded as a reference to a corporation for the purposes of this Act'

¹⁰ See Henochberg on the Close Corporations Act, [Issue 26], Com-52, Vol 3

¹¹ In this regard see Henochberg on the Close Corporations Act, [Issue 26], Com-50, Vol 3

necessary fidelity fund certificate. Both Gordon and Day testified that she was not an estate agent but an office administrator employed by the plaintiff. She testified that she knew the defendants personally and they preferred to talk to her. She sometimes filled in information in agreements to save time and assisted the agents. She is reflected on the email correspondence as office administrator.

[38] The Estate Agency Affairs Act contains a long definition of what an Estate Agent is. An Estate Agent is defined, *inter alia*, as:

- a) ‘...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 canvas 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*;...

[39] In the matter of **Rogut v Rogut**¹² the Court held that in determining whether the person is an estate agent, for the purposes of the Estate Agency Affairs Act, the key words in the definition of an estate agent in section 1 of the Act are “holds out” or “advertises”. The ‘holding out’ or ‘advertising’ must precede the instructions or mandate. Without such holding out or advertising there cannot be an estate agent as defined. The expression ‘holds himself out’ in section 1, according to the Court in **Rogut** means ‘represents’.¹³

[40] Day was apparently listed as an agent on the website of Cape Region Home Sales. Gordon explained this by saying that their website did not have a separate

¹² 1982(3) 928 AD at 937H to 938C

¹³ See *Rogut v Rogut supra* at 935E

page for office administrator. According to him, Day has never been an estate agent and has never claimed to be one. Her business card and email reflected that. He testified that even though under Day's name there is reference to agent, if one clicked under her name there will be no listings because she did not do listings. Her telephone numbers were listed because she was the office administrator. He conceded that they made a mistake by not creating a separate column for her.

[41] Having considered all the relevant evidence, I am satisfied that Day merely attended to administrative duties on behalf of the plaintiff and did not act as an estate agent in the manner described in paragraphs (a)(i) to (a)(iv) of the definition in the Estate Agency Affairs Act. She accordingly was not required to have a fidelity fund certificate.

[42] Lastly, the suggestion by the magistrate that Gordon should have been cited as the second plaintiff as he was involved with the transaction is misdirected as he acted as an agent. The commission was therefore not due to him.

[43] For the reasons set out above the magistrate erred, in my view, by coming to the conclusion that the plaintiff had failed to prove its claim. His decision should therefore be set aside.

[44] In the result, I propose an order in the following terms:

1. The appeal is upheld with costs.
2. The magistrate's decision is set aside and replaced with the following order:
 - 2.1 The first and second defendants are ordered to pay to the plaintiff jointly and severally, the one to pay and the other to be absolved:
 - 2.1.1 An amount of R78 375.00;
 - 2.1.2 Interest thereon at the rate of 15.5% per annum *a tempore morae* from date of summons to date of payment;
 - 2.1.3 Costs of suit.

N P BOQWANA

Judge of the High Court

I agree, and it is so ordered

T C NDITA

Judge of the High Court

APPEARANCES

FOR THE APPELLANT: Adv. J. A. B. Nel

Instructed by: Bailey Haynes Inc., Cape Town

FOR THE RESPONDENTS: Adv. M Basson

Instructed by: Johan Victor Attorneys, Cape Town