

SOUTH AFRICA / JUDGMENT

Bianca Properties (Pty) Ltd v Mogomana (A113/2019) [2021] ZAGPPHC 606 (17 September 2021)

[2021] ZAGPPHC 606

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Schyff, Van der Westhuizen, Neukircher

CASE / FILE NUMBER

A113/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A113/2019

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

NOT

REVISED

17

September 2021

In

the matter between:

BIANCA
PROPERTIES (PTY)
LTD APPELLANT
and
MATSEBA
MOGOMANA RESPONDENT

JUDGMENT

Van der Schyff J (Van der Westhuizen J and Neukircher J concurring)

Introduction

[1] This is an appeal against the judgment and order by Mtati AJ delivered on 16 February 2018. The appeal concerns a question of law that was raised by the appellant in a special plea and adjudicated by the court a quo on a stated case. The respondent in this appeal is the plaintiff in the main action and is interchangeably referred to as either the respondent or the plaintiff in this

judgment.

Stated case

[2] The parties recorded the facts agreed upon, as follows:

'The Plaintiff's cause of action is based on the payment or remuneration of commission earned in respect of or arising from the sale of several immovable properties in her performance as that of an estate agent and/or relating to the business of an estate agent.

The Defendant is a company which conducts business as that of an estate agent. At all relevant times to the sale of the respective immovable properties the Plaintiff was not in possession of a valid fidelity fund certificate issued to her in terms of the Estate Agency Affairs Act 112 of 1976.'

[3] The question of law the court was required to determine was the following:

'The question whether section 34A of the Estate Agency Affairs Act 112 of 1976 precludes the Plaintiff from claiming commission or payment in the absence of a valid fidelity fund certificate, alternatively whether possession of a valid fidelity fund certificate is a prerequisite for an estate agent to enforce a claim for payment of commission or remuneration.

Whether the Plaintiff's special plea should be upheld with costs.'

[4] The context for the Rule 33(4) stated case is the following:

4.1 In her particulars of claim, the respondent claims an amount of R112 000,00 as commission earned on three property transactions she concluded on behalf of the appellant. She alleges that she is entitled to this commission by virtue of an oral agency agreement entered into between herself and the appellant where she 'would be remunerated at a rate of 40% after the deduction of Value Added Tax on commission earned on property actions concluded by the Plaintiff';

4.2 In response to this, the appellant filed a special plea. In this, the appellant pleads that:

4.2.1 the plaintiff's cause of action is based on an agreement in terms of which the plaintiff was allegedly entitled to commission in her capacity as a sale agent in respect of the sale of various immovable properties;

4.2.2 the plaintiff's claim is subject to the provisions of the Estate Agency Affairs Act 112 of 1976 (the EAA Act);

4.2.3 in order to sustain an action based upon a contractual claim which is governed by the EAA Act, the plaintiff must allege and prove, amongst others, that (a) she is a registered estate agent at the Estate Agency Affairs Board and (b) has a valid fidelity fund certificate as required by the EAA Act.

The judgment of the court a quo

[5] Mtati AJ dismissed the special plea. The learned judge relied on the judgment in *Taljaard v Botha Properties*[1] in which it was held that although estate agents are not entitled to remuneration if they do not possess fidelity fund certificates, commission paid on the basis of the underlying agreement is not invalidated by virtue of a fidelity fund certificate not being issued. Mtati AJ reasoned that it is unconscionable that a certified estate agent allows an uncertified agent to execute a client's mandate and later return to say, 'but I cannot pay you since you do not possess a fidelity fund certificate'. Because both parties would have been acting in contravention of s 26 of the EAA Act, Mtati AJ held that one party could not be enriched at the expense of the other. He disagreed with the judgment of the Full Court of the Eastern Cape Division in *Warren Jack Property Brokers CC v Venter*[2] where it was held that s 34A applies to agreements between estate agents inter se, and it is not limited to agreements concluded between an estate agent and its client.

Discussion

[6] 'Estate agent' is defined in s 1 of the EAA Act, the relevant part of which reads 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 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) – (b) ...

- (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;
- (cA) – (e) ...

[7] Paragraph (c)(ii) of the definition of 'estate agent' extends the meaning of estate agent to include employees of an estate agent for purposes of, inter alia, ss 16 and 26. Section 16(1) provides that every estate agent or prospective estate agent shall apply to the board for a fidelity fund certificate. Section 26 provides that no person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him or her and every person employed by him or her as an estate agent. If s 26 is read with the said paragraph (c)(ii), no person employed by an estate agent may perform any act referred to in subparagraphs (a)(i) or (a)(ii) of the definition of 'estate agent' in s 1 of the EAA Act unless a valid fidelity fund certificate has been issued to them.

[8] Section 34 of the EAA Act provides that any person who contravenes or fails to comply with any provision of the Act is guilty of an offence punishable by law. Section 34A provides:

'(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] Although employees who meet the requirements of paragraph (c)(ii) of the definition of 'estate agent' are not deemed to be estate agents for purposes of s 34A, they are not exempted from the consequences of contravening s 26 of the EAA Act by performing the actions referred to in paragraphs (a)(i) or (ii) of the definition without having been issued

with a valid fidelity fund certificate. Section 34A(2) casts the net wide enough to cover all those who fall within the extended definition of an estate agent, as provided for in paragraph (c)(ii) of the definition of 'estate agent' contained in s 1 of the EAA Act.

- [10] The respondent's case as set out in her particulars of claim is that she concluded three property transactions with respective buyers and sellers pursuant to the conclusion of an oral employment agreement with the appellant. She claims that her claim is based on agency contract with the appellant and not on an estate agent agreement with a prospective client, and therefore not governed by the provisions of the EAA Act.
- [11] The 'conclusion of property transactions' falls squarely within the parameters of the actions described in paragraph (a)(i) of the definition of 'estate agent'. Since she was, on her pleadings, employed by the appellant, the respondent is a person described in paragraph (c)(ii) of the definition of 'estate agent'. It is common cause that the respondent was not in possession of a valid fidelity fund certificate as referred to in s 26 of the EAA Act.
- [12] The question whether the legislature intended s 34A should to apply to an agreement between agents inter se, was addressed by the Full Court of the Eastern Cape Division in *Warren Jack Property Broker CC t/a Warren Jack Property Group and Another v Venter*.^[3] Although this judgment emanated from a different Division of the High Court, stare decisis dictates that cognisance must be taken of the judgment, and it should only for good reason not be followed. Mtati AJ gave no reasons for disagreeing with that decision
- [13] In *Warren Jack Property Broker*, the respondent (Venter) was employed by Warren Jack Property Group (WJPG). Venter did not possess a valid fidelity fund certificate. He alleged that it was a material term of his contract of employment with WJPG that he would be entitled to 50% of all commissions received by WJPG in respect of property transactions successfully facilitated by himself for and on behalf of WJPG. Subsequent to his employment with WJPG, he entered into a further agreement with Wood, a duly registered estate agent in the employ of WJPG. Wood possessed a valid fidelity fund certificate. Wood was allegedly employed by WJPG on identical terms as to remuneration as Venter. Venter and Wood agreed to work together and share all commissions payable to either of them by WJPG regarding property transactions successfully facilitated by either of them on behalf of WJPG. After their relationship soured, the agreement between Venter and Wood was cancelled. Venter subsequently issued summons against WJPG and Wood and claimed that certain commissions due to him regarding three transactions had not been paid to him. WJPG and Wood contended on the pleadings and at the trial that Venter

was precluded from enforcing any of his claims by virtue of the provisions of s 34A of the EAA Act. The court a quo held in favour of Venter in respect of two transactions and against him in respect of one transaction.

- [14] Eksteen J, writing for the Full Court, commenced by referring to the purpose of the EEA Act as stated in the preamble to the Act. The Full Court held that on a proper reading of the preamble, it merely declares that the Act intends to control certain activities of estate agents and to do so in the public interest. I agree that this does not advance the debate materially.
- [15] Having considered the relevant provisions of the Act, Eksteen J concluded that Venter 'had performed activities that fell within paragraph (a)(ii) of the definition of 'estate agent' and that, given that his claim, at least in part, had arisen from the performance by him of an act of an estate agent at a time when a valid fidelity fund certificate had not been issued to him, he was precluded from claiming any remuneration or other payment in respect of or arising from the performance of these functions'.
- [16] The learned judge considered the judgments in *Noragent Eiendoms Beperk v De Wet* 1985 (1) SA 267 (T), *Ronstan Investments (Pty) Ltd and Another v Littlewood* 2001 (3) SA 555, and *Taljaard v TL Botha Properties*
- [2008] ZASCA 38; 2008 (6) SA 207 and concluded that the mischief which s 34A seeks to address is not to protect members of the public against unregistered estate agents, but 'to penalise estate agents' who have breached s

26. As stated by the Supreme Court of Appeal, the penalty is that 'an

estate agent who claims remuneration in conflict with section 34A ... will be prevented from enforcing his or her claim'. Eksteen J held:[4]

'It is the enforcement of the right contracted for which is struck by the section. Section 34A prohibits an estate agent from claiming any remuneration or other payment in respect of the performance of any act of an estate agent. Section 34A(2) imposes the same penalty on an employee who has acted without a fidelity fund certificate.

I can find nothing in the structure of the Act or in the wording of section 34A of the Act to support the conclusion that the Legislature intended by section 34A only to regulate the relations between the client and the agent as opposed to relations between estate agents inter se. The contrary is true. (See *Taljaard supra*.) It matters not what the relationship between the parties is, if an estate agent has breached the provisions of section 26, as the respondent has, he is, subject to what is set out below, precluded from enforcing a claim for payment in respect of the performance of the acts of an estate agent.'

- [17] I am in agreement with the judgment in *Warren Jack Property Group*. In the present matter, it does not matter that the respondent's claim is based on the agency contract with the appellant and not an estate agent agreement with a prospective buyer. The remuneration agreed on between the parties is intrinsically linked to the

performance of actions described in paragraph (a)(i) of the definition of 'estate agent' and therefore brings the respondent within the ambit of ss 26 and s 34A(2) of the Act. The entire causa causans of the plaintiff's claim lies in the three property transactions.

[18] Counsel for the respondent submitted that this court must consider the object of the EAA Act as stated in *Rogut v Rogut*.^[5] The court described the object of the EAA Act in the following terms:

'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.'

In my view, s 34A(2) aims to protect the public by discouraging and deterring persons from contravening s 26, by way of the threat of prosecution and nullifying claims for remuneration.

[19] Counsel for the respondent, with reliance on *Swart v Smuts*,^[6] submitted that an agreement entered into contrary to the provisions of s 26 is not void or voidable. The distinction between the present matter, and *Swart v Smuts*, is that the question before us is not whether the agreement concluded between the appellant and the respondent is void or voidable but whether it is enforceable.

[20] In summary, the jurisdictional requirements of s 34A(2) have been met. The respondent is a person referred to in paragraph (c)(ii) of the definition of 'estate agent' contained in s 1 of the EAA Act. A valid fidelity fund certificate had not been issued to her at the time when she performed the acts referred to in said paragraph (c)(ii). In the absence of a valid fidelity fund certificate, the respondent is precluded from claiming any commission or remuneration from the appellant.

[21] In view of all of the above, Mtati AJ, in my view erred in dismissing the special plea, and the appeal must accordingly succeed.

ORDER

In the result, the following order is made:

1. The appeal is upheld, with costs.
2. The order granted by Mtati AJ on 16 February 2018 is set aside and replaced with:
'The defendant's special plea is upheld, with costs.'

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 17 September 2021.

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Instructed by: Rudi

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Instructed by: WWB

Botha Attorneys

Date of the hearing: 8

September 2021

Date of judgment: 17

September 2021

[1] [2008] ZASCA 38 at para [5].

[2] (CA 156/2011) [2012] ZAECGHC 59 (27 July 2012).

[3] (CA 156/2011) [2012] ZAECGHC 59 (27 July 2012).

[4] Ward Jack Property Group at paras [20] and [21].

[5] 1982

(3) SA 928 (A) at 939C-E.

[6] 1971

(1) SA 819 (A).

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