

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 8145/2020P

In the matter between:

MTUBA HARDWARE CC

APPLICANT

and

GOLD REWARD 120 CC t/a REMAX MARINE

FIRST CLAIMANT

TORNOSPACE (PTY) LTD t/a HARCOURTS ZULULAND **SECOND CLAIMANT**

JUDGMENT

BEZUIDENHOUT J:

[1] Applicant was the owner of an immovable property described as erf 8445, 141 Dollar Drive Alton Richards Bay KwaZulu-Natal. The said property was sold during 2019 and there is a dispute between First and Second Claimant as to who was the effective cause of the sale and also entitled to the commission in the sum of R 529 000-00. As a result thereof Applicant filed an interpleader notice and claims no interests in the dispute between Claimants. Second Applicant sought condonation for the late filing of its heads of argument. This was not opposed and condonation was granted.

[2] One Cina Gertruida Van Der Vlies is the sole member of First Claimant and carries on business as an Estate Agent trading as Remax Marine Richards Bay. She has been doing so since 11 August 2003 and was the holder of a valid fidelity fund certificate in terms of section 26(a) of the Estate Agency Affairs Act 112 of 1976. One

Johanna Susanna Fourie (Fourie) is an intern estate agent in her employ from 6 April 2005 and was also the holder of a valid Fidelity Fund Certificate for the years 2017 to 2020.

[3] On 7 March 2017 the said Fourie introduced a lessee to Applicant. The lease was from 1 June 2017 to 31 August 2019. On 14 August 2019 one Steve Freeze (Freeze) of Applicant instructed Fourie telephonically to market the said property or secure an alternative tenant. On 17 October 2019 one Wendy Huang contacted Fourie with regards to the said property and she contacted Freeze and the purchaser viewed the property on 17 October 2019 with Fourie and First Claimant. On 18 October 2019 the purchaser telephonically requested a second viewing of the property which was then done. On 18 October 2019 an offer was made for the said property verbally by the purchaser which was refused by Applicant. Various offers pursued and on 19 November 2019 at 10 a.m. an official site meeting was arranged with a building inspector of the City of Umhlathuzi Municipality to clarify certain issues of the said property with First Claimant and Applicant's representative.

[4] The sale agreement was thereafter prepared by First Claimant and sent to the purchaser on 27 November 2019 at 10:45 a.m. and the final agreement was signed by the purchaser on 3 January 2020 and the seller on 8 January 2020. The property was transferred on 30 October 2020. From annexure "B" to the affidavit of First Claimant it is apparent that on 18 October 2019 there was certain email correspondence between her and the buyer.

[5] From the further documents it is apparent that there was correspondence between First and Second Claimant in respect of who is entitled to the commission in respect of the sale of the said property.

[6] Charmaine Redinger the managing director of Second Claimant sets out in her particulars of claim to the interpleader notice that Harcourts is the holder of a fidelity fund certificate but that she has not received a copy thereof despite numerous requests to the Estate Agency Affairs Board. She then refers to certain annexure in this regard. She contends that on 1 August 2019 Freeze of Applicant contacted Harcourts to assist in obtaining a tenant for the property and an email is attached marked "D" stating the

information about the said property. The property was inspected. It was loaded on their system from 12 August 2019 and she refers to annexure “E” to indicate that it was then on their system. On 15 October 2019 Second Claimant received a website enquiry in respect of the property and attached as annexure “J” is an enquiry by one Wendy with email address and a price of R 98 000-00. On 16 October 2019 Jason Redinger (Jason) replied and stated that the property was still available for lease. He also maintained that the owners would consider offers to purchase. On 16 October 2019 Wendy asked for details so that she could check on Google Map.

[7] It is then apparent from annexure “L” that on 16 October 2019 there was certain communication between Wendy and Jason. On 17 October 2019 Jason enquired whether she was still “alright” for 10 that morning. The response was yes and Jason responded how she could enter into the building. She then enquired whether a certain area would be for their use because if it was not it would not be suitable and Jason responded that he would investigate. On 16 October 2019 an email was also sent to Steve by Jason enquiring as to the price which they would require. From the documents attached it appears that Jason was an intern estate agent.

[8] Supplementary particulars of claim were filed by Second Applicant relating to the fidelity fund certificate and stating that due to a glitch in EEAB’s electronics system it could not be downloaded and no date for printing has been shown. An affidavit from one Debra Lee Vial from the Estate Agency Board is attached stating that a fidelity fund certificate was issued to them for the 2019 year. She states that there was compliance in terms of section 26 of the Estate Agency Affairs Act 112 of 1976. Redinger contends that at all relevant times Harcourts possessed a fidelity fund insurance certificate in terms of the Act. Jason was the listing estate agent in the employment of Second Claimant and the effective cause of the sale. The property was introduced to this purchaser on 17 October 2019.

[9] The first affidavit of Debra Lee Vial was attested to on 24 January 2022 and is attached to Second Claimants amended particulars of claim. Therein she states that Charmaine Redinger was since 2007 up to the current year registered, under the firm Tornospace CC paid for the issue of an FFC for the 2019 year under the firm

Tornospace as required by the Act. Due to a glitch on the system this was never available for downloading by the agent. This is an error in the functioning of the system in this regard. She states at paragraph 6 “I confirm that the agent was at all material times in compliance with requirement for a 2019 FFC to be issued to her and is entitled to such 2019 FFC.”

[10] On 18 July 2022 First Claimant issued a notice of motion seeking leave to file supplementary particulars of claim and to bear the costs of the application save if it is opposed. No notice to oppose this application was filed by Second Claimant. In the affidavit it states that the information was only obtained on 23 June 2022 and therefore the late filing thereof and the reason for seeking condonation. Attached thereto and dated 22 June 2022 is an email from the said Debra Vial stating the following:

“I confirm the Tornospace was not issued with an FFC for 2019 due to the failure to submit audit reports by 30 June 2019 as required by section 32 of the EAA Act 112/1976. They were accordingly disqualified under section 32(a)(A). They were already disqualified due to the failure to submit an audit report for 2018 by the same date. The audit reports were only submitted on 20 December 2018 and 3 October 2019 respectively. The mere submission of an audit report after the due date does not remove the disqualification but the section 27 process must be followed and the fine paid before the agent becomes entitled to an FFC, and then only from the date the firm became compliant. No FFC may ever be issued retrospectively when an agent is not entitled to an FFC at the time. They were prohibited from trading or charging any commission or remuneration for any estate agent activities during the period that they were not issued with an FFC being 11/2/19 to 10/3/2020 when the 2020 FFC was issued after the firm became compliant and the fine was paid on 20 February 2020. The renewal fee was paid on 10 March 2020 and the FFC issued. Since its firm and principal were not issued with FFC for the period none of its employees or agents could have obtained an FFC or received any remuneration or commission.

Accordingly neither the firm nor the principal nor any of the employees were entitled to any commission or remuneration for estate agent activities performed

during the period. (Section 34(A) Act 112/1976) Charmaine Redinger requested her FFC on 29 January 2019 but it was not issued due to none compliance status of the firm. If you require an affidavit regarding this information kindly request same and I will advise of the costs involved. Should you wish a witness to attend the trial to give evidence in this matter kindly issue a subpoena duces tecum for the date of trial and we will comply on the usual basis.”

[11] There is also another affidavit attached by the said Debra Vial which was attested to on 22 July 2022 wherein she *inter alia* states the following:

“I have read the supplementary particulars of claim deposed to by Cina Gertruida Van Der Vlies, the sole member and owner of the applicant/first claimant and I confirm the contents thereof insofar as it relates to me, as being true and correct.

I specifically confirm the content of the supplementary particulars of claim insofar as it relates to the second claimant in the interpleader application lacking any *bona fide* claim to commission as set out in the interpleader proceedings.”

At the commencement of the hearing First Claimant sought condonation for the late filing of the supplementary affidavit and particulars of claim to which I have referred to above. It was submitted that it was set out in the affidavit why it was late.

[12] As set out above there was no notice to oppose filed. It was submitted on behalf of Second Claimant that it was not in terms of Rule 6(5) as Second Claimant should have at least had five days to file a notice to oppose and thereafter 15 days for filing an opposing affidavit.

[13] That was the only basis upon which Second Claimant opposed the said condonation and particulars of claim. Firstly Rule 6(5) which is also known as the long form is not required in this instance as it is an interlocutory application seeking condonation to amend or file further particulars of claim to the interpleader. This was pointed out to Mr. Scheepers on behalf of Second Claimant who did not take the matter any further. First Claimant was accordingly granted condonation for the late filing of the amended particulars of claim as it is apparent from what is contained in the affidavit and therein that it was highly relevant to the issue before Court and also that there was

sufficient reason provided why it was done at that stage. Second Claimant also did not seek any adjournment as a result thereof nor that it suffered any prejudice.

[14] Section 26 of the Estate Agency Affairs Act 112 of 1976 states as follows:

“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; (b) a close corporation to every member referred to in paragraph (b) of the definition estate agent of that corporation.”

[15] Section 34(A)(1) stipulates that: “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 (1), (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 to such an agent.” Section 16 prescribes the period and the manner in which an application for a fidelity fund certificate should be made. Section 16(3) indicates that such certificate will be valid from when it is issued until 31 December of the year to which it relates.

[16] It is accordingly apparent that whoever sold the said property had to be in possession of a valid fidelity fund certificate for the period 2019 and until January 2020 when the sale agreement was finally concluded, to be entitled to commission.

[17] It was submitted by Mr. Reddy on behalf of First Claimant that the supplementary particulars of claim and affidavit of Vial indicates that Second Claimant did not have the necessary certificate due to the fact that the audit reports had not been complied with and was therefore not entitled to receive the commission. It was submitted that it must be at the time of the sale and accordingly that Second Claimant in terms of the affidavit of Vial was not correctly registered at the time, did not have the necessary certificate and could therefore not have claimed the commission. He further dealt with the issue of the effective cause of sale and as to who was responsible for the conclusion of the sale and was the effective cause thereof.

[18] Mr. Scheepers on behalf of Second Claimant referred to paragraph 22 of the judgement of Bezuidenhout AJ in the application for condonation where she referred to the fact that Second Claimant was in possession of a certificate for the year 2019. He referred to the email which was attached to First Claimant's particulars of claim and submitted that the affidavit was under oath by Vial and attached to the papers of Second Claimant. It was an affidavit and not merely an email attached to First claimants papers. Accordingly Second Claimant was duly registered and had the necessary certificate during 2019 and that the judgment of Bezuidenhout AJ in that regard was correct and should be followed. He submitted that even if a penalty or a fine is paid then the estate agent can still continue. He submitted that section 27 of the Estate Agency Affairs Act is not applicable. He then further dealt with the issue of the effective cause of sale.

[19] Firstly in regards to the judgment of Bezuidenhout AJ the issue to be determined at that stage was different to that which has to be decided at this stage. The issue before her was one of condonation and accordingly she merely had to consider whether there were any prospects in the merits of the case and did not have to deal with the main issue. Further at the time that Bezuidenhout AJ gave her judgment the second affidavit by Vial, which is now attached to First Claimants amended particulars of claim, had not been part of the papers and that clearly sets out what the position was.

[20] Mr. Scheepers did not deal with the second affidavit of Vial which was filed in June 2022 attached to Second Claimants amended particulars of claim. Therein she does not just confirm what is set out in the email but specifically states that at the time that the sale was concluded Second Claimant was not registered, did not have a fidelity fund certificate and therefore could not claim any commission for any work that was done. It also is apparent from Second Claimant's particulars of claim that Jason Redinger was the agent who conducted the sale on behalf of Second Claimant. There is no indication in the papers that he had the necessary certificate to do so. On a reading of sections 26 and 34(A) of the Estate Agents Act it would appear that as the agent he also had to be in possession of a certificate as required by section 26. However, even if I am incorrect in that regard, it is clear from the affidavit of Vial which

was attested to during June 2022 that Second Claimant was not registered at the time, that there were difficulties with the audits and that they had to pay a fine. It is further clear that the paying of a fine on its own does not merely entitle you to continue with the selling and obtaining of commission but that it is only once the certificate is issued that it is then applicable and then only until 31 December of that year.

[21] A consideration of the sections of the Act which has been referred to above indicate that commission can only be claimed when there is a valid certificate for that specific period. From the affidavit of Vial dated June 2022 it is clear that at the time that the sale was concluded in 2019 Second Claimant did not possess such a valid certificate. Accordingly neither Second Claimant nor its employees was entitled to claim any commission during that time even if Second Claimant was the effective cause of sale. The certificate was only issued to them on 10 March 2020. In *Brotsky Trading v Cronimet Chrome* 2017 (4) SA 610 (SCA) dealing with the Estate Agency Affairs Act it was held that absent a certificate an agent could not receive commission.

[22] I accordingly am satisfied that Second Claimant did not have a valid fidelity fund certificate at the time that the sale was concluded and accordingly is not entitled to the commission. It is therefore not necessary for me to further consider the second issue namely that of who was the effective cause of sale.

[23] As already set out above the opposition to the supplementary particulars of claim of First Claimant was only of a technical nature which I found was not applicable as it was an interlocutory application and accordingly that the particulars of claim had to be admitted.

[24] It is only the letter and the affidavit of Vial attested to during June 2022 which sets out the position clearly and contradicts her previous affidavit that Second Claimant was registered during 2019. In my view it is therefore not appropriate to award costs on an attorney and client scale as requested by First Claimant.

In the circumstances the following order is made.

1. First Claimant's supplementary particulars of claim is admitted.

2. Applicant is directed to make payment of the commission for the sale the property described as erf 8445, 141 Dollar Drive Alton, Richards Bay, KwaZulu-Natal, in the sum of R 529 000-00 to First Claimant.
3. Second Claimant is directed to pay First Claimants costs.

BEZUIDENHOUT J.

JUDGMENT RESERVED: 15 AUGUST 2022

JUDGMENT HANDED DOWN: 1 SEPTEMBER 2022

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