THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 161/2004
Reportable

In the matter between

ESTATE AGENCY AFFAIRS BOARD **Appellant**

AND

NEIL CURDIE McLAGGAN **First Respondent**

McLAGGANS (PTY) LTD **Second Respondent**

Coram**: Howie P, Cameron, Navsa, Brand, Lewis JJA**

Heard: **14 March 2005**

Delivered: 31 **March 2005**

Summary: Dishonesty is an element of the offences of contravening paras 1 and 2(1), read with para 30(1)(b) of the Fourth Schedule to the Income Tax Act 58 of 1962 (deducting employees' tax and failing to pay it to Revenue), and of contravening s 28(1)(b), read with s 58 of the Value Added Tax Act 89 of 1991 (collecting VAT and failing to pay it to Revenue). The fidelity fund certificate of an estate agent convicted of these offences lapses under s 28(5) of the Estate Agency Affairs Act 112 of 1976. Appeal against decision of High Court, South Eastern Cape upheld. Order is contained in para 34.

JUDGMENT

LEWIS JA

[1] This appeal turns on whether offences in respect of which an estate agent – the first respondent, Mr Neil McLaggan – was convicted in 2002 under the Income Tax Act 58 of 1962, and the Value Added Tax Act 89 of 1991, involve an element of dishonesty such that his fidelity fund certificate lapsed or should be withdrawn. McLaggan is employed by the second respondent, of which he is a director. Although the second respondent ('the company') was charged with the same offences it was not convicted, apparently as a result of an oversight on the part of the trial court magistrate .

[2] On 23 September 2002 the appellant, the Estate Agency Affairs Board ('the Board'), applied in the High Court (South Eastern Cape Local Division) for an order declaring that McLaggan's fidelity fund certificate had lapsed because of his convictions of offences involving an element of dishonesty, pursuant to s 28(5) of the Estate Agency Affairs Act[1] (the 'Estate Agency Act'). Alternatively it sought to have the certificate withdrawn under s 28(3) of that Act. It also sought an interdict to prevent McLaggan from continuing to act as an estate agent while not in possession of a valid fidelity fund certificate. As against the company, the second respondent in the application, the Board sought an order interdicting it from continuing to act in contravention of s 26 or, alternatively, s 28(8) of the Estate Agency Act.

[1] Act 112 of 1976.

[3] McLaggan opposed the relief sought on the basis that he had not been convicted of any offence involving an element of dishonesty, and that his certificate had thus not lapsed. He contended further that the section providing for automatic lapsing was discriminatory and should be restrictively interpreted or declared inoperative. The High Court (per Sandi J) dismissed the application, finding that the offences in question did not involve an element of dishonesty, and that no good cause had been shown for withdrawing the certificate. It is against these findings that the Board appeals to this court, leave having been granted by Sandi J.

[4] I shall deal first with the charges and the convictions of McLaggan; second, the financial history giving rise to the convictions; third, the provisions of the Estate Agency Act that regulate fidelity fund certificates; fourth, the question whether the certificate did lapse because the offences involved an element of dishonesty; and finally, the submission that there is a disparity between sections of the Estate Agency Act[2] that operates unfairly against the respondents.

[5] In April 2002 McLaggan and the company were charged on 37 counts of theft in respect of employees' tax deducted by the second

[2] Sections 27 and 28(5).

respondent and not paid to the South African Revenue Service ('SARS'). In the alternative, they were charged on 37 counts in terms of paras 1 and 2(1), read with para 30(1)(b) of the Fourth Schedule to the Income Tax Act[3] in that they had wrongfully and unlawfully used or applied the amounts deducted, or withheld employees' tax (the amounts being set out in a schedule to the charge), for purposes other than the payment of these amounts to SARS.

[6] They were charged with two further counts of theft in that the company, being a vendor as defined in s 1 of the Value-Added Tax Act,[4] had levied and received value-added tax ('VAT') on goods or services supplied by it and McLaggan, with the intention to steal, had failed to pay such amounts to SARS, using the amounts in question for the benefit of the company or himself. The alternative charges to these were that the company had 'wrongfully and unlawfully' failed to pay the amounts specified as required by s 28 (1)(b), read with s 58(d) of the VAT Act.

[7] The respondents were further charged with failing to furnish SARS with an annual income tax return in respect of three particular tax years. Nothing turns on these charges since it was not ever contended that these were offences entailing an element of dishonesty.

[3] Act 58 of 1962.
[4] Act 89 of 1991.

[8] On 30 April 2002, in the Port Elizabeth Criminal Magistrate's Court, McLaggan, both in his capacity as director of the company and personally, pleaded guilty to the alternative charges under the Income Tax Act and the VAT Act, and on the counts of failure to submit returns. The charges of theft against them were withdrawn.

McLaggan handed in a statement in terms of s 112 of the Criminal Procedure Act[5] in which his plea explanation is set out in full. He also submitted a lengthy 'plea in mitigation'. He was convicted on the alternative charges. As already pointed out, the magistrate omitted to convict the company.

[9] On 2 July 2002 the trial court sentenced McLaggan to six months' imprisonment on each of the counts under the Income Tax Act, such sentences to be suspended for five years on condition that he not be convicted of contravening para 30 of the Fourth Schedule to the Act during the period of suspension. On each of the two counts of contravening section 58 of the VAT Act, McLaggan was sentenced to ten months' imprisonment, also suspended for five years on condition that he not be convicted of contravening s 58 of the VAT Act during the period of suspension.

[5] Act 51 of 1977.

[10] McLaggan appealed against the sentences and the court (the Eastern Cape Division, per Pickering J, Pillay J concurring), upholding the appeal, substantially reduced the sentences on the first 37 counts (under the Income Tax), taking the first nine counts together and imposing a suspended fine (R400) in the alternative to the suspended term of imprisonment for all counts. The remaining offences under the Income Tax Act were treated similarly save that the alternative suspended fine imposed was R10 000. On the charges under the VAT Act an alternative suspended fine of R4 000 was imposed and both charges were taken together.

[11] In reducing the sentences imposed by the magistrate, the court took into account the statement in mitigation, which related to the personal and financial circumstances of McLaggan. Regard was had, in particular, to his lengthy service as an estate agent; his apparent high standing in the business; and that he had served on the Estate Agency Affairs Board itself for some 21 years and had been the President of the Board for some of that period. Because of his high profile the media had made much of the charges of theft against him, and his reputation had been seriously affected. The court stated also that it was clear, in its view, that ‘the provisions of the relevant sections under which the appellant was charged may be contravened in circumstances not involving any dishonesty on the part of the offender, *such as was the*

case in the present matter' (my emphasis). Although the question of dishonesty is the crux of the appeal before this court, it was not in issue in relation to the appeal against sentence, and was not debated in the judgment.

[12] In his statement in mitigation McLaggan said that he had paid the full amount owing to SARS, having obtained a personal loan, and by registering mortgage bonds over two properties owned by his wife. He made much of his and the company's financial plight. It was due to a number of factors: the real estate business had gone into recession in the mid 1990's; interest rates soared; in 1997 the company's administrator and bookkeeper, on whom McLaggan had relied in the running of the company, retired; the new bookkeeper was incompetent and members of staff stole some R94 000, only some of which was recovered. These factors led him to reduce staff, use cheaper vehicles, cancel his medical aid, cash in insurance policies and so on. He did not draw a salary for some four years and lived on the income of his wife. Compounding his financial problems, in November 2000 McLaggan was stabbed and seriously injured, and had to use some R30 000 from the company and money of his wife to pay for medical treatment.

[13] Before this misfortune befell McLaggan it had become clear to him, in July 1998, that he could not pay the amounts owed to SARS. Thus

although he continued to submit monthly tax returns in respect of employees' tax that the company had deducted from their salaries, and VAT returns too, he actually made no payments, this despite the fact that he continued to deduct employees' tax from their salaries and to levy and receive VAT payments. On 3 July 1998 the company, represented by McLaggan, entered into an agreement with the Port Elizabeth office of SARS to pay amounts outstanding, and his wife stood surety for his obligation. But still did he did not pay the amounts due to SARS.

[14] The agreement between the company and SARS reflected that R104 859.83 was owed to SARS. The company undertook to pay some R62 500 immediately after the sale of two properties, and then a monthly instalment until the full amount outstanding was paid in full. The Receiver of Revenue, Port Elizabeth, reserved the right to claim the full balance of taxes due in specified circumstances, including the failure to pay instalments timeously and by 'failure in the timeous and proper submission or payment of any current tax returns'. Payments were not made in terms of the agreement.

[15] On 22 March 2000 McLaggan wrote to SARS in an apparent attempt to explain why payments had not been made. He stated that a new entity, McLaggan's Real Estate CC, of which he was the sole member, had bought property, having been granted a 100 per cent bond

by a bank. The reasons for the acquisition, he said, were, first, that the premises would accommodate the company in ‘more suitable and prominent premises’ which would cost less than the company’s previous premises (the interest payable presumably being less than rental); and second, that the company would benefit from an expropriation adjacent to the new property. McLaggan undertook, in the letter, to pay to SARS ‘such monies as are received from this expropriation exercise within 24 hours of receipt thereof’.

[16] The clear implication of this letter is that while the company would not be paying employees’ tax deducted for payment to SARS, or VAT collected for SARS, it would be paying interest on a bond – thus undertaking a new liability rather than paying what was owed to SARS. No indication is given in the letter of the source of funding for the bond. It is reasonable to infer that the deductions made from employees’ salaries, and VAT levied and received, were used for this purpose.

[17] On 9 July 2002, seven days after McLaggan had been sentenced, the Board wrote to McLaggan, stating that it had come to its attention that he had been convicted on 42 counts of theft (which was of course incorrect in that the convictions were under the Income Tax and Vat Acts). The consequence, said the Board, was that McLaggan had ‘been rendered disqualified as an estate agent pursuant to the provisions of s

27(a)(ii) of the Estate Agency Affairs Act 112 of 1976 in that you have been convicted of an offence involving an element of dishonesty'. The Board requested that he immediately cease carrying on business as an estate agent, and that he return his fidelity fund certificate. The letter ended:

'You may, of course, apply to the Board, by way of substantive application supported by documentary evidence, for the issue to you of a fidelity fund certificate pursuant to the provisions of the proviso contained in s 27 of Act 112 of 1976. You will have, in this respect . . . to satisfy the Board that, with due regard to all relevant considerations, the issue to you of a fidelity fund certificate will be in the interest of justice.'

[18] The relevant provisions of the Estate Agency Act relating to fidelity fund certificates are 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.

27 **Disqualifications relating to fidelity fund certificates**

No fidelity fund certificate shall be issued to-

(a) any estate agent who or, if such estate agent is a company, any company of which any director, or if such estate agent is a close corporation, any corporation of which any member referred to in paragraph (b) of the definition of 'estate agent'-

(i) has at any time by reason of improper conduct been dismissed from a position of trust;

(ii) has at any time been convicted of an offence involving an element of dishonesty;

. . . .

Provided that if in respect of any person who is subject to any disqualification referred to in this section, the board is satisfied that, with due regard to all the relevant considerations, the issue of a fidelity fund certificate to such person will be in the interest of justice, the board may issue, on such conditions as the board may determine, a fidelity fund certificate to such person when he or she applies therefor.' (My emphasis.)

Section 28 deals with the withdrawal and lapse of fidelity fund certificates. It provides that the Board may withdraw a certificate in a number of specified circumstances. The subsection in issue in this case relates to the automatic lapsing of a certificate: s 28(5)(a) reads:

' A fidelity fund certificate issued to any person shall lapse immediately and be of no force and effect if that person-

(a) becomes subject to any disqualification referred to in section 27 (a) (i) to (v); . . . .'

Section 27*(7)* and (8) read:

(7) 'No person whose fidelity fund certificate has been withdrawn in terms of subsection (1) or has lapsed in terms of subsection (5), may directly or indirectly

participate in the management of any business carried on by an estate agent in his or her capacity as such, or participate in the carrying on of such business, or be employed, directly or indirectly, in any capacity in such business, except with the written consent of the board and subject to such conditions as the board may determine.

(8) No estate agent shall directly or indirectly in any capacity whatsoever employ a person referred to in subsection (7), or allow or permit such person directly or indirectly to participate in any capacity in the management or the carrying on of his or her business as an estate agent, except with the written consent of the board, and subject to such conditions as the board may impose.'

[19] The effect of these provisions, in summary, is that an estate agent cannot operate as such without a fidelity fund certificate.[6] The certificate is issued by the Board, and may not be issued in certain circumstances, one of which[7] is that the applicant has been convicted of an offence involving an element of dishonesty. The Board does, however, have a discretion, created by the proviso to s 27, to issue a certificate in the interests of justice. Once a certificate has been issued, and there follows a conviction in respect of an offence involving an element of dishonesty, then the certificate automatically lapses.[8]

[20] The crisp question to be decided then is whether the offences in respect of which McLaggan was convicted did involve an element of

[6]S 26.
[7]S 27(a)(ii).
[8]S 28(5)(a).

dishonesty. He contends not. At all times he rendered tax and VAT returns such that SARS was not deceived: he did not hide from SARS the indebtedness resulting from the company's failure to pay it.

[21] The Board argues the contrary: McLaggan deducted employees' tax from employees of the company, and levied and received VAT payments that were then used for purposes different from that for which they were intended. That in itself is dishonest, argues counsel for the Board.

[22] The Board contends further that dishonesty can be found in the context in which the offences are committed, and need not necessarily be an intrinsic element of the offence. Authority for this is to be found in *R v Ghosh*[9] although in that case the court was primarily concerned with *mens rea* – whether the accused knew that he was acting dishonestly.

[23] Cases dealing with dishonesty as an element of the offence in South Africa have tended to suggest that the element of dishonesty must be an ingredient of the offence. In *Ex parte Bennett,*[10] in dealing with offences committed under the Companies Act[11] La Grange J said:

'What is an "offence involving dishonesty"? In its ordinary meaning dishonesty in this context denotes:

[9][1982] 2 All ER 689 (CA).
[10]1978 (2) SA 380 (W) at 383 in fin-384D.
[11] Act 61 of 1973, and the regulations promulgated thereunder.

"Lack of probity: disposition to deceive, defraud or steal. Also, a dishonest act." (See *Shorter Oxford English Dictionary*, sv "dishonesty" 4.) In *Brown v R* 1908 TS 211 Solomon J said at 212 that in its ordinary sense "dishonest" involves an element of fraud. (Cf *R v White* 1968 (3) SA 556 (RAD).) In *Words and Phrases Legally Defined* (2nd ed by J B Saunders; 1976 Supplement at 57) there is a quotation from a judgment of the Canadian Supreme Court:

"... 'Dishonest' is a word of such common use that I should not have thought that it could give rise to any serious difficulty, but in construing even plain words regard must be had to the context and circumstances in which they are used: *Canadian Indemnity Co v Andrews & George Co Ltd* (1953) 1 SCR 19 at 24. However, to try to put a gloss on an old and familiar English word which is in everyday use is often likely to complicate rather than to clarify. 'Dishonest' is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning. It is such a familiar word that there should be no difficulty in understanding it. *Lynch & Co v United States Fidelity & Guaranty Co* (1971) 1 OR 28 per Fraser J at 37, 38."

In this context the word "involve" means to contain or include as a part, so that the expression "offence involving dishonesty" means an offence of which dishonesty is an element or ingredient - in the case of a common law offence in terms of its definition, and in the case of a statutory offence in terms of the statute which created it.'

This approach was followed in *La Grange v Boksburg Stadsraad*[12] and in *Nusca v Da Ponte*[13] where the court held that illicit diamond dealing was inherently dishonest. Dishonesty is an ingredient of the offence if

[12]1991 (3) SA 222 (W) at 228C-F.
[13]1994 (3) SA 251 (BGD) at 259-60.

not a requirement.[14] In *La Grange* Flemming J added that while dishonesty need not be a requirement of the offence itself, one must have regard at least to the actual conduct complained of in the charge sheet.

[24] Were the offences under the Income Tax Act and the VAT Act intrinsically dishonest? In my view they were. It is true that SARS was aware that the company was not paying the amounts due to it and that the company rendered correct and full tax returns. But at the same time McLaggan, as director of the company, knew it was obliged to pay the taxes it collected from employees to SARS. The company deducted tax from salaries for the purpose of paying the fiscus. It used the money for entirely different purposes. That entails deception of employees, although they would not necessarily be prejudiced since the employer is the agent of SARS for the purpose of paying their tax to it, and once the tax had been deducted they would not be rendered liable again.[15] And it is dishonest in so far as the fiscus is concerned. If an employer deducts tax from employees, and uses it for any purpose other than paying the fiscus, that is dishonest. It is a deliberate misuse of funds. It is conduct that would be regarded by the public in general as lacking in probity. Equally, the levying and receipt of VAT for any purpose other than paying it to the fiscus in accordance with the statute is inherently dishonest. I

[14]At 261F-G.
[15]S 28(2) of the Fourth Schedule to the Income Tax Act provides that the employee's tax certificate shall be prima facie evidence that the employer has deducted tax.

consider therefore that dishonesty is also an element of the offences in respect of which McLaggan was convicted under the VAT Act.

[25] In my view it is conceivable that, in relation to s 27(a)(ii) of the Estate Agency Act, the context in which an offence is committed might also render conduct dishonest even where dishonesty is not an ingredient of the offence itself. But it is not necessary to decide this point given the conclusion that I have reached that the offences of which McLaggan was convicted were inherently dishonest.

[26] Accordingly, in terms of s 28(5) of the Estate Agency Act the fidelity fund certificate of McLaggan automatically lapsed once he was convicted, and the company (by virtue of s 26(a)) could no longer continue to operate as an estate agent.[16]

[27] Counsel for the respondents argued before this court that there is an anomaly in the provisions of the Estate Agency Act in that where one applies for a fidelity fund certificate in the first place the Board must consider whether or not the applicant is disqualified by reason of the provisions of s 27(a)(ii). The proviso to s 27, quoted in full above, gives the Board a discretion in this regard. It allows the Board to issue a certificate, despite a disqualification, if it is 'satisfied that, with due regard

[16] McLaggan is the sole director of the company: every director must have a valid fidelity fund certificate in order for a company to carry on business as an estate agent.

to all the relevant considerations, the issue of a fidelity fund certificate to such person will be in the interest of justice'.[17]

[28] By contrast, it was argued, once an estate agent in possession of a certificate is convicted of an offence involving an element of dishonesty, the certificate automatically lapses.[18] No discretion is exercised by the Board. Indeed the Board plays no role. An estate agent who has a certificate, which lapses by operation of law, thus has no opportunity to place before the Board factors relating to the interests of justice. The estate agent is thus, on this argument, denied a hearing.

[29] The respondents contend that the alleged anomaly operates unfairly against them, and that s 28(5) must be interpreted ('read down') in such a way as to allow them a hearing before the certificate lapses; alternatively that it is unconstitutional, infringing s 9(1) of the Constitution (the right to equality), and s 33(1), which requires lawful, reasonable and procedurally fair administrative action.

[30] I do not propose to deal with these submissions since in my view there is no anomaly in the relevant provisions of the Estate Agency Act. There is good reason for the distinction between an initial application for a fidelity fund certificate, and the lapsing of a certificate in the event of

[17] See *Lek v Estate Agents Board* 1978 (3) SA 160 (C) at 171A-B, where Friedman J considered the proviso and pointed out that it is 'cast in the widest possible terms'.
[18] S 28(5).

disqualification by virtue of s 28(5). When an application is made by a person for a certificate the Board must take a decision as to the fitness of the applicant to hold one. Applicants, for example, who have been dismissed from positions of trust 'by reason of improper conduct';[19] been convicted of an offence involving an element of dishonesty;[20] are of unsound mind;[21] do not have the prescribed standard of training;[22] or do not have the prescribed practical experience[23] must be given special attention because they are disqualified unless there are considerations that make the grant of the certificate consonant with the interests of justice.

[31] On the other hand, where the disqualification occurs after the award of a certificate it is appropriate that the certificate lapses. The disqualification, in the absence of evidence to the contrary, renders the holder unfit to be an estate agent. The Board makes no decision in this regard, and McLaggan's argument that he has been deprived of a hearing by the Board is thus misconceived. A person disqualified is not precluded from applying for a fidelity fund certificate again. Moreover, s 28(7) makes provision for a person whose certificate has lapsed to carry on the business of an estate agent, or to be employed as one, with the written consent of the Board.

[19] S 27(a)(i).
[20] S 27(a)(ii).
[21] S27(a)(iv).
[22] S27(a)(vi).
[23] S27(a)(vii).

[32] As I have already indicated, seven days after being sentenced, on 9 July 2002, in a letter sent to McLaggan by the Board, he was advised that he could 'by way of substantive application supported by documentary evidence' apply for a fidelity fund certificate, but would have to satisfy the Board that the issue of the certificate to him would be in the interests of justice. The factors that he referred to in his statement in mitigation, and that he claimed had led the company and him into financial difficulty, are matters that might well persuade the Board that it is in the interests of justice to issue a certificate to him again.

[33] In the circumstances, I consider that there is no statutory discrimination against McLaggan, or anyone in his position, and that the disparity between s 27 and s 28(5), complained of by McLaggan, is justified. The offences of which he was convicted involve an element of dishonesty, and his fidelity fund certificate lapsed automatically on conviction.

[34] It is ordered that:

1 The appeal is upheld with costs including those occasioned by the use of two counsel.

2 The order of the court below is replaced with the following order:

‘The fidelity fund certificate of the first respondent lapsed by reason of his conviction on 37 counts in terms of paras 1 and 2(1), read with para 30(1)(b), of the Fourth Schedule to the Income Tax Act 58 of 1962, and on two counts in terms of s 28(1)(b) , read with s 58(d), of the Value Added Tax Act 89 of 1991.’

C H Lewis
Judge of Appeal

Concur:

Howie P
Cameron JA
Navsa JA
Brand JA