



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 666/06

In the matter between :

JEAN JACQUES TALJAARD

Appellant

and

T L BOTHA PROPERTIES

Respondent

Before: CAMERON, NUGENT, CLOETE, PONNAN JJA & SNYDERS AJA
Heard: 17 MARCH 2008
Delivered: 28 MARCH 2008
Summary: Estate Agency Affairs Act 112 of 1976 – section 34A – estate agent not entitled to remuneration if functions performed in absence of fidelity fund certificate – client who pays remuneration in such circumstances not entitled to claim its return.
Neutral citation: Taljaard v Botha Properties (666/06) [2008] ZASCA 38 (28 March 2008)

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] The respondent is an estate agent. In April 2004, in performance of a mandate given to it by the appellant, the respondent brought about the sale by the appellant of certain fixed property for the sum of R630 000. It had been agreed between the parties that in return for performing its mandate the respondent would be paid R30 000 by the appellant and the sum was duly paid. At the time the agreement of mandate was concluded (and the mandate was performed) – unbeknown to the appellant at the time – a fidelity fund certificate had not been issued to the respondent under the Estate Agency Affairs Act 112 of 1976. Alleging that the agreement of mandate was for that reason invalid the respondent claimed return of the remuneration. The claim failed in the magistrates' court, and failed again on appeal to the High Court at Cape Town (Fourie J, with whom Traverso DJP concurred). This further appeal is before us with the leave of this court.

[2] Although s 26 of the Act has been amended and substituted from time to time the prohibition that is now material has remained unaltered.¹ The section prohibits any person from performing any act as an estate agent unless a fidelity fund certificate has been issued to him or her. In 1985 the section as it then was – which contained a prohibition in the same form – came under consideration in *Noragent (Edms) Bpk v De Wet*.² It was held in that case that the section did not have the effect of invalidating the contract of mandate of an estate agent who acts in contravention of its terms and that he or she was entitled to enforce a contractual claim for commission.

¹ The section was amended by s 3 of Act 10 of 1985, substituted by s 5 of Act 40 of 1986, and again substituted by s 10 of Act 90 of 1998.

² 1985 (1) SA 267 (T).

[3] It was clearly in response to that decision that s 34A was inserted into the Act the following year.³ In its initial form s 34A provided as follows:

‘Any person acting contrary to the provisions of section 26, shall not be entitled to remuneration in respect of a transaction concluded by him as an estate agent while failing to comply with the provisions of section 26.’

In 1998 the section was substituted⁴ and the material portion now reads as follows:

‘(1) No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act [of an estate agent], unless at the time of the performance of the act a valid fidelity fund certificate has been issued...to such estate agent...’.

[4] It was submitted on behalf of the appellant that the effect of the section is to invalidate the contract of mandate between the appellant and the respondent (pursuant to which the respondent became entitled to its remuneration with the result that the payment made by the appellant in ignorance of the invalidity of the mandate is recoverable by the *condictio ob turpem vel iniustam causam* (which allows for the recovery of money that has been paid in terms of an unlawful agreement⁵).

[5] 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

³ The section was inserted by s 10 of Act 40 of 1986.

⁴ By s 18 of Act 90 of 1998.

⁵ The Law of South Africa ed WA Joubert 2 ed Vol 9 ‘Enrichment’ by JG Lotz (updated by FDJ Brand) para 214; Wouter de Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3ed pp. 161-171.

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*.

[6] It was also submitted on behalf of the appellant that s 34A itself implicitly confers a right of action upon the appellant to recover remuneration that has been paid contrary to its provisions. It was submitted that by disentitling an estate agent from remuneration the section not only disentitles him or her from claiming the remuneration but also disentitles him or her from retaining remuneration that has been paid. The implication, so it was argued, is that a right of action is conferred by the section for its return. For it would be anomalous, so it was argued, if an estate agent were to be precluded from claiming remuneration but permitted to retain remuneration that has been paid.

[7] It seems to me that that misconstrues the purpose of the section. 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,⁶ 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.

⁶ Section 34 provides that ‘any person who contravenes or fails to comply with any provision of this Act’ shall be guilty of an offence.

[8] It is well-established that legislation is to be construed so as to interfere as little as possible with established rights.⁷ While it might indeed seem anomalous that an estate agent is prohibited from enforcing a claim for remuneration that has become due, but may retain that remuneration if it has been paid, that apparent anomaly arises as no more than an incident of the purpose of the section. Had it been intended to confer a right of action upon a client for recovery of moneys that became contractually due it would have been a simple matter to do so in express terms. Absent the express conferral of a right of action I do not think it is conferred by necessary implication.

[9] The appeal is dismissed with costs.

R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

CAMERON JA)

CLOETE JA)

PONNAN JA)

SNYDERS AJA)

⁷ Steyn *Die Uitleg van Wette* 5ed p. 97.