

Dear Colleagues

Taljaard v T L Botha Properties

[2008] JOL 21574 (SCA)

Judgment date: 28/03/2008

T L Botha Properties, and estate agency, was instructed to market a property belonging to Taljaard. For this purpose, the estate agency and Taljaard entered into a mandate agreement in terms of which Taljaard would pay the agent an amount of R 30 000 as commission upon the successful sale of the property. Taljaard's property was subsequently sold and transferred as a result of the efforts of the estate agent and in terms of the mandate given, Taljaard paid the agent an amount of R 30 000 commission.

It transpired later that at the time that the agent and Taljaard contracted, the agent was *not* in possession of a Fidelity Fund Certificate. Taljaard instituted action against the estate agency to return the commission paid, based on section 26 and 34A of the Estate Agent's Affairs Act, 112 of 1976.

Section 26 prohibits any person from performing any act as an estate agent unless a fidelity fund certificate has been issued to him/her. It reads as follows:

- "1) 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."

And **section 34A** determines that an estate agent shall not be entitled to remuneration in the following 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 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.

Taljaard submitted that the effects of these sections were to invalidate the contract between him and the agent and hence that he is entitled to return of the commission paid to the agent.

Held:

- That section 34A does not invalidate the contract of mandate between an agent and a client where the agent acts in conflict with section 26; but
- That section 34A aims to penalize agents who have breached section 26. An estate agent who claims remuneration in conflict with section 34A (i.e. when he practiced without a fidelity fund certificate) might expose himself to criminal action and will be prevented from enforcing his claim for commission.
- It does not follow, however, that a contracting party who had settled his/her contractual obligation to pay commission to the agent, is accorded a right of action for its return.
- Accordingly, whereas the payment of commission was made in pursuance of a valid agreement of mandate, the court found that it was not recoverable by Taljaard.

In support of the above conclusion, the court stated that it is well established that legislation must be construed to interfere as little as possible with established rights. Therefore, 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 section 34A. Had it been the legislature's intention 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. In the absence of express provisions to this effect in the act, it cannot be said that such a recovery claim is conferred by necessary implication.

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