



Miltons Matsemela Inc

The Conveyancers

CASE LAW UPDATE: TRADING WITHOUT A FIDELITY FUND CERTIFICATE – CLAIMING COMMISSION AND ENFORCING A RESTRAINT OF TRADE

There have been two recent cases dealing with agencies that traded without Fidelity Fund Certificates (FFC's) which we thought would be of interest to you. Here are summaries of the two cases:

CLAIMING COMMISSION WITH AN FFC THAT WAS BACKDATED

What are an estate agent's rights to claim commission when they have complied with all the requirements but have still not been issued with a valid FFC? This is the question that was decided in the Cape High Court case of SIGNATURE REAL ESTATE (PTY) LTD v CHARLES EDWARDS AND OTHERS in December 2018. In this case the estate agency had applied for the re-issue of its FFC in good time and met all the requirements, but the FCC had not been issued at the time that the lease was concluded. Thereafter the EAAB issued the FCC and back dated it to a date before the lease agreement was concluded. Was this sufficient to enable the agency to succeed with a claim for their share of the commission?

The answer is a resounding NO! The judge found that because the agency did not hold the FFC at the time of the lease it was unable to sue for commission, and the agency was unsuccessful. The Estate Agency Affairs Act sadly does not allow for any leeway. If there is no FFC at the time of lease or sale, that is the end of the matter! The judge was of the opinion that the appropriate thing for any agency to do, when it realizes that an FFC is late, is to bring an application to the high court to force the EAAB to issue an FFC in terms of the Promotion of Administration of Justice Act (PAJA).

The message is therefore clear. If the agency does not have a FFC at the time of the lease (or the sale) of the property, the agency will not be able to sue for any commission, or even a share of the commission where the full commission was paid to the listing agency. This is the law even if it is the EAAB's fault that the FFC has not been issued.

This judgment is apparently being appealed and we will advise you if the outcome changes.

ENFORCING A RESTRAINT OF TRADE WHEN AN AGENCY IS NOT IN POSSESSION OF A VALID FFC

Another interesting FFC related judgment was issued in the Bloemfontein High Court on 6 December 2018, in the matter of TRIA REAL ESTATE (PTY) LTD t/a PAM GOLDING v MANDY LABUSCHAGNE, whereby the agency sought to restrain Ms Labuschagne from trading as an agent, in terms of a restraint of trade she had agreed to at the time of her employment.

The crux of her defence was that TRIA was not in possession of a valid FFC. TRIA had converted from a CC to a (PTY) LTD some years ago, but had continued to receive FFC's in the name of the CC. The CC had however ceased to exist when it was converted to a (PTY) LTD.

The court refused to accept the argument that by having converted to a (PTY) LTD, the FFC (in the name of the entity as a CC) was the same as being issued to the (PTY) LTD. The case was dismissed. The court relied heavily on section 26 of the Estate Agency Affairs Act which states that if an agency is a company, every director of the company must also have a valid FFC. A director of a company and member of a CC are not at all the same thing and hence the court came to a very quick conclusion, that the agency had no legal standing to enforce any rights in terms of the restraint.

In making his finding the judge declared the contract of employment, and particularly the restraint of trade, to be unenforceable.

What we conclude from this is that any agency which is not in possession of a valid FFC at the time of instituting an action, whether it be to enforce a restraint or any other claim or right, which seeks to protect its business, may very well face the same dilemma, regardless of the reason for the FFC not having been issued.

In making his finding the judge declared the contract of employment to be invalid, null and void and therefore unenforceable. In our opinion this judgment goes too far, as the Estate Agency Affairs Act already sets out penalties for trading without an FFC, and the invalidity of all contracts entered into by the agency is not one of these. This decision might therefore be overturned on appeal. Until then however it is an important precedent that other courts might well follow.

For this reason, any agency which is not in possession of a valid FFC at the time of bringing an application to enforce a restraint may very well face the same dilemma, regardless of the reason for the invalidity / absence of the FFC.

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