

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Appeal No. : A270/2014

In the appeal between:-

**ABEL HENDRIK ERASMUS N.O.**

1<sup>st</sup> Appellant

**ABEL HENDRIK ERASMUS (JNR) N.O.**

2<sup>nd</sup> Appellant

*and*

**VERNA VAN DEN BLINK PROPERTIES CC**

Respondent

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**CORAM:**

KRUGER, MOCUMIE *et* NAIDOO, JJ

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**HEARD ON:**

19 OCTOBER 2015

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**DELIVERED ON:**

22 OCTOBER 2015

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[1] This appeal concerns fidelity fund certificates issued to estate agents under section 26 of the Estate Agency Affairs Act 112 of 1976, in particular where the estate agent is a close corporation.

[2] In the court *a quo* the respondent issued summons against the appellants in their capacity as trustees of the Anthill Real Trust (the Trust) for the payment of commission because the respondent was the effective cause of the lease of property of the trust to the South

African Local Government Association (SALGA). The court *a quo* gave judgment in favour of the respondent.

- [3] The main point argued by Mr Reinders, for the appellant before us is that the respondent close corporation did not have a fidelity certificate as contemplated in section 26 of Act 112 of 1976:

“26. 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.”

- [4] Section 34A of Act 112 of 1976 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 referred to in subparagraph (i), (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-

- (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.

(2) No person referred to in paragraph (c) (ii) of the definition of **'estate agent'**, and no estate agent who employs such person, shall be entitled to any remuneration or other payment in respect of or arising from the performance by such person of any act

referred to in that paragraph, unless at the time of the performance of the act a valid fidelity fund certificate has been issued to such person.”

Paragraph (c)(ii) of the definition of “estate agent” in section 1 of Act 112 of 1976 reads:

“(c) (ii) any person who is employed by an estate agent as defined in paragraph (a) and performs on his behalf any act referred to in subparagraph (i) or (ii) of the said paragraph;”

[5] The trial court made the following findings:

“[16] The plaintiff has led evidence of proof of its incorporation (pgs 38 to 39 of the court bundle), and that she and the plaintiff had been issued with the necessary and valid Fidelity Fund Certificates at the material times by the Estate Agency Affairs Board. As correctly pointed out by Mr Loubser, in my view, the Fidelity Fund Certificate appearing on pg 37 of the court bundle, does meet the requirements of proving that the sole member of the plaintiff and the plaintiff (a close corporation) were duly issued with a valid Fidelity Fund Certificate. The certificate clearly shows *ex facie* that:

- 16.1 It is issued to ‘VAN DEN BLINK VERNA LOUISE’,
- 16.2 In her ‘capacity’ as ‘Principal (Sole Proprietor at Firm), and
- 16.3 Of the ‘Close Corporation’ called ‘VERNA VAN DEN BLINK PROPERTIES trading as Sotheby’s Lew Geffen International Realty Bloemfontein’.

[17] I find no merit in the submission that a separate and distinct certificate, only in the name of the plaintiff itself should have been

issued. After all, the defendant has not led any evidence to that effect but merely sought to lead evidence (by argument from the bar) that such should be the position. I am satisfied that the certificate leaves no doubt about the fact that it has been issued to Ms van den Blink, in her capacity as the principal of the plaintiff specifically mentioned by name in the said certificate. Therefore, as testified by Ms van den Blink, that is how the plaintiff has always operated for years and the Board has never queried its qualification to act as an estate agent, having issued similar certificates to it before. Furthermore, the said certificate was valid for the period in issue (2011).”

- [6] Mr Reinders refers to **Ronstan Investments (Pty) Ltd and Another v Littlewood** 2001 (3) SA 555 (SCA). In the **Ronstan** case the appellants sued the respondent for damages arising from breach of contract by the respondent. In the High Court Fevrier AJ dismissed the appellant’s claim. In the **Ronstan** case the respondent was the sole owner of a company known as Perirand Estates (Pty) Ltd which carried on business as an estate agent. However, the transaction that was relevant for the court case before the Supreme Court of Appeal was concluded by the respondent for his own account and not on behalf of the company. A fidelity fund certificate had been issued to the respondent in his capacity as director of the company. The appellants in the **Ronstan** case contended that because a fidelity certificate had not been issued to the respondent on his own account, he was precluded by section 34A from earning remuneration for any act that he performed as an estate agent. In the Supreme Court of Appeal Nugent AJA (as he then was) stated that a person not issued with a fidelity certificate is not entitled to perform any act as

an estate agent (section 26) and is not entitled to remuneration if that person does work as an estate agent (section 34A) (at par [21] of the judgment).

- [7] In this case the respondent relies on a fidelity certificate issued to “Van den Blink Verna Louise” for the year 2011. Her capacity is stated as being “principal (sole proprietor at firm)”. The words “Close Corporation” or “CC” do not appear on the certificate. At the bottom of the form the name “Van Den Blink” appears together with her ID Number. The certificate was issued to her, not to the CC.
- [8] The court *a quo* took the view that in the case of a close corporation that does business as an estate agent, the certificate is issued to the member or members of the close corporation, not to the close corporation. It is not in dispute that no fidelity fund certificate was issued to the plaintiff close corporation. Mr Loubser for respondent says that no certificate need be issued to the close corporation. Mr Reinders says that where the estate agent is a close corporation a certificate has to be issued to the close corporation as well as to every member. (At this stage I do not deal with employees).
- [9] The regulations dealing with certificates under Act 112 of 1976 appear in GN R 1798 of 29 August 1986, as amended by several other Government Notices. Regulation 9 remained unamended:

“9 (1) Any company or close corporation operating as an estate agent is hereby exempted from the payment of the levy and the contribution

referred to in regulation 2, provided a fidelity fund certificate has been issued to each of its directors, or members contemplated in paragraph (b) of the definition of estate agent in section 1 of this Act.

- (2) Notwithstanding the provisions of subregulation (1), such company or close corporation shall in its own name apply in terms of these regulations for the issue to it of a fidelity fund certificate.
- (3) A fidelity fund certificate referred to in subregulation (2) shall be issued free of charge and shall to the satisfaction of the board be displayed in a prominent position on the premises of the company or close corporation concerned.”

Regulation 9(2) states that a close corporation must in its own name apply for a fidelity certificate which is issued free of charge and which certificate must be displayed on the premises of the close corporation. Thus, if there is any doubt as to the wording of sections 26 and 34A, the regulations make it clear that a separate fidelity certificate must be issued to the close corporation.

[10] It is not in dispute that the respondent close corporation did not have a fidelity certificate issued in its own name. The respondent relied on the fidelity certificate issued to Mrs Van den Blink. That it could not do. In these circumstances it is not necessary to deal with the other issues in this appeal. The appeal must succeed.

## **ORDER**

1. The appeal succeeds.
2. The order of the court a quo is replaced with the following:  
“Plaintiff’s claim is dismissed with costs”.

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**A. KRUGER, J**

We agree.

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**B.C. MOCUMIE, J**

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**S. NAIDOO, J**

On behalf of appellants:

Adv S.J. Reinders  
Instructed by:  
Spangenberg Zietsman & Bloem Att  
BLOEMFONTEIN

On behalf of respondent:

Adv P.J. Loubser  
Instructed by:  
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