

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 3968/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....	15 March 2021
SIGNATURE	DATE

In the matter between:

REAL ESTATE BUSINESS OWNERS OF SOUTH AFRICA NPC

1st Applicant

THE ESTATE AGENTS LISTED IN ANNEXURE "X"

2nd to 210th Applicants

and

ESTATE AGENCY AFFAIRS BOARD

1st Respondent

MINISTER OF HUMAN SETTLEMENTS

2nd Respondent

J U D G M E N T

KATHREE-SETILOANE J:

[1] This application is brought by the Real Estate Business Owners of South

Africa (“REBOSA”) and the 2nd to 210th applicants, on an urgent basis, for certain mandatory relief against the first respondent, the Real Estates Agency Board (“EAAB”), a statutory regulatory body for the real estate agency profession, established by the Estate Agency Affairs Act 112 of 1976 (“Act”).¹

[2] The Act obliges the EAAB to issue a Fidelity Fund Certificate (“FFC”) to a qualifying person who makes a proper application and meets the statutory requirements.² It is a criminal offence for any person to act as an estate agent unless a valid FFC has been issued to him or her.³ An estate agent is not entitled to any remuneration for acting as such unless at the time of so acting, a valid FFC has been issued to him or her.⁴ Every estate agent with an FFC must, by not later than 31 October of each year, apply to the EAAB Board for the issue to him/her of an FFC in respect of the immediately succeeding calendar year.⁵ This application arises from the failure of the EAAB timeously to issue FFCs for 2021 to estate agents who have duly and timeously applied for them.

[3] I enrolled this application as urgent as, at the date of the hearing, a large number of the estate agents involved in this application had still not been issued with FFCs. Their case is urgent because they cannot carry on their profession without risk of arrest and being deprived of any remuneration.

[4] REBOSA, is a non-profit corporation established to promote the common interests of persons engaged in the selling, letting or managing of property. It represents 22 national groups of estate agencies and 573 independent estate agencies, who between them employ 15,113 individual estate agents. In this application, REBOSA acts in its own interest, in the interests of 624 of its members and in the public interest in terms of section 38 of the Constitution (“REBOSA members”).

Common Cause Facts: Perennial Problems Experienced by Estate Agents

[5] The problems experienced by estate agents in obtaining FFC renewals is

¹ Section 2 of the Act.

² Section 16(3) of the Act.

³ Section 26 of the Act.

⁴ Section 34A of the Act.

⁵ Regulation 4(1), GN R2a in GG 39743 of 26 February 2016.

fully described in REBOSA's founding affidavit, which is deposed to by REBOSA's CEO, Mr David Le Roux ("REBOSA's CEO"). He explains that since 2014 when he took over the reins of CEO at REBOSA, there have been consistent problems with the issuing of FFCs. Year after year, come January, large numbers of FFCs have simply not been issued to estate agents who qualify for them. He, by and large, attributes the cause of this to the information technology system of the EAAB ("IT system"). He says that REBOSA has over the years tried to assist the EAAB directly by providing it, on an ongoing basis, with updated lists of "queries" submitted by estate agents to REBOSA. These lists are updated and submitted to the EAAB at weekly and bi-weekly intervals.

[6] However, according to the CEO of REBOSA, even where these lists are submitted to the EAAB, the EAAB often makes inadequate effort to resolve the queries and FFCs remain unissued. For example, the EAAB's finance department will say that payment has not been made by the estate agent in question; yet it is clear that payment has in fact been made. He describes the problem as being so severe, that REBOSA has for the past six years employed an individual, Ms. Fiona Chaitowitz ("Ms. Chaitowitz"), exclusively for the purposes of going into the offices of the EAAB on a regular basis to help the EAAB resolve these issues. She, in effect acts as a "go-between" between the registrations department and the finance department of the EAAB, assisting them in correctly allocating payments made by estate agents and resolving issues in relation to the non-issuing of FFCs. He says that even where REBOSA provides the EAAB with proof of payment by the estate agents, the EAAB does not always act on that information. And, not infrequently, the same information needs to again be provided to the EAAB.

[7] The EAAB has, over the years, publicly acknowledged, at meetings of the Parliamentary Portfolio Committee, that delays in issuing FFC's timeously is caused by its outdated and inadequate IT system and its own internal problems brought on by unskilled and/or unenthusiastic staff. The EAAB has also acknowledged these two problems in its engagements with REBOSA in 2017. The first was during September 2017, when the Deputy Chair of the EAAB Board, Mr Yusuf Patel, acknowledged the problem and pointed blame at the IT system. The second was in December 2017, during a meeting with REBOSA, the EAAB once again acknowledged the problem and blamed it on the IT system. Shortly thereafter, in January 2018, the Registrations

Manager, at the EAAB, circulated an email, dated 12 January 2018, to all stakeholders, wherein he admitted that although the year had started, there were still 946 outstanding queries relating to the issuing of FFCs which was due to an inadequate IT system. Approximately a year later the March/April 2019 edition of the EAAB's e-magazine acknowledged that the EAAB was under-performing and indicated that the EAAB undertook to start with re- engineering its IT system.

[8] During further engagements between the CEOs of REBOSA and the EAAB in December 2019, REBOSA again pointed out the IT problems. The EAAB claimed that the IT system was in the process of being upgraded. This notwithstanding, a great many FFCs were again not being issued timeously. By early January 2020 there were at least 741 outstanding queries relating to unissued FFCs. By 12 February 2020, this number had risen to 1100 which REBOSA made the EAAB aware of. In February 2020, the Acting Chief Information Officer of the EAAB, Mr Mathibela Selepe, made a presentation to REBOSA on the EAAB's proposed IT system upgrade. He also identified the existing IT system as the reason for the EAAB's inability to discharge its obligations and heralded the proposed new IT system as the solution. In April 2020, the Minister of Human Settlements publicly acknowledged that FFCs are not issued on time and attributed the failure to the EAAB's IT system.

[9] None of these allegations are addressed or denied by the EAAB in its answering affidavit. I therefore accept them to be admitted.

Trigger for the urgent application

[10] Notwithstanding the challenges with the EAAB's IT system coupled by poor administration, on 21 January 2021 the *Property Professional* magazine, an industry publication, reported that the EAAB had claimed that all compliant FFC's for 2021 had been timeously issued by 31 December 2020 and that all industry bodies had confirmed this. This according to REBOSA was simply not true because a week later, on 28 January 2021 the 209 individual applicants in this application as well as the 624 REBOSA members listed in annexure "Y" had still not received their FFCs.

Statutory Framework

[11] The objects of the EAAB are set out in section 7 of the Act which reads:

‘Having due regard to the public interest, the objects of the [EAAB] shall be to: (a) maintain and promote the standards of conduct of estate agents; and (b) regulate the activities of estate agents.’

Section 26 of the Act provides:

‘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.’

[12] The term “estate agent” is defined as follows:

‘(b) For purposes of section 3(2)(a), includes any director of a company or a member who is competent and entitled to take part in the running of the business and the management, or a manager who is an officer, of a close corporation which is an estate agent as defined in paragraph (a).’

[13] The effect of section 26 is that an FFC must be held not only by natural persons, but also by corporate entities carrying on the business of estate agents, by directors of those corporate entities, and by their managers and officers. The upshot of this is that if the corporate entity concerned or any of its directors or managers or officers do not hold an FFC, the entire business is precluded from operating as an estate agency.

[14] Section 34 of the Act criminalises a person who carries on the activities of an estate agent without an FFC having been issued to them. Section 34A of the Act provides that an estate agent is not entitled to remuneration unless an FFC had been issued to them at the time of performance of the act in question. It reads:

‘(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.'

[15] Section 16(1) of the Act provides that every estate agent shall within the prescribed period and in the prescribed manner apply to the EAAB for an FFC, and that the application will be accompanied by levies referred to in section 9(1)(a) and the contribution referred to in section 15.

[16] Section 16(3), in turn, provides that subject to certain provisions relating to the lapsing, withdrawal and suspension of FFCs, if the EAAB upon receipt of an application for an FFC together with payment of the relevant levies and contributions is satisfied that the applicant concerned is not disqualified in terms of section 27 from being issued with an FFC, "the board shall in the prescribed form issue to the applicant concerned a fidelity fund certificate or a registration certificate, as the case may be, which shall be valid until 31 December of the year to which such application relates.⁶ It follows from this that: (a) FFCs expire on 31 December of each year; (b) application for an FFC must be made by the preceding 31 October; and (c) an estate agent must have a new FFC by 1 January of each year in order to be able to lawfully operate as an estate agent in that year.

[17] The EAAB is thus under a statutory obligation to issue an FFC to every qualifying estate agent who not later than 31 October makes application to it for an FFC in respect of the succeeding year. It is also under an obligation to issue the FFC to every qualifying

⁶ Regulation 4(1) provides that an estate agent to whom an FFC has already been issued in respect of a specific calendar year shall, unless he/she has ceased or will cease before the end of that year to operate as an estate agent and has advised the EAAB of such fact in writing, by not later than 31 October of that year, apply to the EAAB for an FFC in respect of the immediately succeeding calendar year.

agent before the commencement of the year for which it is applied i.e., not later than 31 December of that year.

Developments in the matter

[18] The overwhelming majority of the 2nd to 210th applicants (“the individual applicants”) are qualifying estate agents who not later than 31 October 2020 duly made application to the EAAB for an FFC in respect of 2021. The EAAB did not issue an FFC to any one of the individual applicants before 1 January 2021. Since the launch of the of this application (29 January 2021), the EAAB has issued FFC’s to 162 of the individual applicants. In relation to the remaining 47 individual applicants, the EAAB says that 12 of them have been de-registered “for one or other reason” due to non-compliance with section 27 of the Act, and 27 of them have provided the EAAB with incomplete applications. In relation to the remaining 8 individual applicants the EAAB provides no answer at all and makes no attempt whatsoever to justify its continuing failure to issue them with FFCs.

[19] Concerning the 624 REBOSA members, REBOSA’s supplementary founding affidavit states that by 9 February 2021, only 41 of the 624 agents listed in Annexure “Y” who are REBOSA members or employees of members (“REBOSA members”) had been issued with FFCs, but this only occurred after REBOSA launched this application.

[20] Subsequently, an additional 32 queries by members of REBOSA were raised on the system. The names of these estate agents have been added to the list of aggrieved estate agents in Annexure “Y”. The EAAB was invited in the supplementary founding affidavit to address these applications on the same basis as the REBOSA members listed on Annexure “Y”. The EAAB does not deny this in its answering affidavit nor does it respond to the allegations or invitation made in relation to them.

[21] REBOSA received affidavits from an additional 36 of estate agents who claimed that they had applied for FFCs on the same basis as the individual applicants did (as set out in paragraphs 14 and 15 of the founding affidavit), except that these estate agents are not applicants in the matter. Their affidavits are attached as SFA1.1 to SFA1.36 of the supplementary founding affidavit.

Standing of the REBOSA applicants

[22] The EAAB does not provide any explanation, in its answering affidavit, for its failure to issue the REBOSA members listed in Annexure “Y” with FFCs. Its only answer is to deny that REBOSA has standing to act on their behalf and in their interest. The sole basis for the denial is that REBOSA “is not a statutory body with powers and rights to act on behalf of its members in the absence of those members.” I consider this challenge to REBOSA’s standing to be patently without merit. REBOSA acts in its own interests, in the interests of its members listed in Annexure “Y” to the founding affidavit, and in the public interest in terms of section 38(a) and (e) of the Constitution.⁷ Section 38 is applicable because the EAAB’s failure to fulfil its statutory duty of issuing FFC’s to the affected estate agents infringes or threatens to infringe their constitutional right to economic activity in section 22⁸ of the Constitution and their right to administrative action in section 33 thereof. For an organisation to act on behalf of or in the interests of its members in terms of section 38 of the Constitution, it does not have to be a statutory body as contended by the EAAB. Provided that there is a threat of, or an, infringement of its members constitutional rights, REBOSA is entitled, in terms of section 38 of the Constitution, to approach this court on behalf of its members.

[23] To restrict REBOSA to the common law requirements of standing would be inimical to the “ideal of a vibrant and thriving civil society which actively participates in the

⁷ Section 38 of the Constitution provides:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its members.

⁸ Section 22 of the Constitution provides: “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

evolution and development of a rights culture” as envisioned in the Bill of Rights.⁹ REBOSA has, in the founding affidavit, set out its interests in protecting its members as well as the rights of the industry as a whole. EAAB does not dispute that REBOSA has worked with it for many years to resolve the challenges relating to the issuance of FFCs to its members. These delays, however, not only affect estate agents, but also the general public and the economy. REBOSA therefore acts both in the interests of its members and in the public interest in terms of section 38(e) and (d) respectively.

[24] REBOSA accordingly has the requisite standing to seek the relief in prayers 3 and 5 of the Notice of Motion on behalf of, and in the interests, of its members listed in Annexure “Y” to the founding affidavit. It also has the requisite standing to seek the order in prayer 5 (structural interdict) of the Notice of Motion on behalf of its members and in the public interests.

REBOSA Members

[25] The REBOSA members listed in Annexure “Y” have applied timeously for their FFC’s but the EAAB has not as yet considered most of their applications. The EAAB does not deny this and nor does it raise a substantive defence for its failure to do so. Those of them who have not yet received their FFCs (583) are accordingly entitled to have their applications determined by the EAAB.

Individual Applicants

[26] As already alluded to, the CEO of the EAAB, Ms. M. Mohlala (“the EAAB CEO”) says in the EAAB’s answering affidavit that 162 of the 209 individual applicants have now been issued with FCCs. In relation to the remaining 47 individual applicants, she asserts that 39 are not entitled to an FFC. Of these 39, she says that the CEO asserts that 12 of them have been de-registered “*for one or other reasons*” due to non-compliance with section 27 of the Act. Although each of the individual applicants has stated, under oath, that he or she is not disqualified

⁹ *Rail Commuter Action Group v Transnet t/a Metro Rail and Others* 2003 (5) SA 518 (C) at 556; *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC).

from being issued with an FFC for any of the reasons contemplated by section 27, the EAAB CEO makes no attempt to produce any evidence that what they say is not true. She does not even allege why each of them has been “*de-registered*”. Her blanket assertion is purely conclusory with no primary facts indicating why each of the 12 applicants are disqualified.

[27] The EAAB CEO furthermore says that the applications of 27 of the individual applicants are incomplete. Each of the individual applicants has stated, under oath, that he or she has applied for the FFC in the prescribed manner and has met all of the regulatory requirements, and that to the best of their knowledge and belief, no reason exists why the EAAB should not have issued them with an FFC. Again, the CEO makes no attempt to produce any evidence that what they say is not true. She does not even allege why the application of each of them is “*incomplete*”. Her blanket assertion is purely conclusory and unsupported by any primary facts. Lastly, the EAAB provides no answer at all to the claims of the 8 remaining individual applicants who have still not received their FFCs.

[28] In so far as the 12 “deregistered applicants” and the 27 who have submitted “incomplete” applications are concerned, I am unable to place any reliance on the EAAB’s conclusory assertions for two primary reasons. The first is that the EAAB has in fact issued FFC’s to two of the estate agents listed in Annexure “AA2” as having been deregistered, namely Harold Pramhas and Joshua Raisun. The EAAB issued them with FFCs on 31 January 2021 and 8 February respectively. This was well before 17 February 2021, which is when the EAAB CEO deposed to her answering affidavit. In the circumstances, I am unable to rely on the CEO’s claim that the 12 individual applicants were not issued with FFCs because they were deregistered.

[29] Second, in relation to the 27 individual applicants listed in Annexure “AA4” who are claimed to have provided incomplete documentation, at least 4 of them have in fact been issued with FFC’s. These applicants are Ms. Greselda Smith, Mr. Jacobus de Wit, Ms.

Johanna Smith and Ms. Sharon van Aarde. The EAAB issued them with FFCs between 3 and 12 February 2021. This was once again well before 17 February when the CEO of the EAAB deposed to her answering affidavit.

[30] A further difficulty I have with the statement of the CEO in respect to these 27 individual applicants, is that she says at paragraph 7 of the answering affidavit that “[c]ommunications were sent to these applicants to provide outstanding documentation but to date they have not. I attach hereto to the relevant communication marked “AA3.1”, “AA3.2”, “AA3.3”, “AA3.4”, “AA3.5”, “AA3.6””. Although the CEO suggests that communications were sent to all the applicants, she only attaches 6 emails. On closer scrutiny of these emails, it is clear that Annexure AA3.1 is from a certain Mr Vukani Mbatha (“Mr Mbatha”) to Akasane Debichund (“Ms. Debichund”). Ms. Debichund is, however, a REBOSA member and not an individual applicant. She is still waiting for her application to be determined by the EAAB. She is, therefore, not one of the 27 individual applicants who the EAAB alleges to have supplied incomplete applications to it. Moreover, this e-mail was only sent to Ms. Debichund on 8 February 2021, which is five weeks after EAAB was obliged to issue her with an FFC. Thus, to the extent that her application was incomplete, she should have been advised of this much earlier and before the 31 December 2020, by when she should have been issued with an FFC.

[31] Annexure “AA3.2” is an email, dated 12 February 2021, from Mr Mbatha to Ms. Beatrice Barbeli (Ms. Barbeli”). She too is not an individual applicant but a REBOSA member whose name is listed on Annexure “Y” to REBOSA’s founding affidavit. Like Ms. Debichund, she is not one of the 27 individual applicants who may have provided incomplete applications to the EAAB. This email was also sent to Ms. Barbeli almost 6 weeks after she should have been issued with an FFC. Annexure “AA3.3” is, similarly, an email from Mr Mbatha, dated 17 February 2021, to Ms. Diane Hosty (“Ms. Hosty”). Ms. Hosty too, is not an individual applicant but a REBOSA member (listed in Annexure “Y” to founding affidavit) whose application has not yet been determined. The EAAB sent her this communication 7 weeks after the EAAB was obliged under the Act to issue her with an FFC.

[32] Annexure “AA3.5” is an email from Mr Mbatha, dated 17 February 2021, to Ms. Wendy K.¹⁰ She is also a REBOSA member and not an individual applicant. She received the email 7 weeks after the EAAB was obliged to issue her with an FFC under the Act. Lastly, Annexure AA”3.4” is an email from Mr Mbatha to Ms. Johanna Smith. She is the only individual applicant listed in Annexure “X” to REBOSA’s founding affidavit. It turns out that although she was sent this email requesting proof of payment of an outstanding balance of R142.20 on 17 February 2021, the EAAB had already issued an FFC to her on 8 February 2021. This notwithstanding, the EAAB CEO deposed to an affidavit on 17 February 2021 indicating that Ms. Smith could not be issued with an FFC because there was outstanding information that she had to supply the EAAB with.

[33] Finally, a further difficulty with these six communications is that none of what is alleged in them is confirmed on affidavit by Mr Vukani Mbatha. As the scribe of these emails, he would have knowledge of the relevant facts, yet he does not verify them on affidavit.

[34] What the results of this brief survey demonstrate, is that the EAAB has provided no primary facts which prove that at least 24 of the individual applicants whose name are listed in Annexure X, have submitted incomplete applications to the EAAB. The CEO’s conclusionary assertions (or secondary facts) that 27 individual applicants listed on Annexure “X” to the founding affidavit have provided incomplete documentation cannot therefore be relied upon.

Supplementary Affidavit and Further Supplementary Affidavit

[35] I heard argument in this matter on Friday, 5 March 2021 in the urgent court. I reserved judgment just before 14h30 that afternoon. On Tuesday, 9 March 2021, at approximately 5.45 pm, which is well after the closure of the court for filing papers, the EAAB’s attorney attempted to file an application for leave to file a supplementary affidavit.

¹⁰ Her surname does not appear on the email.

Since Caselines was frozen, he wrote to my law clerk, Mr. Desmond Rapanyane to unfreeze it. However, since he had already left for home by then, he only discovered the email on Wednesday morning and gave the attorney permission to upload the notice of motion and supplementary affidavit to Caselines. The notice of motion and affidavit was uploaded to Caselines after 10 am on Wednesday, 10 March 2021, and brought to my attention later that morning. My law clerk also received an e-mail from the applicants' attorney on Wednesday morning indicating that he will file a responding affidavit on behalf of the applicants on that day. That affidavit was emailed to my clerk and uploaded to Caselines on Wednesday midday.

[36] The purpose of the supplementary affidavit is purportedly to bring to the attention of the court what the EAAB contends is material evidence in the form of correspondence sent by the EAAB to 41 individual applicants who had not been issued with FFC's as a result of submitting "incomplete" applications or having been "deregistered", respectively. The supplementary affidavit is deposed to by Mr. Ntiyiso Mathebula ("Mr. Mathebula"), EAAB's attorney of record. He states that "an email of which he was not aware was sent to him on 18 February 2021, by the EAAB, which had attached to it "proof of correspondence with estate agents who have not been issued with FFC's" and that he would like "to bring to the attention of the court copies of these emails so that the court can make a decision based on true facts." These emails are annexed to the supplementary affidavit marked Annexures "SA5" to "SA68,

[37] According to Mr. Mathebula, his failure to file the emails was due to the fact that Ms. Deli Nkambule, of the EAAB, had sent them to his personal email address instead of his work email and that, due to the amount of pressure he was under to file the EAAB's answering affidavit by 11 February 2021, he neglected to properly bring the additional emails to the court's attention. Needless to say, Mr. Mathebula only filed the EAAB's answering affidavit a full six days later on 17 February 2021.

[38] I have a number of difficulties with Mr. Mathebula's explanation as set out in the supplementary affidavit. It is only in exceptional circumstances that a court in motion

proceedings will exercise its discretion in favour of a party to the proceedings filing a further set of affidavits. In other words, something new or unexpected must have emerged from the applicants replying affidavit.¹¹ Where, as in this case, argument has been completed, judgment has been reserved and before judgment is granted, a party applies for leave to place a further affidavit before the court, that party will have a heightened burden to demonstrate exceptional circumstances. This is because of the increased possibility of prejudice to the other parties to the litigation, the need for finality and the undesirability of a reconsideration of the whole case.¹²

[39] The first difficulty which I have with Mr. Mathebula's supplementary answering affidavit is that none of the attached annexures constitute admissible evidence that there were valid grounds for refusing to issue FFC's to the individual applicants concerned. Notably, none of the allegations in the annexures marked "SA5" to "SA68" is confirmed on affidavit by anyone who has knowledge of the relevant facts. In the circumstances, the supplementary affidavit does not bear on the question in issue, namely whether the EAAB has proved that it is justified in refusing to issue FFCs to those individual applicants, each of whom have deposed to an affidavit saying that he or she had filed a fully compliant application, and that there is no ground under section 27 of the Act which justifies a refusal.

[40] The EAAB also seeks to bring to the attention of the court emails or communications that were sent to 36 of the estate agents whose names are listed on Annexure "Y" to the founding affidavit. Similarly, none of what is alleged in these communications is confirmed on affidavit by anyone who has knowledge of the relevant facts. The applicants cause of action is that applicants have a right to an FFC and the EAAB has not produced admissible evidence that they do not have such right. Their cause of action is not that an email was not sent to them.

¹¹ Erasmus, *Superior Court Practice*, Vol. 2 at RS 9. D1-67.

¹² Erasmus (above)

[41] Mr. Mathebula refers to a confirmatory affidavit deposed by the EAAB CEO confirming the allegations in his affidavit that refer to her. No such affidavit is attached. He also refers to a confirmatory affidavit deposed to by Ms. Karen Son, an employee of the EAAB. Annexure "SA3" which is supposedly his confirmatory affidavit is, however, unsigned and not attested to. Mr. Mathebula also refers to "SA4" which is supposedly the confirmatory affidavit of his associate, Mr. Pule Malahlele. This affidavit is also unsigned and not attested to. As I view it, the EAAB's supplementary affidavit provides no evidence at all as to the truth of what is stated in the attached emails and communications marked "SA5" to "SA68" and will not take its case any further.

[42] Mr. Mathebula's version is essentially that he only became aware of the emails and attached correspondence marked "SA5" onwards when it was brought to his attention by the CEO of the EAAB after the hearing, that she had instructed her staff to let him have all correspondence which the EAAB had sent to the individual applicants before she deposed to the affidavit. I am not convinced of Mr. Mathebula's explanation for the simple reason that the CEO of the EAAB, who deposed to its answering affidavit on 17 February 2021, is an admitted attorney. As such, I must assume (as I do) that she would have read her affidavit before signing and attesting to it. Having done so (including initially each page of the affidavit and the attached annexures), I fail to understand how she could have failed to notice that the correspondence (other than annexures AA3.1 to AA3.6) which Mr. Mathebula now wishes to bring to the attention of the court, was not attached to the answering affidavit. A party seeking an indulgence must make full disclosure. This is simply lacking as neither Mr. Mathebula nor the CEO have provided an explanation for how she could have failed to notice this.

[43] In addition, Mr. Mathebula says that he received the email (of which he was unaware) from Ms. Deli Nkambule on 18 February 2021 with the attached emails marked annexures "SA5" to "SA68". However, on closer scrutiny it is readily apparent that several of these annexures appear to be generated or printed by the EAAB on Monday, 8 March 2021. For example, Annexure "SA5" is entitled "The Estate Agency Affairs Board". Stated on the top right-hand side is "Date 08/03/2021" and "Time 19:51. On the bottom the words

“Printed by SAP Business One”. SAP Business One is the EAAB’s current IT system. What is clear from this, is that this annexure seems to have only been printed or generated by the EQAB’s SAP Business One IT system on Monday, 8 March 2021. This is three days after the date of the hearing. The same is true of the following annexures: “SA11”; “SA13” (second page); “SA14”; “SA16”; “SA17”; “SA22”; “SA23”; “SA24”; “SA32”; “SA33”; “SA47”; “SA52”; “SA65”; “SA66”; and “SA68”. The two annexures marked “SA36” appear to have also been generated by the EAAB’s IT system on Tuesday 9 March 2021. Although it is not possible for the abovementioned annexures to have been sent to Mr. Mathebula on 18 February 2021, he provides the court with no explanation for this conundrum.

[44] This, as pointed out by REBOSA’s CEO, is further evidence of the disarray in the EAAB and the concerns raised by REBOSA in the founding affidavit in the urgent application. The contents of the supplementary affidavit reinforce what has been already been argued before me about the way this litigation has been conducted by the EAAB. What the EAAB seeks to do in this affidavit is to plug the holes in its case that were pointed out during the hearing. Thus, in view of the patently dissatisfactory explanation provided by Mr. Mathebula coupled with the lack of admissible evidence, I refuse the EAAB leave to file the supplementary answering affidavit.

[45] On Thursday, 11 March 2021, at approximately 15h17, the EAAB uploaded a further supplementary answering affidavit to Caselines. It did so without advising me through my law clerk, Mr Rapanyane. It, therefore, only came to my attention on Friday morning. This affidavit comprises more than 550 pages and is approximately 12 times as long as the EAAB’s answering affidavit. The EAAB, however, offers no explanation for filing yet another supplementary answering affidavit. Nor does it seek leave, on notice of motion, from the court to file such further supplementary affidavit.

[46] As I understand it, the further evidence which the EAAB seeks the court to admit relates to the status of the applications of the REBOSA members whose names appear in annexure “Y” of the founding affidavit. You may recall, that the EAAB had challenged

the locus standi of REBOSA to act on behalf of, or in the interest of these members in the answering affidavit. They, in fact, persisted with that challenge during argument. They, moreover, failed to plead over in answer to the allegations, in the founding affidavit, in respect of these estate agents. Despite this challenge, and its failure to pertinently pleaded over, they now tailor their further supplementary affidavit to meet both the applicants' arguments raised at the hearing, and their response to the allegations in the supplementary affidavit.

[47] As alluded to, the application was served on 29 January 2021. The EAAB was required to file its answering affidavit by 11 February 2021. It instead filed its answering affidavit of 17 February 2021. Nowhere in its answering affidavit did it state that due to the tight time constraints, it did not have time to prepare a full answering affidavit and reserved its rights to supplement it. It also did not attempt to supplement its answering affidavit before the hearing on 5 March 2021, with the 550 pages of evidence which it now seeks to adduce in its further supplementary affidavit. When it became apparent at the hearing that its defence had no merit, it attempted to remedy the weaknesses in its case by filing a supplementary affidavit. When the defects in that affidavit were exposed by the applicants in their responding affidavit, the EAAB sought to plug those gaps by filing a further supplementary affidavit containing evidence which was available to the EAAB earlier, but it elected not to place before the court.

[48] Significantly, Mr. Mathebula also seeks, in the further supplementary affidavit, to provide the court with the confirmatory affidavits of the CEO of the EAAB, his associate Mr. Kwezi Mqoboli and Ms. Karen Son of the EAAB. Yet nowhere in that affidavit or in a note to court (through my clerk), for that matter, does he explain that due to tight time constraints it was not possible to provide the court with signed and attested copies, but it will do so in due course. These confirmatory affidavits were produced three days later. Conduct of this nature, in litigation, is simply impermissible and abuse of the rules of court.

[49] The EAAB was not entitled to file a further supplementary affidavit without leave of the court. It provides no explanation for why the evidence which it wishes the court to

admit in relation to the REBOSA members listed in Annexure “Y”, was not provided to the court prior to the hearing of the matter. I ruled that this matter was urgent, heard argument and reserved judgment indicating that I would give judgment before the end of the week. However, due to the conduct of the EAAB in filing two sets of supplementary affidavits, the handing down of judgment has been delayed to the inconvenience of the court and the prejudice of the applicants.

[50] It would take a substantial period for the applicants to analyse and respond to the more than 550 pages of annexures which have now been attached to this further supplementary affidavit relating to the 624 REBOSA members, in whose interest REBOSA acts. This will no doubt lead to another attempt by the EAAB to fill the gaps in its case by introducing a further affidavit. This will require a rehearing of argument and a further delay in finalization of this matter. For these reasons, I find that it is not in the interests of justice that this affidavit be admitted into evidence.

No disputes of facts

[51] Thus, as things stand on the affidavit evidence before me on the date of the hearing of the matter, there is no dispute of fact with regard to whether the 39 individual applicants are entitled to an FFC.¹³ There is also no dispute of fact in relation to the 8 individual applications in respect to whom the EAAB simply failed to provide an answer. As indicated, all 47 of these individual applicants have alleged under oath that they are entitled to FFCs as their applications are fully compliant with the provisions of the Act. As already demonstrated, a conclusory assertion to the contrary without admissible evidence of the relevant facts does not give rise to a dispute of fact, particularly where it has been demonstrated that the EAAB’s assertions cannot be relied upon.

[52] To create a dispute of fact in relation to those estate agents who have allegedly been deregistered, the EAAB would need in each instance to produce admissible evidence of the deregistration of that estate agent, and of the breach committed by that particular estate agent. A blanket conclusory assertion is not evidence. Furthermore, in

¹³ *Wright v Wright* 2015 (2) SA 262 (SCA) at para 15.

relation to those estate agents who allegedly provided insufficient documentation, to create a dispute of fact, the EAAB would be required, in each instance, to identify what documentation that estate agent did not provide and produce admissible evidence that he or she did not provide it. The EAAB has patently failed to do any of this.

[53] As to the 624 (less 41 who have received FFCs) estate agents listed in annexure “Y” to the answering affidavit, REBOSA alleges that they have properly applied for FFCs, but their applications have not yet been considered and determined by the EAAB. The EAAB does not deny this in its answering affidavit. Its only response is that these estate agents are not applicants and that REBOSA does not have standing to represent them because it is not a statutory body. As I have already found, REBOSA has standing to act in its own interests, in the interests of its 624 members listed in Annexure “Y” and in the public interest. There is accordingly no dispute of fact in respect of these estate agents as the EAAB has produced no effective answer in relation to why they are not entitled to the relief in prayer 3 of the notice of motion.

Relief Sought

[54] The applicants seek final mandatory relief. The requirements for such relief are trite: (a) The applicant must have a clear right, (b) There must be a reasonable apprehension of harm to the applicant if the interdict is not granted, and (c) The applicant must have no other appropriate remedy except the interdict.¹⁴

[55] Section 16(1) of the EAA Act provides that an estate agent “shall within the prescribed period and in the prescribed manner apply to [the EAAB] for a fidelity fund certificate, and such application shall be accompanied by the levies referred to in section 9(1)(a) and the contribution referred to in section 15”. All the remaining 47 individual applicants state on oath that they have applied for an FFC within the prescribed period and in the prescribed manner. Each of them has paid the levies referred to in section 9(1)(a) and the contribution referred to in section 15. None of them are disqualified from being issued an FFC under section 27 of the EAA Act, nor

¹⁴ *Selegelo v Selegelo* 1914 AD 221.

are the provisions of section 28(1), 28(5) or 30(6) applicable to any of them. The EAAB has adduced no evidence to the contrary. In the circumstances, section 16(3) of the Act which provides that the EAAB “shall in the prescribed form issue to the applicant concerned a fidelity fund certificate... which shall be valid until 31 December of the year to which such application relates” has application. Each one of the individual applicants who has not already been issued with an FFC is therefore entitled to be issued with an FFC.

[56] The REBOSA members listed in Annexure “Y” who have not yet received FFCs also have a clear right to have their applications for an FFC processed and determined without further delay. If the EAAB declines to issue an FFC to them, they are entitled to know the reason for this. REBOSA seeks this relief on their behalf in prayer 3 of the notice of motion.

[57] Section 34A(1)(a) of the Act provides that “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) or paragraph (a) of the definition of ‘estate agent’ unless at the time of the performance of the act a fidelity fund certificate has been issued to such estate agent”.

[58] As is clear from the provisions of section 34A, the injury or harm apprehended by estate agents is arrest and prosecution, being precluded from earning remuneration, and the infringement of their constitutional right in section 22 of the Constitution which provides that “every citizen has the right to choose their trade, occupation or profession” and “the practice of a trade, occupation or profession may be regulated by law”. The effect of the EAAB’s failure to issue FFCs is to prevent estate agents from carrying on their occupation and earning a livelihood from it, without any lawful basis. As aptly explained by the CEO of REBOSA, “if its members work as estate agents without an FFC, they are at risk of not being entitled to remuneration for the services they provide, and at risk of arrest and prosecution. If they stop working as estate agents, they will be unable to support themselves and

those who are financially dependent on them. Whatever choice they make, they suffer very material injury and harm as a result of the failure of the EAAB to issue them with an FFC". This would apply equally to the individual applicants who have not received their FFCs.

[59] The applicants have adequately demonstrated why they have no alternate remedy. As is apparent from its answering affidavit, REBOSA has gone to great lengths to assist its members and, indeed, all estate agents who are in the same boat, to timeously obtain their FFCs. All attempts at doing so without recourse to the courts have come to naught.

[60] I am accordingly satisfied that the applicants who have to date not been issued with FFCs and/or those whose applications have not yet been considered by the EAAB are entitled to the relief sought in prayers 2 and 3 of the notice of motion.

Structural Relief

[61] The relief sought in paragraph 5 of the notice of motion requires that the EAAB file a report with the court essentially setting out the extent of the continuing failure to issue FFCs. This prayer addresses the undisputed fact that the EAAB has for several years failed to issue FFC's timeously. This has been a systemic problem which extends as far back as 2015. It has repeatedly been raised by the Portfolio Committee of the National Assembly and by REBOSA. Even the Chairman of the EAAB and the Minister of Human Settlements have acknowledged this.

[62] A report of the nature sought in paragraph 5 of the Notice of Motion is an essential means for more effective relief in the form of a structural interdict should the EAAB, in the future, fail in its statutory obligation to provide estate agents with FFCs by the due date i.e., 31 December of each year. REBOSA seeks this relief in the interest of its members and in the public interest. I am satisfied that it has made out a case for this relief.

Punitive Costs

[63] The applicants seek a punitive costs order against the EAAB. I am of the view that the EAAB's sustained breach of its statutory duties and its failure to acknowledge any wrong is a sufficient basis to justify an order of costs on the scale as between attorney and client. It has in addition taken unmeritorious technical and dilatory defences and failed to engage fully with the merits of the case. It opposed the application by 8 individual applicants in respect of whom it provided no answer at all. It furthermore challenged the standing of REBOSA to act in the interests of its 624 members but failed to plead over and engage with their case on the merits.

[64] The EAAB had also issued FFC's to 162 of the 209 individual applicants after the launch of the urgent application, but simply failed to provide the court with an explanation or apology for its failure to act earlier. Notably, the EAAB not only did not tender the applicants' costs but contended that the applicants should be ordered to pay the costs, despite knowing full well that it was their failure to act earlier and timeously, which necessitated the urgent application.

[65] The applicants are also entitled to a punitive costs order in their favour in respect of the EAAB's application for leave to file a supplementary affidavit and in filing a further supplementary affidavit without seeking leave from the court to do and without providing an explanation for adducing evidence which would have been at its disposal prior to the hearing of the urgent application.

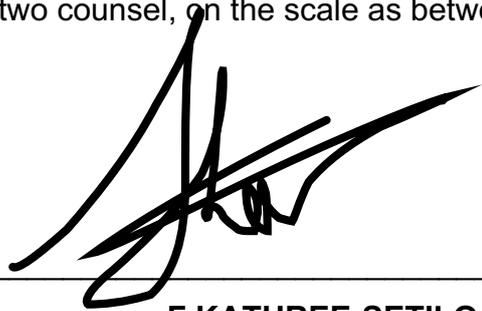
[66] The applicants seek a personal costs order against the CEO of the EAAB. I do exercise my discretion in favour of making this order. While her conduct in this litigation can hardly be described as beyond reproach, I am not convinced that she acted recklessly or with mala fides. There is an ongoing relationship between the EAAB and REBOSA. For a proper resolution of the challenges that the EAAB is experiencing with the timeous issue of FFCs, their respective CEO's need to co-operate and work with each other. A personal costs order in my view is likely to destroy any chance of that happening.

[67] In the result, I make the following order:

1. This application is urgent as contemplated by Rule 6(12) and the usual forms, manner of service and time periods set out in the Uniform Rules of Court and in the Practice Directives of this Court are dispensed with.
2. The first respondent (“the EAAB”) is ordered, within 8 days of this order, to issue a fidelity fund certificate to each of the applicants listed in Annexure “X”, who at the date of hearing has not yet been issued with a fidelity fund certificate in terms of section 16 of the Estate Agency Affairs Act 112 of 1976 (“the Act”).
 - 2.1 If there are proper grounds for the EAAB to decline to issue a fidelity fund certificate to the person or entity concerned, the EAAB is ordered to inform that person or entity of the reasons for doing so, within 8 days of the order.
3. The EAAB is ordered, within 15 days of this order, to determine the applications made by each of the estate agencies and estate agents listed in Annexure “Y” for a fidelity fund certificate in terms of section 16 of the Act, who at the date of hearing have not yet had their applications determined or their FFCs issued.
 - 3.1 If the determination of the EAAB is to issue a fidelity fund certificate to the person or entity concerned, the EAAB is ordered to issue such certificate to that person or entity within 5 days of that determination.
 - 3.2 If the determination of the EAAB is to decline to issue a fidelity fund certificate to the person or entity concerned, the EAAB is ordered to inform that person or entity of its determination and the reasons for it, within 5 days of that determination.

4. The EAAB is ordered, within 30 days of this order, to file a report with this Court and to serve a copy on the applicants, which report shall indicate:
 - 4.1 How many applications were lodged by estate agencies and estate agents with the EAAB on or before 31 October 2020 for a fidelity fund certificate for the year commencing 1 January 2021;
 - 4.2 In how many of the applications referred to in para 4.1 has the EAAB determined that a fidelity fund certificate will be issued;
 - 4.3 In how many of the applications referred to in para 4.2 has a fidelity fund certificate been issued to the estate agency or estate agent in question;
 - 4.4 In how many of the applications referred to in para 4.1 has the EAAB determined that a fidelity fund certificate will not be issued;
 - 4.5 The total number of current unresolved queries lodged by estate agents with the EAAB;
 - 4.6 What is the total of the funds currently held by the EAAB in its suspense account.
5. The applicants are granted leave, should they allege that the EAAB has not complied with any part of this order, to set the matter down for further hearing by this Court on an urgent basis for the granting of further relief, on the papers already filed and such further papers as they may be advised to file.
6. The EAAB is ordered to pay the applicants' costs of the application, including the costs occasioned by the employment of two counsel, on the scale as between attorney and client;

7. The costs in paragraph 6 above are to include the costs in relation to the 162 applicants who were issued with Fidelity Fund Certificates after the launch of the urgent application on 29 January 2021.
8. The application for leave to file a supplementary affidavit is dismissed with costs, including the costs occasioned by the employment of two counsel, on the scale as between attorney and client.
9. The EAAB's further supplementary affidavit which was uploaded to Caselines on 11 March 2021 is struck with costs, including the costs occasioned by the employment of two counsel, on the scale as between attorney and client.



**F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances

Counsel for the applicants: G Budlender SC with Mr. K. Hopkins

Instructed by: Cliff Dekker Hofmeyr Inc

Counsel for the first respondent: Mr. W Mokhare SC with Mr. TB Hutamo

Instructed by: Mathebula Nkosi Attorneys

Date of hearing: 5 March 2021

Date of Judgment: 15 March 2021

Judgment uploaded to Caselines

