

April 2015

"A man must be big enough to admit his mistakes, smart enough to profit from them, and strong enough to correct them." John C. Maxwell

AGENT'S COMMISSION FOR A "ONCE-OFF" SALE

The Estate Agencies Act ("the Act") prohibits estate agents to act in such a capacity if he / she is not in possession of a valid fidelity fund certificate and will therefore not be entitled to earn commission on a sale.

The purpose of the Act is to protect the public from arbitrary acts of estate agents which may result in a loss to the public. The purpose of the fidelity fund is to act as a method of insurance to any person who has suffered a loss due to the mismanagement or theft, whether negligent or intentional, of funds entrusted to an estate agent.

The question arises whether a natural person that is not an estate agent who facilitates a sale of immovable property is entitled to remuneration for services?

In the matter of *Rogut v Rogut* the court reiterated the necessity of an estate agents' fidelity fund certificate. The learned judge stressed the purpose of the Act being the protection of the general public. The Act clips the wings of those who hold themselves out to be estate agents in that they are required to register as such and obtain a fidelity fund certificate. However, the court continued to note that where a person does not hold himself / herself out as an estate agent nor advertise as such, the Act will not be applicable. Thus if a person merely acts under the mandate of a friend, he will still be entitled to his remuneration despite not being in possession of a valid fidelity fund certificate.

The principle of *Rogut* was applied in the recent matter of *Papenfus v Torre* and was subject to caution in that every matter is to be adjudicated on a case by case basis. The bottom line being that if a person does not hold himself / herself out to be an estate agent nor advertise as such and not handle any funds on behalf of a client / friend, he / she will be entitled to an agreed remuneration for services despite not being in possession of a valid fidelity fund certificate.

Law & Laughter

Q: Why won't sharks attack lawyers?
A: Professional courtesy.

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DIRECTOR WITH NO AUTHORITY

Zelpy 1780 (Pty) Ltd (the “Company”) was the developer of a residential complex, La Palma Terraces in the South Coast, Kwa-Zulu Natal. The Company had two directors, also being the shareholders. One of the directors, Van den Berg a minority shareholder and director was authorised as agent of the Company to market the developed units and conclude sale agreements on behalf of the Company.

In 2007 the Company, represented by Van den Berg, concluded a sale agreement for a unit with a purchaser. The Purchaser took occupation before registration and was liable for occupational interest. The Purchaser did not deny his liability for the occupational interests upon same being claimed by the Company. However, the Purchaser contested that he advanced a loan to the Company in terms of a verbal loan agreement entered into by the Company, represented by Van den Berg. The Purchaser requested that the occupational interest be set-off against the outstanding loan amount.

The Purchaser alleged that Van den Bergh was at all times duly authorised to represent the Company. The Company denied concluding a loan agreement with the Purchaser and further denied that that Mr. Van den Bergh had the authority to conclude a verbal loan agreement on behalf of the Company.

The court said where an ordinary director acts on his own, the third party bears the onus of proving that the director had the necessary authority which the Purchaser failed to do. Furthermore ostensible authority could also not be proved by the Purchaser as any oral or tacit representations were made by Mr. Van den Berg alone. The Purchaser never dealt with any other director or agent of the Company. The Company escaped liability as Van den Berg acted outside the scope of his usual authority. The Company was therefore not legally bound to the oral loan agreement and the Purchaser's claim for set-off was dismissed.

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