

No Fidelity Fund certificate: no commission & no valid contract

We previously wrote about the case of *Botha Properties (2008) 3 ALL SA 453 (SCA)*. In that case the court confirmed that an estate agent cannot claim commission, even if all the other requirements of a commission claim have been met, where the estate agent does not have a fidelity fund certificate.

The importance of having a fidelity fund certificate was again emphasized in the case of *Tria Real Estate (Pty) Ltd v Labuschagne and Another (5583/2018) [2018] ZAFSHC 198 (6 December 2018)*. The dispute pertains to the enforceability of a restraint of trade agreement between the agency and an ex-employee.

The agency was a close corporation that was converted into a company. The fidelity fund certificate was, however, still issued in the name of the close corporation.

Based on section 29B of the Companies Act, 1973 the court found that a new entity was actually formed and the previous one ceased to exist when the conversion from a close corporation to a company was done. The certificate, the court furthermore reasoned, therefore was issued to a non-existing entity.

The restraint of trade agreement was consequently invalid and could not be enforced by the agency against the ex-employee.

All estate agencies should therefore ensure that they have validly issued fidelity fund certificates. Where the agency is a company, each director should also have a certificate.

Volker Krüger