

# SUMMARY OF THE JUDGMENT

## AGENCY CONVERTING FROM CC TO COMPANY: EXISTING FFC STILL VALID?

### Tria Real Estate (Pty) Ltd v Labuschagne and Another (5583/2018) [2018] ZAFSHC 198 (6 December 2018)

*Where an estate agency converted from a close corporation to a company, are the Fidelity Fund Certificates issued to the close corporation and its members sufficient and compliant with the requirements of the Act for the purposes of the operation of the (new) company and its directors? The judgment answers this question and illustrates the outcome of a dispute between an estate agency and an ex-intern employee regarding restraint of trade and the validity of the agreement they had entered into.*

The Judgment can be viewed [here](#).

### FACTS

In May 2017, under the umbrella of the company Tria Real Estate (Pty) Ltd (Tria), a large leading estate agency group practicing in the Bloemfontein area concluded an Intern Agency Agreement with Ms Labuschagne. It was specifically recorded that the agreement was governed by the provisions of the Estate Agency Affairs Act 112 of 1976 (the Act) and that Tria had met the necessary requirements to enter into such an agreement as a qualified estate agent holding a valid Fidelity Fund Certificate (FFC). The agreement also contained a restraint of trade clause barring Labuschagne from engaging or participating in the property industry in that area for a period of six months after the termination of the agreement between the parties. It was also provided that Tria had the power to lift the restraint or shorten the period thereof.

In October 2018, Labuschagne resigned from Tria's employment and joined another estate agency as an intern agent. It was at this point that Tria invoked the provisions of the agreement dealing with the restraint.

Amongst the various contentious issues raised by both parties in this matter was the issue regarding the legality or validity of the agreement entered into by them. During the period of Labuschagne's employment (approx. 18 months), she gained knowledge of valuable importance pertaining to the business of Tria. To that extent this matter was of cardinal importance to Tria. Tria therefore approached the Court for an order interdicting and restraining Labuschagne from utilising and/or communicating confidential information relating to its business affairs, property listings, pricing, valuations etc, and from operating in any capacity in the residential property market in certain suburbs.

Labuschagne however argued that since Tria was a company with limited liability operating as an estate agency, it was required to hold an FFC in the name of the company, which it did not. (It appeared that Tria had converted from a close corporation to a company some time ago, and that the FFC still reflected Tria's registration as a close corporation. In addition, she argued the agreement was void and unenforceable because all directors of the company did not possess an FFC.

**HELD:**

- There are two fundamental flaws that rendered the agreement between the parties invalid and therefore unenforceable. Firstly, the applicant was cited as Tria Real Estate (Pty) Ltd, followed by its "trading as" name. This meant that it was a company with limited liability registered in accordance with the laws of the Republic. It was a legal entity that could sue and be sued in its own right. It had a legal personality separate from that of its directors. Its core business was that of an estate agency.
- The FFC was issued in the name of Tria Real Estate CC. A close corporation is also an entity with a separate identity to that of its members, has its own legal personality and can sue and be sued in its own name. But it is a different type of entity to a company; a company being cited as the applicant in this matter.
- The close corporation was converted into a company (Tria) in December 2013, which meant that the close corporation ceased to exist as far back as then. The FFC was accordingly issued to a non-existing entity. There also was no plausible explanation as to why, five years later after the conversion of the close corporation to a company, the certificate was still issued in the name of a non-existing entity. The Court added that "any 'assurance' by the officials of the Estate Agency Affairs Board that there was nothing wrong in such conduct despite a glaring transgression of the law is unacceptable".
- Regarding Labuschagne's second argument that the agreement was void because all directors of Tria did not possess an FFC, section 26 of the Act prohibits any person from performing any act as an estate agent unless a valid FFC has been issued to him or her. In the event that such a person is a company, each and every director of that company must also possess a valid FFC. The same applies to close corporations in that all members must possess a valid FFC. This also extends to every person employed by such an entity as an estate agent. It is not enough that the application is being processed at the offices of the EAAB. Our courts have been clear that it is a transgression of the law not to adhere to section 26. The issuing of FFCs to estate agents is to ensure that the public is not hard done by unscrupulous

elements within the property industry. It is a controlling measure to minimise or eliminate the risk that the unsuspecting public may be exposed to. In short, it is a licence to practice without which you cannot practice. Because Tria is a company, its directors must have FFCs issued to them in their capacity as directors, not members of a non-existent cc.

- The absence of an FFC issued to Tria and its directors meant that it nor its directors could act as estate agent(s), which in turn rendered the agreement entered between the parties null and void, and thus unenforceable.

The application therefore failed.

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