

**IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)**

CASE NO:

In the matter between:

THE ESTATE AGENCY AFFAIRS BOARD

Applicant

and

CONSTANTIA SECTIONAL TITLE MANAGEMENT (PTY) LTD

First Respondent

and

QUINTIN BROWN

Second Respondent

NOTICE OF MOTION

TAKE NOTICE that application will be made to the above Honourable Court on **Wednesday the 20th day of APRIL 2011 at 10h00** or as soon thereafter as Counsel may be heard for an order in the following terms:

PART A

1. Condoning the Applicant's failure to confirm with the forms and process provided for in the Uniform Rules of Court and directing that this matter be heard by way of urgency in accordance with the Provisions of Uniform Rule 6(12);

2. That for so long as each Respondent has not been issued with a valid Fidelity Fund Certificate (as contemplated in Section 16, read with Section 1 (vi) of the Estate Agency Affairs Act (No. 112 of 1976) ("the Act") for the calendar year 2011, from trading as estate agents (as that term is defined in the Act), and in particular (but without limitation of the foregoing) that the First and Second Respondents are interdicted and prohibited from the performance of any of the following:

2.1. the acquisition of gain or for their own account, or in partnership, and in any manner holding themselves out as a person who, directly or indirectly advertised that he or she, on the instructions of or on behalf of any other person:

2.1.1. sells or purchases or publicly exhibits for sale immovable property or any business undertakings or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor;

2.1.2. lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvassing or undertaking or offering to canvass a lessee or lessor therefor; or

2.1.3. collects or receives any monies payable on account of a lease of immovable property or any business undertaking; and

2.1.4. instructing or procuring any other person to do or perform any of the activities or functions set out in 2.1 above.

- 2.2. That for so long as each Respondent, estate agent, person or entity referred to below has not been issued with a valid Fidelity Fund Certificate (as contemplated in Section 16, read with Section 1 (vi) of the Act: interdicting and prohibiting the Respondents from causing or procuring an estate agent or person who carries on or intends to carry on the business of an estate agent under a trade name which is identical or confusingly similar to the trade name of the First and Second Respondent, including but not limited to, any entity operating under the name and style of CONSTANTIA SECTIONAL TITLE MANAGEMENT.

PART B

3. That a *rule nisi* be issued calling upon the Respondents and any other interested party to show cause, on **2 AUGUST 2011** at **10h00** or such date to be determined by this Honourable Court, why an order in the following terms should not be made:
- 3.1. That the First and Second respondents are interdicted and prevented from operating in any way on any trust, savings or other interest bearing account of the First Respondent referred to in Section 32 of the Estate Agents Act of 1976 as amended ("the Act") which accounts include, (but are not limited to), the following:
- 3.1.1. Nedbank Account, account number 1983038040;
- 3.1.2. Nedbank Call Account, account number 9015533452;
- 3.1.3. Nedbank Account, account number 1286101840

- 3.2. Appointing Mr Lawrence Moepi as the curator bonis ("the curator bonis") to administer and control such trust, savings and other interest bearing accounts, as are referred tin paragraph 3.1 above, with the following rights, duties and powers:
- 3.2.1. To take care of and administer the said accounts and to make whatever payments therefrom as the curator bonis is authorised to make in terms of the Act.
- 3.2.2. To take care of and administer any account conducted by the First Respondent at any bank, building society or financial institution into which the First Respondent may have, at any time, deposited monies received by it on account of any other person and which monies were deposited pursuant ot the provisions of Section 32 of Act 112 of 1976, in any account.
- 3.2.3. To invest monies from such accounts in the manner contemplated by the Act.
- 3.2.4. To perform any act in respect of the said accounts or monies therein which may be necessary in the interests of the business or the interests of any person or persons entitled to performance of such act.
- 3.2.5. To take any proceedings which may be necessary for protecting the interests of those persons whose monies have been or will be deposited into such account.

- 3.2.6. To grant valid receipts and acquittance for any monies received into any of the said accounts.
- 3.2.7. To make such enquiries as he may deem necessary concerning the whereabouts of monies withdrawn from the said accounts and concerning monies received by the First or Second Respondent in the capacity as an estate agent on behalf of any persons and not paid into the said accounts.
- 3.2.8. To have unrestricted access to the books of account of the First Respondent for the purpose of exercising and giving effect to the powers aforesaid, such access to include the right to remove the books of account for such periods as are consistent with the proper conduct of the business of the First Respondent.
- 3.2.9. To require that the First Respondent and the Second Respondent give the curator bonis such assistance or information regarding the affairs of the First Respondent, as may be necessary to enable the curator bonis to exercise the rights, duties and powers given to him in terms of this order.
- 3.2.10. To require the Second Respondent, within such time as the curator bonis may stipulate, to give unrestricted access to him of the accounting and other books and records and documents of the First Respondent as are necessary to enable the curator bonis to exercise the rights, duties and powers granted to him in terms of this order; such access to include the right to remove

the books of accounts for such periods as are consistent with the proper conduct of the business of the First Respondent.

3.2.11. To delegate the performance of any of the aforesaid rights, duties and powers to any persons as he may deem necessary in his discretion for the due and proper performance of his duties.

3.3. Directing that the Second Respondent deliver to the curator bonis forthwith the accounting and other books, records and documents of the First Respondent and to give the curator bonis such assistance and information regarding the affairs of the First Respondent as may be necessary to enable the curator bonis to exercise the rights, duties and powers granted to him in terms of this order.

3.4. Save with the consent of the curator bonis, the First and Second Respondents are interdicted from:

3.4.1. receiving any monies which they or either of them would upon receipt be required to deposit into a separate account in terms of Section 32 of the Estate Agents Act 112 of 1976, as amended;

3.4.2. committing any act providing for payment to or holding by either or both Respondents of monies referred to in 3.4.1 above.

4. Pending the return date:

4.1. The aforesaid rule nisi is to operate as an interim interdict;

- 4.2. Mr Lawrence Moepi, in his capacity as curator bonis, be and is hereby authorised to exercise the rights, duties and powers conferred on him in terms of paragraph 3.2 above.
5. Directing the First and Second Respondents to pay the costs of this Application jointly and severally, the one paying, the other to be absolved on the scale as between attorney and own client.
6. Further or alternative relief.

TAKE FURTHER NOTICE that the affidavit of **CLIVE MARTIN ASHPOL** and the annexures thereto shall be used in support of the prayers set out above.

TAKE NOTICE FURTHER that if you intend opposing this application that you are required to notify the Applicant's attorneys by fax and email marked for the very urgent attention of Mr Andrew Scarrott (011 463 2007 and andrew@absattorneys.co.za) and to contact Mr Scarrott telephonically on 011 463 7336 or 083 251 2466) to inform him of your opposition **and** to file your answering affidavit by no later than **12h00 on Monday 18 April 2011**.

KINDLY ENROL THE MATTER ACCORDINGLY.



A B SCARROTT ATTORNEYS
c/o Harrison's Attorneys
11 Pilrig Place, 5 Eton Rd, Parktown
Tel: 011-463-7336
Fax: 011-463-2007
Mobile: 083 251 2466

TO: THE REGISTRAR OF THE SOUTH GAUTENG HIGH COURT

AND TO: First Respondent
Panorama Office Park
Koedoe Street,
FLORIDA

AND TO: Second Respondent
Panorama Office Park
Koedoe Street,
FLORIDA

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First Respondent

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QUINTIN BROWN

Second Respondent

AFFIDAVIT

I, the undersigned,

CLIVE MARTIN ASHPOL
(ID number: 511217 5023 082)

do hereby make oath and state that:

1 I am an adult male and I am the Executive Manager: Education and Training and employed by the Applicant. I am duly authorised to depose to this affidavit and to launch these proceedings for and on behalf of the Applicant. A resolution of the Applicant confirming my authorisation is annexed hereto marked Annexure "A".



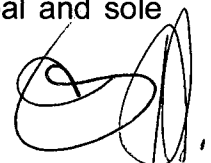
- 2 The facts contained herein are, save where the converse is stated or where the context indicates otherwise, within my own personal knowledge and are to the best of my knowledge and belief, both true and correct.
- 3 Where any legal issues are dealt with in these papers, they are dealt with on the advice given by the Applicant's attorneys and Counsel and I accept that such advice is correct.

4 THE PARTIES

4.1 The Applicant is the Estate Agency Affairs Board, a statutory body established in terms of Section 2 of the Estate Agency Affairs Act, 112 of 1976 ("the Act"). As a juristic person the Applicant has the power to sue and be sued in its own name. The Applicant's principal place of business is situated at EAAB House, Jan Smuts Avenue; corner Albury Road, Hyde Park, Johannesburg, Gauteng.

4.2 The First Respondent is Constantia Sectional Title Management (Pty) Ltd a company duly registered and incorporated as such according to the company laws of South Africa carrying on business as an estate agency and rendering and advertising that they render, inter alia, the services of collecting or receiving money payable by any person to or on behalf of a developer or a body corporate, as defined in the Sectional Titles Act of 1971, in respect of units and proposed units, as defined in the Sectional Titles Act, and rental administration and collections, in terms of the Act, and having its principal place of business at Panorama Office Park, Koedoe Street, Constantia Kloof, Florida, in the Gauteng Province.

The Second Respondent is Quentin Brown an adult male estate agent carrying on business as such subject to the terms of the Act as the principal and sole



director of the First Respondent at Panorama Office Park, Koedoe Street, Constantia Kloof, Florida, in the Gauteng Province.

5 RELIEF SOUGHT

This is an urgent application for:

- 5.1 an interdict prohibiting the First and Second Respondents (hereinafter "the Respondents"), and every person employed by them as an estate agent, from performing any act as an Estate Agent without a valid Fidelity Fund Certificate as required by Section 26 of the Act of the Estate Agency Affairs Act, 1976, until such time as the Respondents have been issued with a valid Fidelity Fund Certificate by the Applicant; and
- 5.2 prohibiting the Respondents and any persons employed by them as Estate Agents from operating in any way on the trust account held in the name of the First Respondent, Nedbank account number 1983038040, and any other savings or interest bearing accounts falling within the definition of a trust account or used to hold funds for and on behalf of third parties; and
- 5.3 appointing a *curator bonis* to control and administer the aforementioned trust, savings and any other interest bearing accounts.

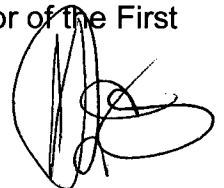
6 As will be set out in more detail below:

- 6.1 The First and Second Respondents operate an estate agency rendering and advertising, inter alia, the services of collecting or receiving money payable by persons to or on behalf of a developer or a body corporate, as defined in the Sectional Titles Act of 1971, in respect of units and proposed units, as defined



in the Sectional Titles Act, and the letting and hiring of immovable property (hereinafter the "Services") under the name and style "Constantia Sectional Title Management".

- 6.2 The Second Respondent is the sole director of the First Respondent. This has been confirmed by Mornay Crouse (hereinafter "Crouse") one of the inspectors appointed by the Applicant as detailed herein. This fact is also confirmed by the results of the Company's office search and the statement to this effect on the First Respondents last audited financial statements annexed hereto as annexures "GN 7" and "GN8" of Annexure B respectively. Wherever I refer to annexures herein prefixed with "GN" I refer to those annexures that relate and are attached to Annexure "B" of the papers.
- 6.3 The First and Second Respondents carry on business as an Estate Agent rendering and advertising the Services as an Estate Agent as aforesaid and specifically as defined by Government Notice R1485/1981 dated 17 July 1981. This notice specifically states that the Services rendered by the Respondents designates them as "Estate Agents" in terms of the Act and makes the Act applicable to their conduct. A copy of this Government Notice is annexed hereto as annexure GN11 for ease of reference. Annexed hereto marked 11(1) is a print out of the First Respondents web site taken on 14 April 2011 showing that they clearly advertise the letting of "Rental units".
- 6.4 The Respondents are prohibited from rendering or advertising any services including the Services, or from carrying on business as an Estate Agent, without a valid Fidelity Fund Certificate having been issued to both the First Respondent and also to the Second Respondent as the sole director of the First

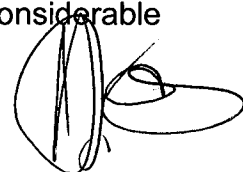
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Respondent, and also to every person employed by them as an Estate Agent in accordance with Section 26 of the Act.

6.5 The Second Respondent has no valid Fidelity Fund Certificate issued to him as required by Section 16 of the Act. The Second Respondent is accordingly prohibited by Section 26 of the Act from rendering any services as an Estate Agent. The Second Respondent is the sole director of the First Respondent and in terms of Section 26 of the Act, every director of the First Respondent is required to have a valid Fidelity Fund Certificate. The First Respondent is accordingly prohibited from performing any act as an Estate Agent as its sole director has no valid fidelity fund certificate.

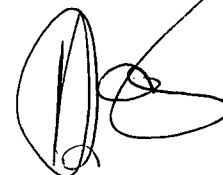
6.6 As the Respondents are prohibited by Section 26 of the Act from performing any acts as Estate Agents, the Respondents were obliged to cease acting as estate agents and to wind up their trust, savings and other interest bearing accounts in the prescribed manner in accordance with Section 32 (7) of the Act. The Respondents have not done so and continue, contrary to Section 26 of the Act, to operate a trust, savings and other interest bearing accounts holding deposits from members of the public notwithstanding the absence of a valid Fidelity Fund Certificate for the Second Respondent. This and the fact that there have been irregularities on the Respondents trust account, makes it necessary for the Applicant to apply to this Honourable Court, urgently, for the relief sought including the appointment of a *curator bonis* in accordance with Section 32 (6) of the Act.

6.7 In collecting levies and dealing with payments for, in excess of 400 Sectional Title complexes, the First Respondent collects and receives a considerable



number of deposits each and every month from the owners of the Sectional Title units. Each and every month the sheer number of deposits received by the Respondents on the first day of each month take up approximately the first 100 pages of the First Respondent's trust account bank statement of Nedbank account number 1983038040. Although the first Respondent also operate two additional accounts as mentioned in paragraph 19.9 below, the one is allegedly "dormant" and the other is a section 32(2)(a) account used to invest trust monies, which account has not been analysed in any detail yet. Where I refer to the First Respondent's trust account or do not specify otherwise I refer herein, as does Matthew Lee Nicholls in his affidavit, to Nedbank account number 1983038040. The First Respondent accordingly collects and receives into trust considerable amounts of money each and every month. This is dealt with further below. This money can only be received by the Respondents as trust monies.

The funds standing to the credit of the trust account need to be protected and dealt with as provided for herein. Only a person holding a valid Fidelity Fund Certificate or authorised to do so in terms of Section 32(6) of the Act, is entitled to administer an estate agent's trust account. The First and Second Respondents are prohibited by Section 26 of the Act from performing any acts as Estate Agents without a valid Fidelity Fund Certificate being issued to the Second Respondent and accordingly it is essential that a curator be appointed to take control over the First Respondent's trust account. This is additionally necessary by virtue of the fact that there clearly appear to have been irregularities on the Trust account as is set out below.

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6.8 Unless a *curator bonis* is appointed there will be nobody entitled to examine the trust, savings and other interest bearing accounts of the Respondents or to deal with the proceeds in these accounts, the Respondents being disqualified from doing so by virtue of their not having all of the requisite valid fidelity fund certificates.

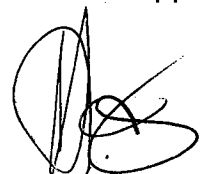
7 LEGAL POSITION

7.1 The Respondents are Estate Agents governed by the provisions of the Act in that, inter alia:

7.1.1 They have registered as such with the Applicant;

7.1.2 The Respondents are receiving and dealing with third parties' funds as trust monies, as indeed they are;

7.1.3 The Respondents are rendering the Services as is envisaged by Government Notice GNR1485 of 17 July 1981, specifying that such services are services for purposes of the definition of "Estate Agent" as defined in Section 1 of the Act. Advertising the letting and hiring of immovable property and the collection and receipt of money payable under a lease is also included as part of conduct the mere advertising of which, would constitute the Respondents as estate agents in terms of the definition thereof in section 1 of the Act and more specifically part (a)(ii) and / or (iii) of the definition of "estate agent" as contained in the Act. The Respondents clearly advertise on their web site that they have "Rental units available" as appears



from annexure GN11.2, a print out of a page from the First Respondents web site taken on 14 April 2011.

7.2 The affairs of Estate Agents and the relevant conduct of the Respondents are regulated inter alia by the Act and the Code of Conduct published in accordance with Section 8(1)(b) of the Act.

7.3 The Applicant has as its object :

7.3.1 the maintenance and promotion of standards of conduct of estate agents and

7.3.2 the regulation of activities of estate agents with due regard to the public interest.¹

7.4 The Applicant is the duly constituted statutory body charged with, inter alia, the duty of overseeing and administering the conduct of estate agents, protecting the public interest with regard to the affairs of estate agents and ensuring that estate agents abide by the provisions of the Act and the code of conduct and administering the fidelity fund.

7.5 The Applicant is a duly established juristic body² and is authorised by the Act to take all steps and to perform all acts as may be necessary or expedient in order to achieve the maintenance and promotion of the standards of conduct of estate agents and to regulate the activities of estate agents.³

¹ See Section 7 of the Act

² Section 2 of the Act

³ Section 8(1)(e) as read with Section 7 of the Act



7.6 The Act establishes a fund known as the "Estate Agents Fidelity Fund" (hereinafter "the Fidelity Fund").⁴ The Fidelity Fund is controlled and managed by the Board of the Applicant⁵ (hereinafter the "Board") and is administered by the Board of the Applicant in accordance with the provisions of the Act. The funds held therein are applied, in appropriate circumstances, inter alia to reimburse persons who suffer pecuniary loss by reason of the theft of trust monies by an estate agent or the failure of an estate agent to comply with its obligations in accordance with Section 32 of the Act. Persons suffering such a loss may be entitled to be reimbursed for any loss suffered by as a result of such a theft from the proceeds of the Fidelity Fund.⁶

7.7 The Applicant is thus the body that is required to protect the proceeds of the fidelity fund from avoidable claims that may arise if the circumstances in section 18 of the Act are allowed to be perpetuated.

7.8 Section 16 of the Act expressly requires and provides that :

7.8.1 all estate agents are required to make application to the Board of the Applicant for a Fidelity Fund Certificate;

7.8.2 no Fidelity Fund Certificate shall be issued unless and until the provisions of the Act are complied with and

⁴ See Section 12(1) of the Act

⁵ See Section 12(2) of the Act

⁶ See Section 18 of the Act

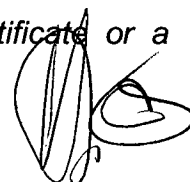


- 7.8.3 any Fidelity Fund Certificate issued in contravention of the provisions of the Act will be invalid and returned to the Board of the Applicant at its request.

These provisions are contained in Section 16 of the Act which, in light of its importance in this matter, is set out in full for the convenience of the Court.

"16. Applications for and issue of fidelity fund certificates and registration certificates

- 1) *Every estate agent or prospective estate agent, excluding an estate agent referred to in paragraph (cA) of the definition of 'estate agent' in section 1, shall, within the prescribed period and in the prescribed manner, apply to the board 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.*
- 2) *An estate agent or prospective estate agent referred to in paragraph (cA) of the definition of 'estate agent' in section 1, shall, within the prescribed period and in the prescribed manner, apply to the board for a registration certificate, and such application shall be accompanied by the levy referred to in section 9(1)(a).*
- 3) *Subject to sections 28(1), 28(5) and 30(6), if the board upon receipt of any application referred to in subsection (1) or (2) and the levies and contribution referred to in those subsections, is satisfied that the applicant concerned is not disqualified in terms of section 27 from being issued with a fidelity fund certificate, 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.

- 4) *No fidelity fund certificate or registration certificate shall be issued unless and until the provisions of this Act are complied with, and any fidelity fund certificate and registration certificate issued in contravention of the provisions of this Act shall be invalid and shall be returned to the board at its request.*
- 5) *An estate agent who applies to the board for a fidelity fund certificate or a registration certificate, as the case may be, after the prescribed period referred to in subsection (1) or (2), or whose application is not accompanied by the levy referred to in section 9(1)(a) or the contribution referred to in section 15, as the case may be, shall pay to the board a prescribed penalty in addition to the levy or contribution and no fidelity fund certificate or registration certificate shall be issued to the estate agent until the penalty has been paid”.*

7.9 The Act expressly prohibits any person from performing any act as an estate agent without a valid Fidelity Fund Certificate. This express prohibition is contained in Section 26 of the Act which is set out below for the convenience of the Court:

“26. Prohibition of rendering of services as an estate agent in certain circumstances



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."*

7.10 Agents are, for obvious reasons required to :

7.10.1 keep and maintain proper and sufficient accounting records sufficient to explain the state of affairs *iter alia* of trust monies received or expended, their assets and liabilities, all financial transactions of the business and indeed the financial position of the business itself⁷;

7.10.2 cause such accounting records to be audited within four months of financial year end⁸;

7.10.3 keep separate accounting records of trust deposits, investments and other interest bearing accounts referred to in Section 32(2)(a) of the Act⁹;


7.10.4 to balance all accounting records relating to trust monies at least on a monthly basis and to cause these records to be audited within four months of financial year end¹⁰

⁷ Section 29(1)(a) of the Act

⁸ Section 29(1)(b) of the Act

⁹ Section 32(3)(a) of the Act

¹⁰ Section 32(3)(b) of the act




7.11 All estate agents are required to open and keep one or more separate trust accounts specifically referring to Section 32(1) of the Act with a bank and to deposit in such account all trust monies held or received by or on behalf of such estate agent. This is provided for in Section 32(1) of the Act which provides as follows:

"32. Trust account of and investment of trust moneys by estate agent

- 1) *Every estate agent shall open and keep one or more separate trust accounts, which shall contain a reference to this section, with a bank and such estate agent or his or her employee, as the case may be, shall forthwith deposit therein all trust money held or received by or on behalf of such estate agent and the name of such bank and the number of each such trust account shall forthwith be notified to the board."*

7.12 Section 32(6) of the Act specifically authorises the Board of the Applicant to apply to court to prohibit any estate agent from operating in any way on his trust account or any interest bearing trust account opened in accordance with Section 32(2)(a) of the Act and to appoint a *curator bonis* to control and administer such trust, savings or other interest bearing account with such rights, duties and powers as the court deems fit. This section reads as follows:

- "6) The court may, on good cause, upon application by the board or any other competent person, prohibit any estate agent to operate in any way on his trust, savings or other interest-bearing account referred to in subsection (2)(a) and may appoint a Curator bonis to control and administer such*



trust, savings or other interest-bearing account, with such rights, duties and powers as the court may deem fit."

7.13 Where any Fidelity Fund Certificate is refused or withdrawn, the Estate Agency concerned is required to wind up his trust, savings or other interest bearing account in the prescribed manner and to pay out in the prescribed manner all monies standing to the credit of such account. This is provided for in Section 32(7) of the Act which reads as follows:

"7) If -

a) the board under the provisions of this Act -

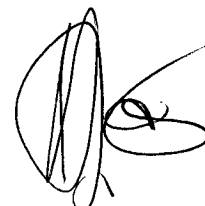
i) refuses to issue a fidelity fund certificate to any estate agent who applied therefor; or

ii) has withdrawn a fidelity fund certificate issued to any estate agent;
or

b) any estate agent ceases to act as Such; or

c) any estate agent becomes subject to any disqualification referred to in section 27,

the estate agent concerned shall wind up his trust, savings or other interest bearing account in the prescribed manner and pay out in the prescribed manner the amount standing to the credit of any such account to the persons entitled to it."



7.14 The Board of the Applicant is entitled to appoint inspectors with the powers set out in Section 32 A of the Act to determine whether the provisions of the Act are being complied with.¹¹

7.15 The Applicant is duly authorised to empower, in writing, an inspector to conduct an investigation to determine whether the provisions of the act are being complied with or not. This authorisation and the powers of the inspector are as set out in Section 32A of the Act which provides as follows:

"32A. Powers of inspectors

1) Any inspector furnished with inspection authority in writing by the board may conduct an investigation to determine whether the provisions of this Act are being or have been complied with and may, subject to subsection (5), for that purpose, without giving prior notice, at all reasonable times -

- a) enter any place in respect of which he has reason to believe that –*
 - i) any person there is performing an act as an estate agent;*
 - ii) it is connected with an act performed by an estate agent;*
 - iii) there are books, records or documents to which the provisions of this Act are applicable;*
- b) order any estate agent or the manager, employee or agent of any estate agent -*
 - i) to produce to him the fidelity fund certificate of that estate agent;*

¹¹ Section 32A of the Act



- ii) *to produce to him any book, record or other document in the possession or under the control of that estate agent, manager, employee or agent;*
 - iii) *to furnish him, at such place and in such manner as he may reasonably specify, with such information in respect of that fidelity fund certificate, book, record or other document as he may desire;*
 - c) *examine or make extracts from or copies of any such fidelity fund certificate, book, record or other document;*
 - d) *seize and retain any such fidelity fund certificate, book, record or other document to which any prosecution or charge of conduct deserving of sanction under this Act may relate: Provided that the person from whose possession or custody any fidelity fund certificate, book, record or other document was taken, shall at his request shall be allowed to make, at his own expense and under the supervision of the inspector concerned, copies thereof or extracts therefrom.*
- 2) *No person shall -*
- a) *fail on demand to place at the disposal of any inspector anything in his possession or under his control or on his premises which may relate to any inspection;*
 - b) *hinder or obstruct any inspector in the exercise of his powers under this section;*
 - c) *falsely hold himself out to be an inspector.*
- 3) *Any inspector shall issue a receipt to the owner or person in control of anything seized and retained under this section.*

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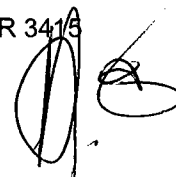
- 4) *Any inspector who exercises any power in terms of this section shall, at the request of any person affected by the exercise of that power, produce the inspection authority in writing furnished to him in accordance with subsection (1).*
- 5) *Notwithstanding anything contained in this section, the provisions thereof, excluding subsection (2)(c), shall not apply in respect of -*
- any attorney, member of a professional company or articled clerk, as defined of any such attorney, member or company;*
- a) *any premises from which such attorney or company conducts his or its practice; and*
- c) *any book, record or document on such premises or in the possession or under the control of any person referred to in paragraph (a).*

7.16 All estate agents are required to comply with the provisions of the Act and any regulations.¹²

8 In accordance with the foregoing, :

- 8.1 no estate agent or agency may operate without all of the requisite and valid Fidelity Fund Certificates being in place;
- 8.2 in this instance where the agent is a company, as is the case with the First Respondent, the Respondents are prohibited by Section 26 of the Act from carrying out any acts as Estate Agents as, in the case of the First Respondent, its sole director, the Second Respondent, does not have a valid Fidelity Fund

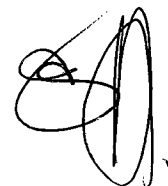
¹² Section 2.4 of the Code of Conduct for Estate Agents published on 24 December 1992 under GNR 341/5 which came into operation on 1 April 1993.



Certificate, and in the case of the Second Respondent, he himself has no valid Fidelity Fund Certificate.

- 8.3 where a Fidelity Fund Certificate has been refused by the Board of the Applicant or has been withdrawn or the estate agent becomes disqualified from holding a fidelity fund certificate or an estate agent ceases to act as such, then that agent is obliged to wind up his trust account in accordance with the provisions of the Act;
- 8.4 The business of the Respondents and the Respondents conduct is governed by the Act.
- 8.5 the Applicant is duty bound in accordance with its objects to make application to prevent an estate agent without a valid fidelity fund certificate from carrying out any acts as an estate agent in accordance with the provisions of the Act and to place any trust, savings or other interest bearing account administered by the agent in the hands of a *curator bonis*.
- 8.6 The Applicant is duty bound in accordance with its objects to make application to prevent the Respondents from continuing to administer the First Respondent's trust account both by virtue of the fact that they do not have a valid Fidelity Fund Certificate and by virtue of the fact that there have been irregularities on their trust account as is set out below, requiring that the First Respondent's trust account be placed in the hands of a curator immediately to assess the extent of the irregularities and to take proper and appropriate steps as is set out in the Notice of Motion to which this affidavit is attached.

9 BACKGROUND AND BASIS FOR APPLICATION



9.1 On 17 March 2011, the Applicant received a “whistle blowers” report alleging fraud and other irregularities in respect of the First and Second Respondents. A copy of the whistle blower’s report is not annexed hereto in light of the confidential nature of the report and the serious allegations contained therein which have not been substantiated as yet. A copy of the report will be available for the Respondents if they request it and to the Court at the hearing if required. The allegations contained in the whistle blowers report alleged inter alia:

- 9.1.1 very serious irregularities in respect of the First Respondent’s trust account;
- 9.1.2 that the Second Respondent was using the First Respondent’s trust account to “fund his lifestyle as well as manage the business [of the First Respondent]” and had used in the region of R 20 000 000 of trust monies in this regard;
- 9.1.3 that expenses for Body Corporates administered by the First Respondent were not being paid;
- 9.1.4 that the Second Respondent is not registered as an Estate Agent although he is holding himself out as the principal of the First Respondent;

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9.1.5 that the First Respondent's trust account is in overdraft on occasion and that cheques drawn thereon had been returned by the bank.

10 The Board of the Applicant, concerned at the allegations made against the Respondents, appointed Mornay Crouse, Grant Jacobsohn, Marcus Coetzee, Cindy Nicholls, George Nicholls, Joe Heshu and Aysha Patel as inspectors in terms of Section 32(A) of the Act to "*conduct all such investigations as may be necessary to determine whether the provisions of the Act and the Financial Intelligence Centre Act 38 of 2001 (FICA) as amended are being, have been or were complied with Constantia Sectional Title Management and or any other Estate Agency firm practising under the name or style of Constantia Sectional Title Management*". A copy of the certificate of appointment dated 17 March 2011 setting out the powers of the inspectors is annexed hereto marked annexure GN1.

11 Pursuant to their appointment, the foregoing inspectors began to investigate the allegations and the Respondents compliance with the provisions of the Act and the Financial Intelligence Centre Act. This investigation is ongoing and is progressing slowly as a result of the attitude adopted by the Respondents. The Respondents have adopted an obstructive attitude and are hindering the inspectors' investigations. This is detailed and fully set out in the Affidavit of George Nicholls annexed hereto and I respectfully refer this Court thereto. As appears there from, the Respondents:

11.1 deleted information in an attempt to prevent the Applicant's inspectors from obtaining same;

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- 11.2 changed attorneys and appointed different sets of attorneys for the various Respondents forcing the inspectors to liaise with multiple parties to try and arrange meetings, access to information or to make any arrangements;
- 11.3 made the task of the inspectors more difficult, inter alia by refusing to attend meetings, cancelling scheduled meetings, setting unreasonable conditions for the answering of questions and delaying in providing information;
- 11.4 stated that various meetings with the Applicants inspectors would be held and then cancelled meetings;
- 11.5 now question at this late stage, as appears from annexure GN6 and GN6.2 whether the investigation is competent even suggesting, alarmingly, that the Act does not apply to them.
- 12 The findings of the inspectors as detailed in the attached affidavit of Matthew Nicholls, one of the Applicants inspectors, thus far require that this application be brought at this time.

13 NO VALID FIDELITY CERTIFICATE

- 13.1 I have checked the records of the Applicant and confirm that the First Respondent has a fidelity fund certificate issued to it for the 2011 year. The Second Respondent does not.
- 13.2 Fidelity fund certificates have also been issued to two further persons in the employ of the First Respondent, namely Rita Marie Ferreira and Tian Nawn for

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the 2011 year.

13.3 The Second Respondent was previously registered with the First Respondent only as an "Intern Estate Agent" for the 2010 year and an "intern fidelity fund certificate" was issued to him in that capacity for the year ending 31 December 2010. An intern estate agent is effectively a trainee agent serving a 12 month apprenticeship during which time the intern estate agent is expected to "learn the ropes" and write the entrance exam. In terms of the Standard of Training of Estate Agents Regulations¹³, an intern estate agent must serve as an intern estate agent under the supervision of a principal agent for a continuous period of 12 months from the date of the first issue to that person of an interim fidelity fund certificate by the Applicant.¹⁴ The Regulations further state that an intern estate agent must comply with the educational requirements within the 12 month period, after which a full status fidelity fund certificate may be issued to him by the Applicant. Should an interim estate agent fail to comply with the educational requirements, the internship period must be extended by the intern for a further period until such intern agent has complied with the requirements. The Second Respondents intern fidelity fund certificate expired in December 2010.

13.4 No further application for an intern agent fidelity fund certificate was received by the Second Respondent or issued by the Applicant to the Second Respondent for the 2011 year. The Applicants records further show that the Second Respondent has not passed the estate agents entrance exam at this time.

¹³ GNR.633 of 4 June 2008
¹⁴ See Regulation 1 thereof.

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13.5 The Second Respondent is the sole Director of the first Respondent. This is apparent from a company's office search and from the last signed audited financials for the First Respondent as annexed hereto marked "GN7" and "GN8" respectively.

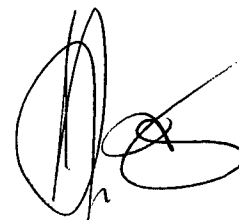
13.6 In terms of section 26 of the Act, no services as an estate agent shall be rendered unless both the First and Second Respondents have been issued with a valid fidelity fund certificate.

13.7 In the premise, the First and Second Respondents are not permitted to conduct any of the services of an estate agent, and as such they are prohibited from operating a trust account in terms of the Act and were to have wound up their trust account in terms of Section 32(7) of the Act. Notwithstanding this statutory prohibition, the Respondents continue to render services as estate agents as defined in the Act.

14 IRREGULARITIES

I respectfully refer this court to the affidavit of Matthew Lee Nicholls, who is known as "George Nicholls", attached hereto as annexure B, and the findings of the investigators as appointed by the Applicant thus far. It is apparent from therefrom that the investigators have discovered that:

14.1 The Respondents are misusing their trust account;

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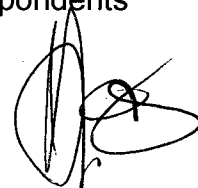
14.2 The First Respondent is not keeping proper accounting books and records as specified by Section 29 of the Act in that at present the books and records of the First Respondent are not sufficient to fairly reflect and explain the state of affairs of all monies received or expended by the First Respondent including monies deposited into the First Respondent's trust account and or invested in terms of Section 32(2)(a) or to fairly reflect and explain the financial transactions and position of the First Respondent's business. It is also apparent from the books and records of the First Respondent that they do not separately reflect the affairs of each one of the Sectional Title schemes for which the First Respondent undertakes collections;

14.3 The First Respondent is not administering their trust account as required by the Act specifically in that:

14.3.1 the First Respondent's trust account has traded in overdraft;

14.3.2 cheques have been returned by the bank, Nedbank, on the First Respondent's trust account because of a lack of funds in that account;

14.3.3 the First and Second Respondent's are treating the funds in their trust account as their own and are making ongoing and substantial payments to the Second Respondent and to others to which they are not lawfully entitled and or in respect of which they have not been instructed to make payment by those entitled to the funds. It even appears as though debit orders for the Second Respondents obligations have been put in place against the First Respondents trust account containing funds belonging to third parties.

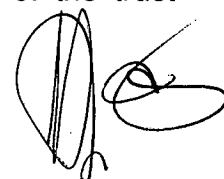


Details of the foregoing and the inspectors' findings and activities are set out in the Affidavit of George Nicholls, annexure B hereto, and I respectfully refer the Court to that affidavit.

15 SPECIFIC SUBMISSIONS : INTERDICT

- 15.1 The Applicants having been statutorily charged with enforcing the provisions of the Act for maintaining and promoting the standards of conduct of Estate Agents and regulating their activities¹⁵ is statutorily compelled to enforce the prohibition on the Respondents trading without a valid Fidelity Fund Certificate.
- 15.2 The provisions of the Act quoted aforesaid are clear and are not subject to any interpretation or negotiation: the Respondents are not entitled to carry on any activities as estate agents without every director of the First Respondent, in this case the Second Respondent, having a valid Fidelity Fund Certificate.
- 15.3 Notwithstanding the fact that the Respondents do not have the required valid Fidelity Fund Certificates, they continue to carry on activities and render the Services as estate agents.
- 15.4 Due to the findings of the inspectors so far that there have been such significant and substantial irregularities on the First Respondent's trust account, it is additionally of vast importance that a curator be appointed to take charge of the First Respondent's trust account.
- 15.5 It is apparent from what is set out above that the First and Second Respondents are not dealing with their trust account as they should and that the number of irregular transactions that are taking place utilising the proceeds of the trust

¹⁵ Section 7 as read with Section 8(1)(e) of the Act

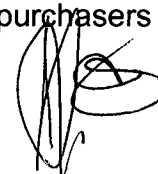


account for the personal business affairs of the First and Second Respondent are very serious.

- 15.6 It is apparent that the situation has existed for a considerable period of time and is still ongoing. The lack of assistance and obstructive attitude of the First and Second Respondents to assisting the Applicant's inspectors as set out above, and the fact that material parts of the whistle blower's report appear to have been confirmed and the fact that the situation appears to still be ongoing, make it essential that a curator is appointed to take control of the First Respondents trust account and to prevent further and ongoing irregularities from taking place.
- 15.7 The ongoing nature of the Respondents conduct makes it clear that without an interdict they will continue their conduct and that it is likely that further abuses of the trust account and further trading contrary to the Act, will take place.
- 15.8 If there is a shortfall on the First Respondent's trust account then this exposes the Fidelity Fund to the potential of claims.
- 15.9 It is only the grant of an interdict preventing the First and Second Respondents from dealing with the proceeds of their trust account that can effectively prevent any interference with the First Respondent's trust account and allow the curator to undertake his activities.

16 SPECIFIC REPRESENTATIONS: CURATOR BONIS

- 16.1 The purpose of the separate trust account of any estate agent is to provide a regulated account into which monies belonging to third parties are to be held pending fulfilment with contractual obligations of sellers and purchasers of



immovable property. The funds standing to the credit of any estate agent are accordingly funds which do not belong to the estate agent, form no part of the estate agents estate¹⁶, and belong to third parties. These trust funds are required to be administered by the estate agent in accordance with the legal obligations of the third party buyers and sellers of immovable property and must be retained in trust until the estate agent is entitled to the funds or instructed to make payments therefrom¹⁷. They may not be treated otherwise.

16.2 Until the funds are transferred as aforesaid to the First Respondent as fees or recoverable disbursements if they are entitled to such, the funds belong to the depositors, not the Respondents and may not be used by the Respondents.

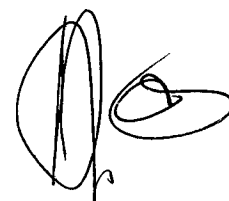
16.3 It is inconceivable that any Body corporate instructing the First Respondent to collect and receive payments would authorise the payment of the Second Respondents BMW motor vehicle, bonds and debts from their funds. As appears from the standard form contract the Respondents use, a specimen of which is attached hereto as annexure "C", no such authority is given to the Respondents. In fact this contract emphasises that the Respondents operate a trust account "in terms of Section 32 of the Estate Agents Act, on behalf of the Body Corporate"¹⁸

16.4 The importance of trust monies held by estate agents and the need to preserve the public's confidence in the sanctity of trust monies held by estate agents is evident in the fact that the act provides for the Fidelity Fund which may pay out to those who have suffered loss by improper use of trust monies by agents. The

¹⁶ Section 32(8) of the Act

¹⁷ Section 32(2)(e) of the Act

¹⁸ Clause A.1.1 of Annexure A (Duties of the [First Respondent])



circumstances where the fidelity fund may pay out are set out in Sections 18 – 21 of the Act.

- 16.5 It is alarming the First Respondent's trust account has been dealt with in the manner set out above. It is apparent that the proceeds of these accounts are being used as the First and Second Respondent's own monies.
- 16.6 The Respondents are compelled to hold monies in trust until such time as the estate agent is lawfully entitled thereto or instructed to make payment therefrom to any person.¹⁹
- 16.7 The fact that there is currently no estate agent entitled to deal with the proceeds in the Respondents trust account means that it is critical that a *curator bonis* be appointed to deal with the funds in the Respondents trust account and to ensure that they are dealt with lawfully and as required by the Act. At present there is no person authorised to deal with the proceeds in the Respondents trust account as the sole director of the First Respondent, the Second Respondent, has no valid or indeed any fidelity fund certificate.
- 16.8 The Respondents are not entitled to carry out any act as estate agents as they do not have all of the requisite valid fidelity fund certificates²⁰. This includes dealing with the proceeds of their trust account.
- 16.9 The Respondents continue to operate the following trust, savings and other interest bearing accounts, Nedbank Current account number 1983038040. This is the account that has been analysed and dealt with in these papers. The first Respondent also operates an interest bearing Call Account at Nedbank under

¹⁹ Section 32(2)(e) of the Act

²⁰ Section 26 of the Act

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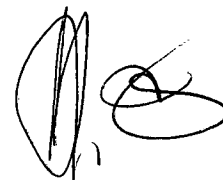
account number 9015533452, as envisaged in section 32(2)(a) of the Act. The first Respondent additionally has a third account designated as a trust account, being 1286101840 at Nedbank, which account Gerrit van Schalkwyk, the FIRST Respondent's Financial Manager has told Crouse, is dormant. This fact has not been verified and an order is sought in the circumstances on all three accounts.

16.10 The existence and continued operation of these accounts has been verified by Crouse.

16.11 The findings and considerable volume of irregular transactions on the First Respondent's trust account make it imperative that a *curator bonis* be appointed to preserve the balance in the trust, savings and other trust bearing trust accounts as listed in paragraph 16.9 above. The *curator bonis* is required to take control of these accounts to assess and quantify any shortfalls and to deal with the proceeds as required.

16.12 By virtue of the previous and continued operation of the Respondents as estate agents, the aforementioned banking accounts hold and are likely to continue to receive deposits from the numerous owners of various Sectional Title schemes administered by the First Respondent.

16.13 The findings of the Applicants inspectors so far, as set out in the attached affidavit of Matthew Nicholls, show that a misappropriation of trust funds has taken place. The fact that the Second Respondent patently treats the trust monies received as his own (making payment of vehicle expenses, bond payments, making loans to himself and to other staff members and making payment of his private debts), is completely unacceptable and unlawful. The

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