



THE ESTATE AGENCY AFFAIRS BOARD



THE PURCHASE AND SALE OF IMMOVABLE PROPERTY THROUGH AN ESTATE AGENT

This brochure is issued by the Estate Agency Affairs Board as a service to housing consumers. It highlights, in general terms, some important issues to be aware of when purchasing or selling immovable property through an estate agent.

Why make use of the Services of an Estate Agent?

The purchase and/or sale of immovable property are complex transactions requiring special skills and knowledge. For most people the purchase or sale of immovable property is a rare experience which unnecessary complications should not spoil. The help of an estate agent can reduce risk and avoid unnecessary stress when either buying or selling property.

Selecting an Estate Agent.

Members of the public have complete freedom of choice in selecting the estate agent they wish to engage. In terms of the Estate Agency Affairs Act No 112 of 1976, all estate agents must be registered with the Estate Agency Affairs Board. Every registered estate agent is issued with a fidelity fund certificate and must comply with the provisions of a Code of Conduct framed in terms of the Act. In addition, the estate agent of your choice will have either undertaken an examination course in the principles of real estate and estate agency or completed a practical training period of one year under the guidance of a qualified "full status" estate agent. It is an offence for an estate agent to act as such without having first obtained a fidelity fund certificate issued by the Estate Agency Affairs Board. Since all fidelity fund certificates expire at the end of each year, always check that your estate agent is properly registered.

Giving an Estate Agent a Mandate.

An estate agent is given a mandate to sell when he/she is asked by a seller to sell a particular property and has accepted that instruction. No estate agent may market a property for sale unless he/she has been given a mandate to do so by the person entitled to sell the property. In law a mandate need not be in writing but can be given orally. In terms of the Board's Code of Conduct, however, a sole mandate **must** be in writing.

A seller is never forced to give an estate agent a sole mandate. The decision whether or not to give a sole or an open mandate to an estate agent is an important one which can affect the way the property is marketed. Both sole and open mandates have advantages and disadvantages which should be carefully explained by the estate agent concerned before the seller finally decides on the type of

mandate which best meets his/her particular needs. Estate agents believe that a sole mandate will deliver a more dedicated marketing service in terms of time, money and effort spent in promoting a sale.

When giving an estate agent a sole mandate, the following matters should be considered:-

- During the period of the sole mandate, the seller should not breach the mandate by selling his/her property through another estate agent. Sole mandates often also make the seller responsible for the payment of damages to the appointed sole agent if the owner sells the property himself/herself during the mandate period, or if the owner sells the property after the mandate period has come to an end to a person introduced either to the seller or the property by the estate agent during the mandate period.
- An owner may also be liable to pay a commission if he/she sells the property after the mandate period has come to an end to a person introduced either to the seller or the property by the estate agent during the mandate period.
- The period of the sole mandate should be negotiated between the seller and the estate agent.
- Although a seller cannot be forced to sell his/her property to a purchaser found by an estate agent, a sole mandate is often worded in such a way that a seller who either refuses to sell his/her property on the terms set out in the mandate or prevents the estate agent from concluding a sale of the property, will still be responsible to pay the estate agent the agreed commission by way of damages.

It is important for the seller to read and understand the sole mandate document prepared by the estate agent. A client is entitled to a signed copy of the sole mandate and should ask the estate agent to supply one.

In practice, each estate agency business will use its own pre-printed sole mandate forms. The Estate Agency Affairs Board has, however, prepared a pre-printed sole mandate form, adequately protecting the interests of both seller and estate agent. If you wish to use this form rather than any other mandate form, ask the estate agent to do so.

Giving a Mandate to more than one Estate Agent.

Unless a seller has given an estate agency firm a written sole mandate to sell his/her property, he/she may ask as many estate agents as he/she pleases to market the property. The seller should inform every estate agent appointed by him/her that he/she has also asked other estate agents to sell the property.

A seller who asks more than one estate agency to sell his/her property risks a claim for the payment of more than one estate agent's commission. This may happen when the seller sells his/her property through one of the estate agents appointed by him/her to a purchaser previously introduced to the property by another estate agent also appointed by the seller. When signing a contract of sale the careful seller should, therefore, ask the estate agent whether or not the property had perhaps been shown to the purchaser by another estate agent. If the answer is 'yes', the seller should protect himself/herself against a second claim for commission by demanding that the purchaser (and/or the estate agent through whom the property is sold) accept responsibility for payment of such second commission. To protect himself/herself further, a seller may also ask all estate agents appointed to give him/her a list containing the names and details of all persons introduced to the property by the estate agents. The seller can then quickly find out whether or not the interested purchaser was shown the property by another estate agent.

Important Matters to be Discussed with your Estate Agent.

When giving an estate agent a mandate, the following aspects should be discussed in detail:-

The selling price and the deposit required.

An estate agent can give a seller valuable help in setting a realistic, market related selling price of a property. If the property is mortgaged, the approximate balance still owing should be given to the estate agent.

Agents commission.

The amount of the estate agent's commission (payment for services to be rendered), and when it will become payable, must be agreed on. Estate agents base their commission on a set percentage of the selling price of the property. No commission tariff is prescribed for estate agents. The amount of commission is therefore fixed by negotiation between the seller and his/her estate agent.

Defects.

Defects in the property must be disclosed to the agent to avoid later disputes.

Movable items to be included as part of the property.

Movables included in the sale may include, for example, built-in wall units, TV aerials, swimming pool equipment, etc.

Occupation.

The date on which the purchaser can move into the property must be agreed on.

When the property may be viewed.

It is important to agree on the times when the estate agent may bring possible purchasers to view the property and whether appointments should first be made with the seller.

Length of mandate.

The length of the mandate and when, if at all, it may be cancelled before the expiry of the mandate period, must be agreed on.

Necessary consents.

Consents (eg the consent of a husband/wife) may have to be obtained before the property can be sold. This should be discussed with the estate agent.

Estate agent's obligations.

If the seller requires the estate agent to do something special, for example, to advertise the property in specific newspapers or to place a "For Sale" board on or in front of the property, such arrangements must be agreed on. Specific undertakings are referred to in a standard pre-printed sole mandate form prepared by the Estate Agency Affairs Board.

Suspensive conditions.

In most cases, a sale can only take place if the purchaser can get a loan from a bank with the property serving as security for repayment of the loan. Certain suspensive conditions such as the obtaining of bond finance or the purchaser selling his own home first, may be necessary and should not be overlooked in the completion of the sale agreement.

The appointment of a conveyancer.

The name of the conveyancer (attorney) who is to attend to transferring the property into the name of the purchaser, must be stated in the sale agreement. The seller has the right to appoint the conveyancer of his choice except in Kwa-Zulu Natal where the purchaser appoints the conveyancer.

What services a Seller may expect of an Estate Agent.

1. Professional service.

A seller expects a professional service from his/her estate agent. The agent in turn requires the full and honest cooperation of the seller to enable him/her to market a seller's property professionally. For example, the agent should know the seller's reasons for selling.

2. A thorough inspection of the property.

A professional estate agent will undertake a thorough inspection of the seller's property. The seller must ensure that the estate agent is informed of all relevant facts and information regarding the property and should discuss its strong selling features, the advantages and disadvantages of the property's particular location, the current condition of the property, etc. Sellers should remember that the general appearance and neatness of a home and garden are always strong selling features.

3. Advice on the likely market value of the property.

An important function of the estate agent is to advise a seller on the likely market value of the property and to help in setting a realistic price. This is done by comparing the prices of recently sold properties in the area with the price suggested by the seller. The asking prices of similar homes up for sale in the area will also influence the seller's asking price. A seller must understand that the sale price of a property is set through the interaction of supply and demand and is beyond the control of either the estate agent or the owner. The amount of money which a seller has spent on his/her house will also not necessarily increase the sale price of the property. The asking price of a property will obviously determine the number of interested buyers. Also remember that properties, when overpriced, usually remain unsold for a longer time and might eventually only sell at a much lower price than the original asking price.

4. Courtesy and cooperation.

A seller can ask his/her estate agent to make an appointment before showing the property to prospective purchasers. A seller should ideally not accompany a prospective buyer through the property during a showing since prospective buyers will be more relaxed when asking questions if the owner is not present.

A seller is entitled to request the estate agent to give him/her a sales progress report from time to time.

5. A speedy finalisation of the transaction.

After finalising a sale, most estate agents, although not obliged to do so, try to speed up the transfer of the property into the name of the purchaser. Their efforts ensure that the seller receives payment of the purchase price with the minimum of delay. The estate agent concerned might also be willing to act as a mediator in settling minor disputes that may arise between a buyer and seller after the sale.

The Duty of an Estate Agent : To Protect the Interests of the Client.

An estate agent is obliged to protect the interests of the client (usually the seller) to the best of his/her ability and must try to sell the property on the best possible terms and at the best price. When submitting “offers to purchase” to a seller, the estate agent must explain how a particular offer either corresponds with or differs from the seller’s stated requirements.

In law, a relationship of trust exists between an estate agent and a client. The estate agent must, therefore, act with the utmost good faith towards the seller during the whole sales process.

The Estate Agent and the Purchaser.

1. Buying the right property.

Every purchaser of a home wishes to buy the ideal property at the right price and on the most favourable terms. An estate agent can assist the purchaser in achieving this objective. The estate agent must, however, have a good understanding of the

needs, financial resources and motives of the prospective purchaser to identify properties matching the buyer's requirements as closely as possible. It is of little use for a purchaser to be introduced to properties that he/she obviously cannot afford or that do not meet his/her requirements, such as price, size or location. When showing a property to a purchaser which does not appear to meet his/her stated requirements, a good agent will point out alternative features which may yet satisfy the purchaser's expectations.

2. Making an Offer to Purchase.

Once the purchaser has decided to buy a property, the estate agent will fill in the necessary "offer to purchase" form. The estate agent will also assist the purchaser in applying to a bank selected by the purchaser for a home loan by completing and submitting all necessary application forms. Should the application be refused, the estate agent should be able to advise the purchaser on alternative options to be investigated in order to obtain the required home loan.

3. Communication between estate agent and purchaser.

Regular communication between an estate agent and a prospective purchaser will ensure that misunderstandings and later disputes are avoided.

4. Duty to the purchaser.

An estate agent has both a legal and ethical duty not to make any misrepresentations about a property to a prospective purchaser. The estate agent is obliged to disclose to the prospective purchaser all material facts relating to the property that he/she is aware of including all defects in the property. An estate agent is, however, not a construction expert so that, in appropriate circumstances, obtaining expert advice concerning the structure of a property might be necessary.

Entrusting money to an Estate Agent.

1. Trust moneys.

Any deposit or other moneys paid by a purchaser in terms of a contract of sale to an estate agent must immediately be receipted by the estate agent and paid into his/her trust account. A receipt must be given to the purchaser especially if cash has been

paid.

A trust account is protected in the event of the estate agent's death or insolvency. An estate agent may only pay money out of his/her trust account to the persons who should receive it. The Estate Agents Fidelity Fund, which is administered by the Estate Agency Affairs Board, protects members of the public should an estate agent steal such trust moneys.

2. Interest earned on trust moneys.

In terms of the Code of Conduct an estate agent must pay all interest earned on trust moneys invested by him/her to the person entitled to that interest. The estate agent must be given a written instruction, however, to pay the interest to that person. If, after the estate agent has explained the rights to receive interest to the parties, no written instruction is given, the interest will then be paid to the Estate Agents Fidelity Fund.

The Agreement of Sale.

A purchaser wishing to purchase a property through an estate agent will be asked to sign an "offer to purchase" form prepared and filled in by the agent. Many estate agency firms use their own forms for this purpose. A standard pre-printed Agreement of Sale form has been prepared by the Estate Agency Affairs Board. Buyers and sellers must ask their estate agent to use the Board's form if they wish to finalise the sale on the Board's form.

Both the purchaser and seller should carefully read and study the completed document which the estate agent submits to them for signature. They should make sure that the terms and conditions stated in the document accurately reflect their wishes. The document should never be signed until it has been properly checked and all blank spaces filled in.

The following points are particularly important:-

- The contract form must correctly show the deeds office description of the property sold, the purchase price to be paid and the identity of the purchaser and seller. All clauses must either be completed or deleted if not applicable and

spaces should never be left blank. Only alterations and deletions on the document should be initialled by both seller and purchaser and their witnesses.

- The contract form must accurately record all the aspects agreed upon. Oral undertakings given by the parties must be written down on the form, for example, whether or not any moveable items are to be part of the sale.
- If the sale is subject to a condition that the purchaser obtain a loan to finance the transaction within a certain time the sale will be legally binding and enforceable only once the condition has been met within the time allowed. The purchaser must take all reasonable steps to ensure that agreed conditions are complied with. A purchaser breaches the agreement when he/she tries to prevent the fulfilment of conditions by, for example, deliberately failing to apply for a loan or giving incorrect information to the bank of choice. Estate agents are not legally required to help purchasers in obtaining loans, but many will do so as part of their overall service.
- A provision in an agreement of sale or in an addendum to the agreement, which “loads” or inflates the purchase price to enable the purchaser to obtain a higher loan than would otherwise be the case is dishonest and should not be done. An estate agent who assists a purchaser to prepare or include such a provision in the agreement of sale can be prosecuted under the Code of Conduct for Estate Agents.
- The contract must correctly reflect the agreed date when the purchaser can move into the property as well as any agreed occupational interest (similar to rental) to be paid by the purchaser if he/she moves into the property before it is registered into the name of the purchaser.
- If the contract states that the purchaser will be at risk for accidental damage to, or destruction of, the property before it is transferred into his/her name, the purchaser must not forget to insure the property.
- Defects in the property must be stated in the sale agreement and it must also be stated whether or not the seller is to repair them.
- If the agreement states that the sale is “voetstoots” (“as is”), this means that the

seller cannot be held responsible for any latent defects in the property (ie those defects which are not easily visible). A voetstoots clause does not, however, protect a seller who deliberately deceives the purchaser by not disclosing latent defects of which the seller is aware.

- The clause dealing with payment of the estate agent's commission must be carefully read. Buyers must ensure that the amount of the commission contained in the agreement is the sum agreed upon. In terms of the Code of Conduct, sale agreements may not contain provisions allowing the estate agent to deduct commission from the purchaser's deposit before registration of transfer of the property into the purchaser's name. The purchaser could in such a case end up paying the commission if the contract of sale is later cancelled due to the seller's fault.
- Great care must be taken if the sale agreement has to be made subject to the condition that the purchaser must first be able to sell his/her own house on or before a certain date. Transactions are often concluded on this basis where the purchaser requires the money from the sale of his/her property to finance the whole or part of the purchase price of the property to be bought. Problems may, however, arise if there is a delay in the transfer of the purchaser's property. In such a case the purchaser may find it difficult to meet his/her payment obligations in respect of the newly bought house and this, in turn, could result in difficulties for the seller. For this reason the relevant clause in the agreement of sale should be very carefully worded to provide adequate protection for both the seller and the purchaser. A specimen clause containing the necessary safeguards is included in the Estate Agency Affairs Board's standard pre-printed Agreement of Sale form.

The estate agent must, in terms of the Code of Conduct, explain to both the buyer and seller the meaning and consequences of the main provisions of the sale agreement.

If the terms of the contract are still not clear the estate agent should be asked to explain them again until they are fully understood. Both purchaser and seller are at all times entitled to consult an attorney before signing the filled in sale form.

Commission.

An estate agent is someone who sells immovable property on behalf of others in

return for the payment of a **commission**. Important principles relating to the payment of the estate agent's commission are:-

- Unless otherwise agreed, commission is payable by the estate agent's client or the person who gave the estate agent a mandate. In practice, the commission is usually payable by the seller.
- It is important to agree with the estate agent on the amount of his commission. No commission tariff is prescribed by law and the amount of the commission should therefore be agreed upon between the parties.
- An estate agent who has been given a mandate to sell a property will usually earn commission after:
 - (i) introducing a willing and able purchaser to the seller;
 - (ii) finalising a legally binding agreement of sale; and
 - (iii) once all suspensive conditions contained in the agreement have been met.

The estate agent must, however, have been the "effective cause" of the sale. Commission is generally payable by the seller upon registration of transfer of the property into the name of the purchaser although a different date for payment can be agreed upon. It may also be agreed that should the agreement be cancelled as a result of fault on the part of either the seller or the purchaser, the party at fault will be responsible to pay the commission. If the seller and the purchaser privately agree to cancel the agreement, the seller will still be responsible to pay the estate agent's commission or damages instead of the commission.

- Unless otherwise agreed at the time of giving the mandate, a seller cannot refuse to pay commission because the purchase price differs from the original instruction given to the estate agent. Legally speaking, an estate agent earns commission if he/she **substantially** performs his/her mandate.
- If a contract of sale negotiated by an estate agent is subject to a suspensive condition (eg a condition that the purchaser obtains a loan from a bank or that the purchaser sells his own property first), the estate agent is not entitled to

payment of commission until the suspensive condition has been fulfilled. The only exception is if both the purchaser and the seller agree in writing in a separate document that the estate agent can be paid commission before the fulfilment of suspensive conditions. This kind of agreement is risky and is not recommended.

- A seller should not try to avoid paying commission by privately negotiating with a purchaser introduced by an estate agent. He/she will face a claim for commission even if he/she privately concludes a sale with a purchaser who was originally introduced to him/her by an estate agent.
- If a person who viewed a property through an estate agent tells someone else about the property and that person, as a result, purchases the property through another estate agent, the seller may still be responsible to pay the first estate agent a commission on the transaction. For example, if a wife tells her husband about a property she has seen through an estate agent and he, as a result, privately concludes a sale with the seller, that seller may be legally responsible to pay the estate agent a commission. In these circumstances the seller should request the agent to protect him/her against a possible claim for commission by way of an indemnity written into the contract.
- An estate agent who introduces a willing and able purchaser to a property does not necessarily lose his/her right to claim commission should the property later be sold to that buyer through another estate agent who accepted a lower commission on the transaction.

A seller should always freely discuss any uncertainties regarding payment of commission with his/her estate agent. If necessary, an attorney should be consulted.

The Role of the Estate Agency Affairs Board.

The Estate Agency Affairs Board is an institution established under the Estate Agency Affairs Act, 112 of 1976. An important objective of the Board is to protect consumers in their dealings with estate agents. The Board also administers the Estate Agents Fidelity Fund, from which consumers who have suffered loss as a result of the theft of trust moneys by estate agents, are reimbursed.

Every estate agent must comply with the Code of Conduct framed in terms of the Estate Agency Affairs Act. Should a member of the public feel unhappy about the conduct of an estate agent, a complaint, in the form of an affidavit (sworn statement), should be sent to the Estate Agency Affairs Board for investigation and possible disciplinary action against such agent.

The Estate Agency Affairs Board has also set up an arbitration tribunal where commission disputes between estate agents and members of the public can be resolved without the lengthy time delays and high costs of a court trial. Copies of the constitution and procedural rules of the arbitration tribunal are available from the Board on request.

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