

Monday Contemplation No 24

Code of Conduct – Part 6

We continue with our discussion of the Code of Conduct. This week, we turn our attention to **Regulation 34.6**, which deals with remuneration, which is obviously very important for every property practitioner (PP).

A summary of Regulation (Reg) 34.6 follows below:

1. **Reg 34.6.1** – a PP may not receive any commission from a completed or proposed contract of sale or lease which is subject to a suspensive or resolutive condition, until the suspensive condition has been fulfilled or the resolutive condition is no longer operational. As an example, let us say that a PP takes an offer on a particular property and the offer is subject to (suspensive condition) the potential purchaser obtaining a loan from a financial institution to assist with the purchase of the property. In terms of Reg 34.6.1, the PP may not receive their commission whilst the suspensive condition remains unfulfilled.

2. **Reg 34.6.2 – the commission or fee that you charge as a PP is freely negotiable or set by you as the PP**. In terms of this Reg, you may not tell your client or any other party to the contract, that your commission or fee is prescribed by the law or any other authority or association.

3. **Reg 34.6.3** – a PP (let us call this **person PP 2**) may not introduce a prospective purchaser or lessee to the property or seller or lessor thereof, if the PP (PP 2) knows, or has reason to believe, that the prospective purchaser or lessee has already been introduced to the property or seller or lessor by another PP (PP 1) and there is a likelihood that the client may have to pay more than one commission should the sale or lease be concluded by PP 2. This Reg clearly exists given the complications that an open mandate can create (see one of my earlier posts dealing with open mandates).

As an example, a seller gives an open mandate to PP 1. A potential purchaser views the property with PP 1. The seller also gives an open mandate to PP 2. The same potential purchaser views the property with PP 2 and buys the property through the intervention of PP 2. The seller is potentially in the position of having to pay commission to both PP 1 and PP 2. The purpose of Reg 34.6.3 is to try and prevent this from happening. **This Reg is clear – if you are PP 2, then you may not introduce the prospective purchaser to the property or the seller.**

4. **Reg 34.6.4** – as a PP, you may not have a clause in your mandate agreement or contract of sale or lease, that you are entitled to payment of your commission or fee by the seller or lessor regardless of whether the purchaser or lessee is financially able to fulfil his obligations in terms of the said contract.

In the instance where a potential purchaser has signed an offer to purchase and then changes their mind, the PP's offer to purchase may very well contain a clause that the purchaser will have to pay the PP damages for breaching the contract. In this case, the PP is not holding the seller liable for the payment of the commission as damages due to the breach of contract by the purchaser, but rather the purchaser who has caused the breach. In the circumstances where the purchaser or lessee has breached the agreement through non payment due to not having the money to pay, the PP likewise, cannot hold the seller or lessee liable for payment of the commission.

Next week we will conclude our discussion regarding receipt of commission.