

Monday Contemplation No 36

No FFC – Is my mandate valid?

What happens when a Property Practitioner (PP) does not hold a valid FFC, signs a mandate with a client, sells the property and gets paid the commission due?

Is the PP entitled to keep the commission? The case of Taljaard v Botha Properties is most interesting in this regard.

The summarised details of the case are as follows:

1. It is important to be aware that the judgement was delivered in 2008.
 2. Botha Properties (respondent) sold a property in terms of a mandate given to it by Taljaard, the seller (appellant).
 3. At the time the agreement of sale was concluded, **a FFC had not been issued** to the respondent in terms of the Estate Agency Affairs Act 112 of 1976 (remember this case happened in 2008).
 4. The seller was of the opinion that the mandate was for that reason invalid and the seller claimed return of the commission that had been paid to the PP.
 5. In terms of **Section 26** of the Estate Agency Affairs Act 112 of 1976, any person was prohibited from performing any act as an estate agent unless a FFC had been issued to him or her.
 6. **Section 34A** of the same Act, said that **no estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act of an estate agent**, unless at the time of the performance of the act a valid FFC had been issued to such estate agent.
 7. The seller was of the opinion that the effect of **Section 34A** was to invalidate the contract of mandate between the appellant and the respondent. Hence, the commission paid by the seller to the PP would need to be re-paid to the seller.
- This was especially so as the seller was unaware that the PP did not hold a valid FFC at the date of sale of the property.
8. The judge was of the opinion, that if the Estate Agency Affairs Act required repayment of commission by the PP back to the seller, in the instance indicated above, then the legislation would expressly say so.
 9. The judge went on to say that **Section 34A** does not invalidate the contract of mandate of an estate agent who acts in conflict with Section 26. In other words, **a PP who acts without a FFC is acting illegally** and is not entitled to commission.

This means, that if the seller has not paid the PP their commission, then they are not legally required to do so.

However, if the PP has been paid their commission already, then the PP is not required to give the commission back to the seller, as **not holding a valid FFC does not invalidate the mandate**, in terms of which, the seller is responsible for payment of commission to the PP.

10. The judge said, "Had it (**Section 34A**) been intended to confer a right of action upon a client for recovery of moneys that became contractually due it would have been a simple matter to do so in express terms" – meaning that the Act would say so – you are not entitled to keep the commission, so give it back to the seller!

11. Hence, **the PP was entitled to keep the commission** paid, in this case.

We know that the Estate Agency Affairs Act 112 of 1976 has been repealed and replaced by the Property Practitioners Act 22 of 2019.

My question to you is, whether or not Act 22 of 2019 has amended the provisions of Act 112 of 1976 highlighted in this case?

I will post my response to my question next week.