

Monday Contemplation No 37

No FFC – Is my mandate valid? Part 2

Last week we discussed the case of Taljaard v Botha Properties. In summary, an estate agent took a mandate from a client to market and sell their property, but at the time of taking the mandate, the estate agent did not hold a valid Fidelity Fund Certificate (FFC).

The agent sold the property and was paid their commission. The seller was of the opinion that the mandate was invalid, as the agent did not have a valid FFC, and the seller claimed return of the commission that had been paid to the Property Practitioner (PP).

The judgement was handed down in 2008 and the relevant governing legislation at the time, was the Estate Agency Affairs Act 112 of 1976. The judge ruled as follows:

1. Section **34A** of the Estate Agency Affairs Act 112 of 1976, 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.

2. 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.

3. 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!

4. 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We know that the Estate Agency Affairs Act 112 of 1976 has been repealed and replaced by the Property Practitioners Act 22 of 2019. What does the Property Practitioners Act (PPA) have to say:

1. Section **48(1)** of the PPA says that no person or entity may act as a PP unless they have been issued with a FFC.

2. Section **48(3)** says that any person who does not comply with Section 48(1) is guilty of an offence.

3. Of great importance, is **Section 48(4)** which says, **any person who acts without a FFC, must when requested, repay any money received as a result of a property transaction whilst acting without a FFC**. Any person who does not comply with Section 48(4), is guilty of an offence.

4. Section **56(1)** says that a PP is under no circumstances entitled to remuneration unless they are in possession of a Fidelity Fund Certificate (FFC).

The deficiency in Section 34A of the Estate Agency Affairs Act, pointed out by the judge in Botha v Taljaard Properties has therefore been amended **by Section 48** of the Property Practitioners Act.

In simple terms, a PP may not act without a valid FFC. If a PP acts without a valid FFC, any commission earned as a result, must be paid back to the client. The mandate signed by the client and the PP will be of no consequence. Quite simply, **no FFC, no commission** and if you have been paid your commission, then you need to give it back to your client. So, **make sure you have a valid FFC!**

The next interesting question, is what happens to a PP's commission when the PP has applied for their FFC but the FFC has not been issued timeously by the PPRA?

I will post my response to this question next week.