

Monday Contemplation No 9

Defects and the Property Practitioner

In the last two Monday Contemplations, we have discussed some interesting issues relating to latent defects. These blogs dealt with the relationship between sellers and buyers. We will now discuss **the responsibility of the property practitioner (PP)** when it comes to latent defects. These responsibilities flow from the Property Practitioners Act 22 of 2019 and its associated Regulations, as well as the Code of Conduct contained in the Regulations.

The starting point is for us to look at the Code of Conduct and in particular **Clause 34.3.2.1** which deals with the PP's duty to disclose. Regulation 34.3.2.1 says as follows:

"An estate agent shall -

34.3.2.1 **convey to a purchaser** or lessee or a prospective purchaser or lessee of immovable property in respect of which a mandate has been given to him to sell, let, buy or hire, **all facts concerning such property** as are, or should reasonably in the circumstances be, within his personal knowledge and which are or could be material to a prospective purchaser or lessee thereof;"

There are several important issues that flow from this Regulation:

1. An estate agent (note that reference is not made to a property practitioner), shall convey all facts – it is therefore the responsibility of the PP to convey the facts.
What facts?
2. Facts which are or could be material to a prospective purchaser or lessee. This means that trivial issues are not important and do not need to be conveyed to a prospective purchaser or lessee. However, important facts must therefore be conveyed, for example, a leaking roof or rising damp. These facts would surely be important to a prospective purchaser or lessee. What is material to one person is not necessarily material to another person. Perhaps one way to look at materiality as a PP, is to ask yourself this question, "If I were the purchaser or lessee, would I want to know about the leaking roof or rising damp?" This is obviously not a legal test or a hard and fast rule but is a practical way of looking at this responsibility. And what if the seller shows the PP something in the property and says not to say anything to potential buyers??? In terms of Clause 34.3.2.1 it is the PP's responsibility to disclose those problems or defects in the property, regardless as to what the seller has instructed the PP?
3. Would it be acceptable for a PP to say that they didn't know about something that should be disclosed? The Regulation says that the PP must disclose all material facts that are, or should reasonably in the circumstances be within his personal knowledge. Again, this is a question of fact. It would not be sufficient for a PP to use as a defence, that they did not know about something. Let us say for example, that a portion of the frontage of a property is to be expropriated due to a road widening. This is surely something that a PP working in a particular farming area should be aware of? Especially those PPs that hold themselves out to be area experts! Conversely, the PP that says they did not know about this impending expropriation, cannot use this as a defence to the charge of not complying with this obligation. The question would be, should the PP have known about this?

It is therefore important that any PP ask relevant questions of their seller or landlord, as well as studying their farming area and keeping informed about the developments in their farming area.

We will continue this theme in our next few Monday Contemplations, including the importance of the mandatory disclosure form.

A question to consider:

If the seller's spouse passed away inside the property that the seller now wants to sell, do you as the PP need to disclose this to prospective buyers?