

Monday Contemplation No 41

Does the agent or the agency hold the mandate? Part 3

In the last two posts, I have discussed some of the important nuances between the common law of agency and the law relating to real estate agency. In particular, the fact that the mandate is given by the client to the agency and not the agent.

A question that often arises, is if a property practitioner (PP) leaves an agency and then joins another agency, what happens to any commission that is owing to that PP?

The simple answer to this question, is that this should be regulated in the letter of employment (LOE) that is signed between the PP and the agency. Some LOEs are very simple and just confirm that the employment status of that PP with the agency for the purposes of the PP getting their FFC. Some LOEs are more complex and contain substantially more information. It is suggested that any LOE contains the following information:

1. Basic employment details, such as names and addresses of the parties.
2. A job description – what is the PP employed to do and what is the ambit of the work required from that PP. Is this person a sales agent or a rental agent? Are they involved in property management? And so on.
3. Remuneration – this is obviously very important for both the PP and the agency. In this part of the LOE, it should be very clear as to what compensation the PP is entitled to, for example, the split of commission. Other benefits such as a basic salary or petrol allowance would also be included in this section of the LOE. Furthermore, this part of the LOE should also deal with what happens in the event of the PP's departure before a transfer is registered, for example. This is very important in order to prevent future disputes.
4. Working hours – notwithstanding that a PP does not have fixed working hours, this should be addressed in the LOE. Likewise, things like leave should also be included in this part of the LOE.
5. Confidentiality and non-disclosure – although this is dealt with by the common law, it should also be made clear in the LOE. Information that the PP is privy to about the agency and any clients needs to be kept confidential and may not be disclosed to outside third parties.
6. Termination – this part of the LOE will deal with the circumstances when the PP may leave the agency. This could be voluntarily and the PP gives notice or it may be in instances where the PP could be dismissed for certain behaviour or conduct. Once again, the matter of outstanding commission could be dealt with in this part of the LOE.

If the PP leaves the agency and there is commission owing to that PP and this is not dealt with in the LOE, the PP will have a claim against their previous employer due to the fact that they have earned the money and it is owing to them. Hence, why it is important to spell this out very clearly in the LOE to prevent any disputes.

Next week I will discuss whether or not a property practitioner is an agent or an employee and if this distinction makes any difference?