

THE CONSUMER PROTECTION ACT – DOES IT APPLY TO THE SALE OF MY RESIDENTIAL PROPERTY?

The Act regulates

1. Every transaction (as defined in the Act) between a supplier and a consumer involving the supply of goods and/or services in the ordinary course of business within the Republic of South Africa
2. The promotion of such goods and services in the ordinary course of business ; and
3. The goods and services themselves after the transaction is completed.

From the reading of the definition of "consumer"; "transaction"; "supplier" and "supply", it is clear that **the transactions covered by the Act are only those for the supply of goods and/or services supplied in the supplier's ordinary course of business for reward.**

A transaction (as defined in the Act) means:

- "(a) in respect of a person acting in the ordinary course of business-
- i) an agreement between or among that person and one or more other persons for the supply or potential supply of any goods or services in exchange for consideration (*writer's underlining*); or
 - ii) the supply by that person of any goods or at the direction of a consumer for consideration (*writer's underlining*); or
 - iii) the performance by, or at the direction of, that person of any services for or at the direction of a consumer for consideration (*writer's underlining*); or
- (b)....."

"'consideration' means anything of value given and accepted in exchange for goods and services..."

The transactions involved are those at arms length and of a regular nature, such as a sale by a property developer, and will exclude the typical scenario where a seller sells his residential home to a buyer for whatever reason.

However once a transaction is covered by the Act, the purchaser's fundamental rights are protected and the supplier will have to make sure that it complies with the provisions of the Act.

The question that then arises is whether the involvement of an estate agent in the sale of a property, even if it is not in the seller's ordinary course of business, will make any difference to the transaction.

The involvement of an estate agent in the sale of immovable property gives rise to two transactions

- the mandate agreement, and
- the resultant sale agreement.

In obtaining a mandate and marketing the property, the service the estate agent provides to the seller is in the ordinary course of the estate agent's business. The question that arises though is whether the mandate granted by the client to the estate agent is a transaction for the purposes of the Act.

It is our opinion that the usual estate agents mandate, where the agent markets the property and attempts to procure a willing and able buyer for the property, might not in fact be a transaction for the purposes of the Act. The service the agent provides to its client is the marketing and advertising of the property in the hope of procuring a willing and able purchaser for the property for which the estate agent will then receive a consideration. The estate agent receives no consideration for his services in advertising and marketing the property unless those services are successful and result in the production of a purchaser for the property.

In our view the Act may not have stretched the meaning of "consideration" to include a future possible payment for services dependant upon the success of the service offered and we wait to see how this is interpreted by our Courts.

We have recommended to our estate agent clients that they rather err on the side of caution and treat their mandate agreements as falling within the meaning of a "transaction" as defined in the Act, and that the agent must therefore ensure amongst other things that the mandate agreement signed between the estate agent and the client: -

- is in plain and understandable language;
- contains fair, reasonable and just terms;
- contains express notice of any term which limits the risk or liability of the agent, or a term that constitutes an assumption of risk and liability by the client;
- sets out the client's cooling off right, if applicable.

In as much as the agent markets its services, the agent is a "supplier" *vis-à-vis* the public and as such, the estate agents marketing practices of its services will have to comply with the provisions of the Act.

A "supplier" is defined as meaning a "person who markets any goods or services" and "market" is defined as to mean "to promote or supply any goods or services".

The estate agent will have to comply with the various chapters in the Act that embody the fundamental consumer rights such as the right to equality and privacy; the right to choose and disclosure of information; the right to fair and reasonable marketing; the right to honest dealings etc. in the marketing of its services, i.e. in how it goes about advertising for listings.

The agreement that results from the estate agents marketing efforts also does not in our opinion, fall under the scope of the Act. The contractual relationship that results is a once off transaction between the seller and the buyer, so simply put - if the sale of immovable property is not in the ordinary course of the business of the seller, the sale of the property is not a transaction for the purposes of the Act.

It is therefore our opinion that as far as estate agents are concerned, the services of an estate agent will fall within the definition of supplier for the purposes of the Act only in so far as;

1. the manner in which he markets his services to the public; and
2. whether the estate agent in marketing its services to whoever grants them a mandate has engaged in direct marketing.

If a mandate is the result of direct marketing, the grantor of the mandate can cancel same on 5 days notice.

Direct marketing is defined as

"to approach a person, either in person or by mail or electronic mail communication for the direct or indirect purpose of:–

- a) promoting or offering to supply in the ordinary course of business any goods or services to the person ..."

The client who will have the right to exercise a cooling off in respect of a mandate granted to an estate agent is the client who is approached by the estate agent in "person or by mail or electronic communication" for such a mandate. The client who seeks out the estate agent's services cannot avail himself of the cooling off period.

To summarise, the Consumer Protection Act in so far as it relates to the sale of immovable property:

1. might not be of application to the usual estate agents mandates as these are not transactions as defined in the Act – this depends on the interpretation of what is regarded as "consideration";
2. is of no application to the sellers of property who are not engaging in the sale of property in the ordinary course of their business
3. applies to the marketing techniques engaged by agents in advertising their services.