

THE NEWSLETTER WITH A DIFFERENCE

# M.C. MONTHLY

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## ATTORNEYS SELLING PROPERTY... DOES IT MAKE SENSE?

In recent years there has been an increase in attorneys grazing the pastures of estate agents. Similarly many other industries eroded attorneys' professional work and thus it is clear that everyone is fighting for survival and trying to broaden their income base.

Numerous estate agents and clients have enquired whether an attorney or conveyancer is indeed qualified and trained to sell properties and questioned whether this tendency is workable, ethical or even legal.

### The legality paradox

The current Act regulating the affairs of estate agents, The Estate Agency Affairs Act (EAA Act) of 1979 exempts attorneys from the definition of "estate agent" and subsequently also from the operation and requirements from the said EAA Act in certain cases. Section 1(d) of the EAA Act exempts attorneys (and, believe it or not, - their candidate attorneys) from the provisions of the EAA Act if they:

- i) act under their own names and
- ii) do so from their normal premises
- iii) in the course of their business.

Although it appears that attorneys (and the candidate attorneys in their employ) can thus operate as estate agents under certain limited circumstances without an EAAB Fidelity Fund Certificate (FFC), it is important to take note of the relevant statutory requirements. Firstly they must act under their law firm's name. I am of the opinion that it is a misinterpretation and an overreaching of the specific exemption to practice under a collective brand name even if they do also identify their legal practice. To prove my point I am sure that you can easily recall the names of a few of these estate agency/attorneys by their collective names but not by the names of the specific attorney who endorses the collective name or who belongs to the franchise. Secondly they must do business from the same office as that of the attorney. Thirdly the sale of property must be done in the course of the attorney's business. I contend that the initial intention was to permit attorneys to earn commission (as a fee) when property is sold in the course of their business i.e. flowing from a deceased estate, a divorce matter, an insolvency matter etc. I seriously doubt (although there might be possible valid arguments against my contention) that the intention was to create a basis where attorneys can operate and compete on a large scale as estate agents without an EAAB FFC whilst not standing under the scrutiny of the EAA Act, its regulations and ethical code.

### The qualification disparity

We must keep in mind that when the EAA Act was promulgated nearly 50 years ago in 1979, the academic and practical experience requirements to become an estate agent was extremely watered down in comparison with today. It can justly be argued that attorneys in general and conveyancers most definitely were better qualified to sell properties in the early years of the EAAB.

The estate agency industry was however transformed and professionalized in recent years whereby it is now required that a person who wants to become a full status (qualified) estate agent has to do a year internship, complete a logbook to portray their practical workplace experience under the auspices of their principal or a full status agent with a valid FFC (minimum of three years), undergo a vigorous practical assessment qualification for a year (FETC RE) (Further Education and Training Certificate in Real Estate on a NQF level 4) and thereafter write an exam at the EAAB known as a PDE 4 (Professional Designation Examination).

If a full status agent wants to qualify to become a principal (and thus be able to employ estate agents and interns) there are additional requirements. The individual then has to do an additional qualification which entails a year practical assessment (NC RE – National Certificate in Real Estate) on a NQF level 5 and thereafter write an exam at the EAAB known as a PDE 5.

Although the intensity and depth of the studies of a conveyancer pertaining to the legal field is far greater than that contained in the syllabus of the FETC RE and the NC RE, the latter covers an exceptional wider field than that of a conveyancer and most definitely than that of an attorney. To compare the relevant skill and knowledge level of an attorney and qualified agent is but one argument.



Written by/Geskryf deur: Tiaan (M.C.) van der Berg - Director

Keep in mind however that the relevant exemption is also applicable to candidate attorneys. Not all candidate attorneys have a law degree or even need to be enrolled for one. In terms of section 2(1)(d) and (e) of the Attorneys Act an individual can register a five year candidate attorney contract with only a matric certificate. This means that a youngster with no formal qualification, no experience and no obligation to comply with the educational and supervisory requirement of his/her peers in the estate agent industry can be let loose on the general public and operate outside the parameters of ethics as laid down by the EAAB. If the argument is accepted that the exemption allows the legal fraternity to compete on large scale with estate agents the aforementioned consequence will be untenable.

The marketing and sale of a property however entails far more than legal issues. To assume that the mere fact that a person is a conveyancer also means he or she is able to do valuations, assist sellers with improving the marketability of their properties, effectively advertise and list properties, perform a market analysis, negotiate a price or do price counselling on a property, etc. is surely a misperception.

I myself am a conveyancer who has been involved in the training of estate agents for many years and as a result I am well aware that the unit standard, relating to legal aspects of the required training, only comprises a portion of the total syllabus. I will unequivocally state that I do not (apart from the legal aspects) deem myself qualified to assist sellers and purchasers in the sphere where estate agents operate, pretty much like they are not qualified to give legal advice. (Although they often venture into this maze to their own detriment).

### The attorney's staff acting as agents conundrum

As explained above, the attorney can indeed operate legally as an estate agent under the FFC issued by the Law Society, but what about his/her "agents"?

Let us presume that it is not the attorney/agent of the in-house estate agency him/herself that lists, markets, negotiates, do viewings with prospective purchasers and sit in the show house etc. (Which I think is a fair presumption.) The question then arises who does this estate agency's foot work? In many cases the attorney would employ NQF4-qualified agents. Unfortunately in many other circumstances this is not the case and rogue individuals, who do not want to, or cannot pass the strenuous academic qualifications, are lured to these attorneys/estate agencies under the false pretence that they can operate legally under the attorney's Law Society FFC without obtaining the proper academic qualification and attaining an EAAB FFC. This is obviously not a correct assumption. Such an estate agent will not be entitled to earn commission on his/her own or for the estate agency.

Keep in mind that the exemption from the EAA Act only includes attorneys and candidate attorneys and not any other staff members. The attorney/agent cannot act as a principal of an estate agency in the true sense of the word under the EAA Act (remember the attorney/agent only falls under the relevant legislation governing attorneys – currently the Attorneys Act). The attorney can thus not employ individuals as interns or as "agents" in the strict sense of the word. The people working for the attorney/agent are not regarded as estate agents but as employees. Furthermore the commission earned by the attorney/agency is deemed to be professional fees which the attorney cannot share with non-attorneys (employees) in terms of the Attorneys Act. The 'agent' must therefore earn a salary. **Continue - see back page.**

*We are proud to announce that we have established a deceased estate department.*

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**M.C. VAN DER BERG**<sup>INC</sup>  
**ATTORNEYS, CONVEYANCERS & NOTARIES**

Your Property Attorneys

Conveyancers under the current EAA Act have no obligation to verify whether an estate agent operates legally before commission is paid to them at registration. In terms of the pending Property Practitioners Bill conveyancers become the gate keepers of the EAAB and such an obligation is indeed envisaged. Time will tell what the attorney/agent will do with his/her own unqualified "agents" in this regard once this legislation is promulgated.

This position creates a double standard in the market in that some estate agents are well qualified and trained and must comply with various requirements, for instance Continuing Professional Development (CPD) and others somehow not at all. I think that this interpretation of the EAA Act makes a mockery of the attempt by the EAAB to professionalize the estate agency industry to the benefit of the consumer. This surely is extremely prejudicial to compliant estate agents as well as to consumers who are unaware of the correct position.

## The ethical issue

It is no secret that the true reason why there is an increase in this kind of activity is because conveyancers are attempting to lure conveyancing work. In fact most of these attorney/agents advertise that they present a one stop shop. In many cases the appointment of the conveyancer to do the conveyancing is a prerequisite for the discount on the commission.

Estate agents operating outside the realm of attorney firms are not ethically permitted to force or lure work to conveyancers as it is not deemed to be in the public interest. Agents should advise sellers that it is their right to nominate the transferring attorney. Surely there is no problem if an estate agent recommends conveyancers, as long as the seller is informed that it is ultimately his/her choice. I think it is fair to say that this would not be the case under discussion. To the contrary, mandates to sell at a sub-market related commission, are given to the attorney/agent with the understanding that the commission-cut is possible because the conveyancing is done by the same establishment.

Conveyancers are supposed to be fiercely and fearlessly independent. If any legal issue arises between the seller/purchaser and estate agent, the independence of the conveyancer ought to ensure that the consumer's rights reign supreme. As an example, if the estate agent (as an employee of the attorney) advises the purchaser incorrectly relating to the status of building plans or zoning, we need to pose the question whether the conveyancer will fearlessly advise the purchaser to hold the agency vicariously liable? As another example, let us say that the seller accepted an offer through the attorney/agency and a follow up transaction (with a higher price) with another estate agency. The attorney/agency's purchaser misses the due date for the bond. Will the attorney now advise the seller to his/her best interest or to the best interest of the agency to walk away from the first deal as it has lapsed? There are countless situations like these where a clear conflict of interest exists.

To me it is clear that a grave risk exists for the seller and the purchaser to make use of the in-house conveyancer. I would propose that the conveyancer, who also acts as the estate agent (in his capacity as a legal practitioner), should advise the seller to appoint another conveyancer to attend to the matter, which obviously will not happen.

If the argument that the attorney/agency and its employees do not fall under the scrutiny of the EAA Act stands, then it flows naturally that they also do not have to abide by the Code of Conduct of the EAAB. That means that the carefully designed protective measures designed to protect estate agents and the general public alike against the unscrupulous behaviour of their colleagues is *pro non scripto* for the attorney/agent. An argument which is hard to comprehend.

The counter argument that the attorney/agent operates under the code of conduct of the Law Society is true but also misleading. Keep in mind that a code of conduct is a set of rules outlining the norms, rules and responsibilities of, and or proper practices for, an individual, party or organization within that specific sphere. Hence the code of conduct of estate agents deals with affairs topical to that industry and the code of conduct of attorneys to the latter industry.

As an example, the rules requiring a sole and exclusive mandate to be in writing with a marketing plan etc. contained in the estate agents code of conduct does obviously not appear in the attorney's code of conduct. Does this mean that the attorney/agent that is ostensibly only regulated under the latter code can, to the detriment of the consumer, accept a verbal sole mandate without a marketing plan?

If it is true that the attorney/agent is only regulated by the attorney's code of conduct, the question must be asked why they often advertise in direct conflict with the code of conduct of the Law Society. It is for instance regarded as unethical for attorneys to advertise and lure work through the advertisement of fees and discount. The old adage: "you can't hunt with the hounds and run with the hares" jumps to mind.

The mere fact that the attorney's code of conduct does not deal with estate agent matters is maybe indicative that my earlier contention, namely that it was never the intention of the legislature to grant attorneys the right to compete with estate agents on this level, is true.

## Who is to gain from this?

These attorney/agencies' sales pitch are that they charge less commission than other agents. The commission issue seems to be the distinguishing factor presented as to why a seller must make use of the so called one stop shop.

I beg the question; who is the winner in all of this?

Surely it is not the employee working for the attorney/agency as he/she now earns less than other agents (at least according to their own submission). Surely it is not the purchaser, as these agencies advertise widely that they are saving the seller commission, hence the reason to give them the mandate to sell. It must therefore be a fair conclusion that the purchaser still pays the same price. So from the purchaser's perspective you have nothing to gain except a conveyancer and estate agent who will not act on your behalf. What about the seller? It can be argued that the seller pays less commission.

Arguing that the seller saves commission is obviously only true if the property is priced right, which is questionable as the attorney or rather the employee as mentioned above is not necessarily schooled in valuations. A wrong valuation can easily wipe out a supposed saving on the commission. Mr. Seller, be careful that you don't lose on the swings what you erroneously thought you won on the roundabouts.

## The conclusion

Although an argument can be made that the attorney/agency medley is legal, I think in many cases the relevant exemption in the EAA Act is taken too far and is abused for dubious purposes. I am of opinion that if the attorney/agent does not tread carefully he/she can easily find him/herself in an ethical minefield. As a seller or purchaser I would most definitely insist on a different and independent conveyancer. I can only come to the conclusion that this is a scheme to compete unfairly with estate agents on the one hand and with conveyancers on the other.

At M.C. van der Berg Incorporated we strive to be fearlessly and fiercely independent and impartial. We have never owned, nor had an interest in any estate agency. We believe that estate agents are schooled and trained in a different sphere of the property industry than we are and that it will be improper and not in the best interest of the seller, the purchaser, the estate agent and the general property industry to compete in a sphere where we cannot act in the best interest of clients.

## Ethical Code - EAAB

### 3. Mandates

#### No estate agent shall -

3.8 knowingly or negligently make a material misrepresentation concerning the likely market value or rental income of immovable property to a seller or lessor thereof, in order to obtain a mandate in respect of such property;

## MCGuides

Visit our website at [www.mcvdberg.co.za](http://www.mcvdberg.co.za) to view our MCGuides.

### MCSellersGuide and MCPurchasersGuide:

- \* These guides inform purchasers and sellers respectively about the risks they have to take into account before entering into a sale agreement, as well as each step of the transfer process.

### MCBondGuide:

- \* This guide explains the bond registration process to the purchaser.

### MCQuickGuide:

- \* A consolidated guide explaining the entire property transfer process and our unique feedback system.

### MCDevelopersGuide:

- \* A generic guide for purchasers in new sectional title developments explaining the development and transfer process.

### MCSectionaltitleGuide:

- \* A guide explaining all issues pertaining to sectional title registrations.

## What our clients have to say / Wat ons kliënte sê

- \* Ek wil net bevestig dat ek baie gelukkig is met die diens wat ek van julle ontvang het. Die inligting wat julle deurgee het my gehelp om die proses te verstaan en julle weeklikse verslag hou mens op hoogte van die stappe in die proses. 'n Gemiddelde persoon soos ek verkoop nie vaste bates elke jaar nie en ek was heel gerus dat alles goed hanteer word en dat daar niks is om oor te stres nie. Ek sal verseker mense aanbeveel om aan julle deur te kloep vir enige dienste wat julle lewer. Weereens baie dankie aan die span wat aan my transaksie gewerk het.
- \* I would also like to acknowledge your professional dealings with me regarding this property purchase. You have always promptly kept me informed at every step of the transfer process and have always been polite and dignified when communicating with me. On the whole, I would recommend M.C. van der Berg Attorneys to any one of my friends if they need good transfer attorneys. I will gladly use your services again in future. Continue with the outstanding work and "Big 5 "greetings from the outskirts of the Kruger National Park (Phalaborwa).
- \* Thank you so much. Know that you helped my girls have a place they can call home for the first time in their lives. You made a difference M.C. van der Berg.

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