

THE FIDUCIARY DUTIES OF ESTATE AGENTS AS MANAGERS OF PUBLIC TRUST FUNDS



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Introduction

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2.What is a Fiduciary Duty and how is this governed

- Common Law
- Code of Conduct
- Consumer Protection Act
- Estate Agency Affairs Act

3.What is Trust Money

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- When and who must open and maintain a Current Trust account?
- Can Trust money be invested for the benefit of a depositor
- How must the Estate Agent deal with interest earned on trust moneys?

The Estate Agent

- **Section 1 of the Estate Agency Affairs Act(EAAA)** defines an estate agent as a person who –
 - i) **sells or purchases** or publicly exhibits for sale immovable property or any business undertaking ...; or
 - ii) **lets or hires** or publicly exhibits for hire immovable property or any business undertaking...; or
 - iii) **collects or receives any moneys payable** on account of a lease of immovable property or any business undertaking – **this subsection makes up the basis of this seminar**

The Estate Agent(ctd)

- **All agents will fall under this definition**, meaning they must be registered “estate agents”
- The agent **must be registered with the Estate Agency** Affairs Board and have a trust account for holding deposits
- The obvious benefit of having an estate agent on board for rental property matters is **Fidelity insurance** cover to protect funds. This is a significant advantage over self-regulation of funds by individual owners.

What is a Fiduciary Duty?

- An individual or entity in whom another has placed the **utmost trust and confidence** to manage and protect property or money.
- The relationship wherein one person has an **obligation to act for another's benefit**.
- **Fiduciary duties are entrenched** in the Common law, the Estate Agency Affairs Act Code of Conduct and find application in the Consumer Protection Act.
- The **management of Trust funds** is entrenched in statute, namely the Estate Agency Affairs Act.

Common law

- At common law, there is a **fiduciary relationship between an estate agent and his client**. Therefore an estate agent may not misuse the trust placed in him by his client.
- In *Daewoo Heavy Industries (SA (Pty) Ltd v Banks and Others* 2004 (4) SA 458 (C) it was stated that:
- *“there is in most, if not all contracts of service, whether it be an employment contract or a contract of agency, an implied fiduciary duty on the part of the employee or agent towards the employer or the principal as the case may be”.*

Common law(ctd)

- It is the **duty** of an estate agent to **act solely for the benefit of the owner** and must disclose any conflict of interest - *Mallinson v Tanner 1947 4 SA 681 (T) 684*;
- Of course in property sales it is, inevitably, the purchaser's funds in their trust account, so whilst they hold a mandate on behalf of the seller there is a statutory duty to manage the funds of the purchaser.
- This applies equally to the rental agent who acts for the owner but manages the rentals and deposits of the tenant.

Code of Conduct

- The code of conduct, created in terms of **section 8(1) (b) of the Estate Agency Affairs Act** was prepared so as to **regulate the conduct** of estate agents when dealing with consumers and other third parties.
- The code of conduct predates the Consumer Protection Act but contains as strong as, if not stronger, protective measures. The Consumer Protection Act of course echoes the same obligations of suppliers to its consumers
- The code stipulates that an estate agent must:
 - **Not do or omit to do any act** which is or may be contrary to the integrity of the estate agents. (section 2.1)
 - **Protect the interest of the client** (the owner) at all times to the best of his ability, with due regard to the interest of all other parties concerned.(section 2.2)
 - Not willfully or negligently fail to perform any work or duties with **such degree of care and skill as might reasonably be expected of an estate agent** (section 2.3) See further section 54 CPA

Consumer Protection Act

- in the CPA we see a definition of an estate agent/supplier as a person who promotes or supplies any goods or services
- a) in relation to **goods**, (this) includes **sell**, rent,..... in the **ordinary course of business for consideration**; or
- b) in relation to **services**, (this) means to **sell the services**, or to perform or cause them to be performed or provided, or to **grant access** to any premises,in the **ordinary course of business for consideration**;

Consumer Protection Act ctd

- **Section 54 of the Consumer Protection Act** provides the Consumer with the right to:
 - **The timely performance and completion of services**, and timely notice of any unavoidable delay in the performance of the services by the Supplier / estate agent.
- **The performance of the services in a manner and quality that persons are generally entitled to expect** from the Supplier/ estate agent.
- For a comparable definition, **See section 9(1) of Trust Property Control Act** – “A trustee shall in the **performance of his duties** and the exercise of his powers act with the care, diligence and skill **which can reasonably be expected** of a person who manages the affairs of another.
- Failure to comply with the Code of Conduct would arguably be a contravention of the above.
- The Management of Trust accounts however is strictly regulated by legislation and therefore in determining the fiduciary duties of estate agents in managing public trust funds we need to consider a **combination of both common law duties and statutory obligations**, the most important statutory obligation being the Estate Agency Affairs Act.

Estate Agency Affairs Act

- Section 29 and 32 of the Estate Agency Affairs Act 112 of 1976 (EAAA)**
- Trust account regulations: GNR 1472 of 1977**

No Distinction

- The EAAB **draws no distinction** whether the estate agent operates as a **sole proprietor, partnership, close corporation or company** and the **requirements for the audit** of the business and trust accounts **remain irrespective**.
- The EAAB reserves the right to institute **formal processes** relating to any non-compliance with the provisions of the Act.

Section 29 of the EAAA

- **Every estate agent to keep accounting records** relating to:
 - **all monies received or expended**, including moneys deposited to trust account or invested in a savings or other interest-bearing account **Section 32(2)(a)**;
 - **all assets and liabilities**;
 - **all financial transactions** and financial position of the business;
 - **accounting records to be audited within four months after the final date of the financial year**;

Section 32(1) of the EAAA

- Every estate agent to open and keep one or more separate trust accounts;
- Account/s shall contain a **reference to this section**;
- Estate agent or his / her employee **to deposit all trust money** held or received herein;
- **EAAB to be notified of all accounts**;
- Employee estate agents need not open separate trust accounts

Section 32(2)(a) of the EAAA

- Moneys deposited in the estate agent's trust account, but not immediately required for any particular purpose, **may be invested** in a separate savings or other interest-bearing account.

Section 32(2)(c) and Regulation 9.2

- Interest on all money in trust, savings or other interest-bearing account payable to Fidelity Fund;
- When receiving trust money in respect of a **contract of sale or lease, estate agents must disclose to the parties** that unless they agree, in writing, in a separate document or provision in the agreement, to whom the interest earned on the trust money is to be paid, **the interest so earned will accrue in favour of the Estate Agents Fidelity Fund.**
- **Estate agents may deduct and retain 50% of interest earned** (where there is no mandate) when payment is made to the EAAB.

Sections 32(2)(e)

- Trust money in an account invested in terms of paragraph (a) or deposited in terms of subsection (1) **shall be retained by the estate agent** in question in that account **until the estate agent is lawfully entitled to it or instructed to make payment therefrom to any person.**

What is Trust Money?

- **Money received or held by an estate agent,**
 - **an agent's representative,**
 - **or any member of an estate agent's staff,**
 - **on behalf of any other person** in the course of an estate agent's business as an estate agent.
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- **Such money must be recorded in the estate agent's trust accounting records and paid into the estate agent's trust account** with an authorised financial institution

What is Trust Money?(ctd)

- Examples of trust money and estate agents' roles
- **Rental collection in managed lease agreements** where the estate agent **manages these funds on a monthly basis**, pays their Consumers /Landlords and deduct their commission;
- **Deposit collection at inception of lease agreements** where the estate agent **manages the security deposit** (plus interest thereon accruing to the tenant) **for the duration** of the lease;
- **Deposit collection in a sales transaction** where an **initial deposit is sometimes paid to the estate agent** with interest accruing to the purchaser. In this instance the estate agent takes the commission from the deposit on registration of transfer. Otherwise (normally), commission is paid to estate agent by the conveyancer on registration of transfer.
- **money received as part of the management of a sectional title scheme; and**
- **prepaid advertising**

What is NOT Trust Money?

- Money received in the course **of other businesses** conducted by an agent **is not money** received in the course of acting as an estate agent, and is not considered to be trust money under the Act.
- Such money does not, therefore, fall within the trust accounting requirements of the Act.
- Funds of this type, however, **may be included as part of an agent's trust account where it is best practice to do so.**
- It is **recommended** that if an agent has any doubts about how to treat any money, they should **act on the side of caution** and treat it as trust money.

Why are there special requirements for the control of trust money?

- Estate agents hold a **significant position of trust** within the community. They hold large sums of clients' money.
- **The trust money accounting system** aims to ensure that all trust money held by estate agents for each client and in respect of each transaction for that client **can be accurately accounted for** at all times.
- It is essential to remember that the **trust account money belongs to other people**. Removing the money from the trust account for a reason other than one that is lawful and appropriate is a very serious matter.

When and who must open and maintain a current trust account?

- **Every estate agency** must open a **cheque trust account** with a bank and at the time of opening the account ensure that it has the following designation in the records of the bank:

"Trust account opened in terms of Section 32(1) of the Estate Agency Affairs Act, 112/1976".

- **Without such a designation the account does not enjoy the special protection envisaged by the Act** and in the event of death or sequestration of a sole proprietor or the liquidation of the estate agency firm, **trust creditors (members of the public who have entrusted moneys to the estate agent) run the risk of losing their moneys paid in good faith as trust moneys.**

How must the Estate Agent deal with interest earned on trust moneys?

- Estate agents are required to advise trust creditors that they are entitled to receive the full amount of interest earned on their trust deposits.
- In the unlikely event of a trust creditor renouncing the right to receipt of interest, the full amount of interest must be paid over to the EAAB.
- In terms of a longstanding arrangement, the EAAB is obliged to refund 50% of such interest received to the estate agent concerned.
- In order, however, to avoid duplication of action, estate agents are entitled simply to pay over to the EAAB the EAAB's half share of interest earned and actually received by the estate agency business.

THANK YOU

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