

“A verbal contract isn't worth the paper it's written on” (Samuel Goldwyn)

Perhaps you are a seller marketing your property through an estate agency, or a buyer asking an agent to find you one, or a landlord employing an agent to let out your property. Whatever the transaction involved, make sure that the agency mandate is in writing.

The problem is that, because we have a human tendency to hear only what we want to hear, the parties to any verbal agreement can, quite genuinely, each remember the terms of their agreement quite differently. Even worse, if one party is determined to cheat the other, it's a lot easier to challenge a verbal agreement than a written one.

Bottom line – oral contracts invite misunderstanding, conflict and protracted litigation, and for that very reason few agents will accept a mandate without requiring your signature on a written agreement.

But not always – let's consider a recent High Court fight over a R450,000 commission claim.

Buyer must pay R450k for a cancelled sale

- A property developer had previously employed an estate agent to source development property for it. No written mandate was ever signed.
- The agent, relying on what she said was a verbal mandate to find a further development property, introduced the developer to a property which it decided to buy. An agreement of sale, including a clause confirming that the agent was entitled to R450,000 in commission, was signed by both buyer and seller. The agent had thus fulfilled her mandate and was the effective cause of the sale, the developer being willing and able to buy the property. In the ordinary course the agent would then have been entitled to her commission on fulfillment of all suspensive conditions (“conditions precedent”).
- However, when the developer cancelled the sale, it refused to pay the agent her commission, denying firstly that any mandate had been given, and secondly arguing that in any event commission was only payable against actual transfer of the property from the seller to the buyer.
- Long story short, the Court dismissed the developer's attempts to convince it that there was no mandate at all, or that the suspensive conditions had not been fulfilled, or that the mandate included either an implied or a “tacit” term to the effect that commission would only be payable against transfer.
- The developer was ordered to pay the agent's commission and is left R450k (and legal costs) down, with absolutely nothing to show for it.

Johannesburg

Unit 7, Visiomed Office Park, 269 Beyers Naude Dr, Northcliff 2195.

Tel: 011 431 3739

Email: admin@duplooyinc.co.za

Hermanus

3B Village Lane, Hemel & Aarde Village, Sandbaai, 7200

Tel: 028 316 3707

Email: info@dpincct.co.za

The lessons...

That is of course not only an expensive lesson for the developer, it's also a clear wake-up call to anyone and everyone entering into a property deal of any sort with the involvement of an estate agent to ensure that you -

1. Sign a written, clear mandate

Both parties could have saved themselves all the aggravation, delay and cost of litigation had they only entered into a written mandate agreement with clear, simple terms accurately recording the terms and conditions they had agreed upon.

As we said above, most agencies insist on written mandates anyway, but make sure you aren't the exception!

2. Specify that commission is payable against transfer

Most sale agreements will provide that commission is **earned** on performance of the agent's mandate and fulfilment of any suspensive or resolute conditions (bond clauses and the like).

But when is the commission actually **payable** to the agency? As it is normally deducted from the buyer's deposit held in trust, both seller and buyer should check that it will not be paid out before transfer (or, in the event of a breach or cancellation of the sale, on that date). And whilst most standard mandates and sale agreements will provide exactly that, you must check because every agreement will be different. If there is a clause allowing payment of commission before transfer, don't accept it without specific legal advice.

From an agent's perspective, further clauses are of course essential to protect your commission payment in the event that the sale is frustrated or doesn't proceed – normally the agreement is that a defaulting party (buyer or seller) is liable to pay the full commission on default.

Most importantly of all, sign nothing property-related without asking us to check it over for you first!