

# PROPERTY PRACTITIONERS' DUTY OF CARE; PROFESSIONAL NEGLIGENCE AND CODE OF CONDUCT

## 1. Code of Conduct:

***“An estate agent shall not wilfully 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”.***

- In simple English – an agent shall perform his / her work with such care and skill as might reasonably be expected of an estate agent.
- If you don't conduct yourself this way, then you could be held to be NEGLIGENT.

## 2. What is negligence?

An agent is **negligent** when:

- He or she does something, or fails to do something when there is a duty of care on him / her to do something, **and**
- this conduct or failure to act, **results** in damages to another person; **and**
- such damages were reasonably foreseeable; **and**
- such, damages could have been prevented, had the agent taken reasonable steps to avoid this.

If you can tick all of these boxes, you call MILTONS!  
What does this mean for you?

1. Firstly, that the client who has suffered damages can sue you for compensation.
2. Secondly, you may face disciplinary sanctions at the PPRA.

### **Does this mean that no error is excusable?**

- a. The law realizes that humans are just that – human - and therefore prone to making mistakes.
- b. NB - Merely making a mistake does not amount to negligent conduct.

c. There must have been damages not mere inconvenience or getting a fright.

d. NEGLIGENCE CANNOT HAPPEN IN A VACCUUM – The nose job.

3. In other words, golden rule #1, is that you are required to do your work with *such skill and care as might be expected of a **reasonable estate agent***.

**This means you have a statutory duty of care**

- What is a “reasonable” estate agent?
- The law uses the “reasonable man” test. What would a reasonable man (agent) have done under the same circumstances?
- ***Doves v Hawks***

Doves are ULTRA careful.

Hawks on the other hand are borderline reckless.

“Reasonable” - means somewhere in between.

There is no textbook example of a reasonable estate agent, it all depends on the facts of the matter.

**4. WHAT DOES IT MEAN WHEN WE SAY THAT DAMAGES MUST HAVE BEEN REASONABLY FORESEEABLE?**

4.1 The test in law is that there must have been a:

4.1.1 *Factual nexis* (connection); and a

4.1.2 *Legal nexis* (connection).

4.2 In other words, there must firstly be a direct factual link between what you did/or failed to do and the end result; and

4.3 There must also be a legal nexus – in other words, to use layman’s terms, the end result may not be too far removed from the conduct that started the ball rolling!

### **EXAMPLE**

*Mr and Mrs Smith; Fluffy - and the leg.*

*Mr and Mrs Smith want to retire. Mrs Smith tells Mr Smith to go find them something nice to downscale to. But he must be 100% sure that Fluffy the poodle can also stay with them!*

*Mr Smith sees a flat on the interweb. He arranges a viewing. It is perfect. He asks the agent, “MAY WE KEEP A DOG?”. Agent asks, “What dog?” and Mr Smith answers, “A Maltese poodle”. The agent says “Yes, absolutely. Mrs Cartwright downstairs has a Labrador so this should not be a problem at all”.*

*Great.*

*Mr Smith puts in an offer and the transfer goes through. The day after taking occupation the trustees see Fluffy and send the Smiths a letter to remove the dog OR face court action because the Conduct Rules prohibit dogs unless the dog is kept for medical reasons.*

*It then transpires that the Labrador was assigned to Mrs C because she has a serious nervous disorder and it was recommended for medical reasons, THAT is why the trustees agreed.*

*Mrs Smith has an all fall down. She packs her bags and leaves – with Fluffy. Mr Smith falls into a depression. He gets drunk one night and falls over the balcony. Medics collect him, entangled in a cactus bush.*

*Whilst being rushed into hospital he falls off the gurney and onto a bucket containing use used syringes and scalpels that a wayward nurse left in the passageway. He gets an infection, followed by gangrene, and 2 weeks later – his right leg has to be amputated.*

- **Fact** - Had the agent first checked WHY Mrs C has a dog he could have given Mr Smith the right answer and Mr Smith would still have his right leg. There is a factual nexus.

- **BUT** - was the loss of his leg REASONABLY foreseeable? Definitely not.
- **Assume** however that all that had happened was that Mr and Mrs Smith were fined each month for keeping a dog when the conduct rules forbid this?
  - That would have been reasonably foreseeable and reasonably preventable because the agent ASSUMED. He should have checked.
  - Assumption is the mother of all ...
  - Is the agent liable for this? YES

## 5. SO THEN - WHAT CAN BE EXPECTED OF A “REASONABLE ESTATE AGENT”.

### CODE OF CONDUCT

5.1 You have to disclose all facts pertaining to a property which **“are, or should reasonably in the circumstances be, within his personal knowledge and which are or could be material to a prospective purchaser”**

**KYC!** Kill your client? KNOW YOUR CLIENT!

- Ask the buyer what he intends to do with the place;
- does the buyer have cats and dogs;
- establish the buyer’s needs;
- does the buyer intend to run a business from the property;
- if so, what kind of business?
- *This will give you an indication of what you need to know or find out.*

### 5.2 What should **reasonably** be within your knowledge?

Two categories of information:

#### 5.2.1 **CATEGORY 1** - Facts that you as the property expert **should** know about:

- **In a ST** – Exclusive use areas – Always double check with the managing agents whether your seller DOES in fact have exclusive use over a parking bay or a storeroom for example.

- **Zoning / consent / departure?** Ask for proof if your buyer wants to know – don't just rely on what your seller tells you.
- **If your buyer asks you whether all improvements are on approved plans?** Insist on getting a copy of the plans and check. Don't simply rely on what the seller tells you.

### **5.2.2 CATEGORY 2 - Facts which only the seller could know about:**

- Leaking pool
- Leaking roof
- Recent repair work
- Subsidence
- Previous flooding problems
- Latent defects
- Are there any planned developments around the property that he knows about?

**REMEMBER THIS – it is NOT your job to go looking for defects.**

**You are fully entitled to rely on your seller to make disclosures and be honest.**

### **THIS IS WHY WE HAVE A PROPERTY CONDITION REPORT**

- **Ensure the seller understands the importance of an accurate condition report** - Never leave out anything your client has disclosed to you.
- Make sure that IT FORMS PART OF THE OTP at the time of the mandate and sale and not later.
  - **NB** - The seller cannot rely on voetstoots *if the buyer was only made aware of latent defects that appear on the PCR, after his offer was accepted.*
  - The buyer can argue that the offer was made voetstoots after all, *BECAUSE no defects were disclosed.*

- **NB FAILURE TO HAVE A DISCLOSURE REPORT UNDER THE PPA** – you will be deemed not to have made any disclosures of any defects.
  - This could see you being accused of not disclosing any defects even though you may have done so orally, but how do you prove this then?
- **What if your seller refuses to sign a PCR?**
  - You may not market the property FULL STOP.
  - Seller must complete and sign but where you have a seller who has zero knowledge of the property add the following:
    - The seller has no personal knowledge of this property's condition because he/she is the executor/curator/owns it as an investment property and has never lived in it. The purchaser is therefore reminded that the property is being bought voetstoots/ AS IS.

### 5.3 **DEATH/SUICIDE/MURDER**

- Is the fact that someone died or committed suicide or murdered someone in the house, something that must be disclosed?
- This is not a defect. It does not impact on the useability of the property at all.
- Legally it is thus NOT something you probably need to disclose.
- HOWEVER - Comes back to KYC – *if you know your client is superstitious or has religious / traditional beliefs which might make this an issue then YES.*

### 5.4 **You must not hold out to have expertise about something if you don't!**

- 5.4.1 A rooky agent placed an ad for a vacant erf and expressed the view that the price was "a steal". Buyer accepted this – bought it with the intention to flip – took 2,5 years to sell and came short R250 000.  
or
- 5.4.2 Your buyer wants to know whether he can subdivide the erf / erect a second dwelling or get business rights. You then take it upon yourself to study the title deed. Don't do that. Refer it to a conveyancer.

### 5.5 **You shall explain everything in a contract that is material to your seller and buyer and if you cannot, you must refer him or her to someone that can!**

*A few examples:*

- For example voetstoots – how to explain this in simple terms – *what you see is what you get. And what you don't see you ALSO get!*

It does not mean that if something goes wrong you call the attorney!

- HOA Constitution/Conduct Rules - ensure your buyer has had access to this. (YOU need not be aware of all the restrictions – but you MUST ensure that the buyer is at least afforded the opportunity of studying this before making an offer).
- Costs – USE THE MM CONNECT APP. Make sure your buyers are fully aware of the costs to be incurred when buying a property. Especially when they want to register a bond.

### OTHER ASPECTS OF THE CODE OF CONDUCT

- 5.6. You may not accept a sole mandate which contains a provision conferring upon you an **option to extend the sole mandate** for a certain period after expiry of the sole mandate, OR where you may continue to render the same service after expiry of the sole mandate.

5.6.1. In other words, you need get a new mandate to extend it.

- 5.7. No estate agent shall inform a seller / purchaser that he has obtained an offer in respect of the property unless such offer **has been signed by the offeror in manuscript** (i.e. WET INK!).

- 5.8. No estate agent shall **wilfully fail to present** to the seller any Offer to Purchase received to sell such a property, unless the seller has instructed him expressly not to present such offer.

- 5.9. **COMMISSION BEFORE A SALE IS FINAL** - No estate agent shall stipulate for, demand or receive any remuneration arising from a contract of sale or lease which is subject to a **suspensive condition**, until such time as that condition has been fulfilled; or in the case of a **resolutive condition**, during the time that the transaction may fall away as a result of the operation of the said resolutive condition.

- 5.10. **PRIOR INTRODUCTIONS** - No estate agent shall introduce a prospective purchaser or lessee to any immovable property or to the seller or lessor thereof, if he **knows, or has**

**reason to believe**, that such person has already been introduced to such property or to the seller or to the lessor thereof by another estate agent; **and** that there is a likelihood that his client may have to pay commission to such other estate agent, or to more than one estate agent, should the sale or lease be concluded through his intervention.

5.11. **EARLY RELEASE OF FUNDS TO A SELLER** - No estate agent shall include any clause in a contract of sale of immovable property negotiated by him, **providing for payment to the seller, prior to registration of transfer of the property** in the purchaser's name, of any portion of the purchase price entrusted to the estate agent by the purchaser, unless:

5.11.1. good cause exists; and

5.11.2. the **purchaser has prior** to his signature of the contract in question, **consented in writing in a document executed independently** of the said contract, to such payment; and

5.11.3. **such document contains an explanation of the implications and financial risks of such payment for the purchaser;** and

5.11.4. such a document is signed by both the seller and the purchaser and the estate agent in question.

#### **SECURITY ESTATES / PREFERENTIAL TREATMENT**

5.12. Any party or person that **directly or indirectly controls or manages any residential property development**, including a body corporate or HOA (the "managing organisation") is prohibited from:

5.12.1. receiving money or any other reward in exchange for a benefit, advantage or other form of preferential treatment in respect of the marketing of properties in such property development; or

5.12.2. limiting the agencies that may market properties in such a development; or

5.12.3. which in any way provides an advantage to any one property practitioner or group of property practitioners over and above any other property practitioners, in providing services in relation to properties in such property development.

5.13. **NB: however, IT is allowed if the owners in a development pass a rule at an AGM** which limits the agencies who may trade on the estate, because this will be taken up in



the constitution of the estate and **this will then be a rule decided upon by the owners by way of a democratic voting system.**

5.14. A property practitioner is guilty of sanctionable conduct if he or she or it differentiates, distinguishes or excludes consumers directly or indirectly on the basis of their race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or commit a criminal offence while performing a function of a property practitioner.

5.14.1. So, if you have a seller or landlord who is not willing to market property to a certain category of individuals, **tread lightly.**

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