



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

N\$1.20

WINDHOEK - 3 January 1996

No. 1242

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Government Notice

MINISTRY OF TRADE AND INDUSTRY

No. 16

1996

CODE OF CONDUCT FOR ESTATE AGENTS

The Estate Agents Board has under section 8(b) of the Estate Agents Act, 1976 (Act 112 of 1976), and with the approval of the Minister of Trade and Industry, framed the Code of Conduct as set out in the Schedule hereto, in substitution for the code of conduct promulgated under Government Notice AG. 98 of 1989, which is hereby

withdrawn.

SCHEDULE

Definitions

1. In this Code of Conduct a word or expression to which a meaning has been assigned in The Estate Agents Act, 1976 (Act 112 of 1976) shall bear that meaning, and unless the context otherwise indicates -

"client" means a person who has given an estate agent a mandate, and where an estate agent has received conflicting mandates in respect of a particular immovable or any interest in immovable property or any business undertaking, the person whose mandate has first been accepted by the estate agent, is regarded as the client;

"estate agency service" means any service referred to in subparagraphs (i) - (iv) of paragraph (a) of the definition of "estate agent" in section 1 of the Act;

"franchise" means an agreement, arrangement or understanding between a franchiser and a franchisee estate agent in terms of which the latter is entitled or required to operate under a trade name which is owned by, or which is associated with the business of, the franchiser or any other person;

"mandate" means an instruction or an authority given to, and accepted by, an estate agent to render an estate agency service;

"sole mandate" means a mandate incorporating an undertaking on the part of the person giving the mandate, not to confer a similar mandate on another estate agent before the expiry of a determined or determinable period;

"the Act" means the Estate Agents Act, 1976 (Act 112 of 1976).

General duty to protect the public's interest

2. In terms of estate agents' general duty to members of the public and other persons or bodies, an estate agent -

- (a) shall not in or pursuant to the conduct of his or her business do or omit to do any act which is or may be contrary to the integrity of estate agents in general;
- (b) shall protect the interests of his or her client at all times to the best of his or her ability, with due regard to the interest of all other parties concerned;
- (c) shall not in his or her capacity as an estate agent 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;
- (d) shall comply with both the Act and the regulations promulgated thereunder;

- (e) shall not through the medium of a company, close corporation or third party, or by using such company, close corporation or third party as a front or nominee, do anything which would not be permissible for him or her to do if he or she were operating as an estate agent on his or her own account;
- (f) shall not deny equal services to any person for reasons of race, creed, sex, or country of national origin;
- (g) shall not discriminate against a prospective purchaser of immovable property or an interest therein or a business undertaking on the grounds that such purchaser will not, or is unlikely to, make use of financial assistance made available by any specific person or financial institution and which the estate agent offers to arrange on his or her behalf.

Mandates

- 3. No estate agent shall -
 - (a) offer, purport or attempt to offer any immovable property for sale or let or negotiate in connection therewith or canvass or undertake or offer to canvass a purchaser or lessee therefor, unless he or she has been given a mandate to do so by the seller or lessor or the property or the duly authorised agent of such seller or lessor;
 - (b) on behalf of a prospective purchaser or lessee, offer, purport or attempt to offer to purchase or lease any immovable property or an interest therein or a business undertaking or negotiate in connection therewith or canvass, or undertake or offer to canvass a seller or lessor therefor, unless he or she has been given a mandate to do so by such prospective purchaser or lessee or the duly authorised agent of such purchaser or lessee;
 - (c) accept a sole mandate, or the extension of the period of an existing sole mandate, unless -
 - (i) all the terms of such mandate or such extension, as the case may be, are in writing and signed by the client; and
 - (ii) the expiry date of such mandate or extension, which shall be expressed as a calendar date, is specifically stipulated in the mandate or extension, as the case may be;
 - (d) accept a sole mandate which contains a provision conferring upon him or her -
 - (i) an option to extend the sole mandate for a certain period after expiry of the sole mandate; or
 - (ii) a mandate to continue to render the same estate agency service referred to in the sole mandate, after expiry of the sole mandate,

unless -

- (aa) the client has prior to his or her signature of the sole mandate expressly consented in a written document, executed independently of the sole mandate, to the inclusion of such provision; and
 - (bb) such document contains an explanation of the reasons for and implications of the inclusion of such provision; and
 - (cc) such document is signed by both the client and the estate agent in question;
- (e) accept a sole mandate which also confers upon him or her a power of attorney to act on behalf of the person conferring the mandate, unless the intention and effect of such power of attorney is fully explained in the document embodying the sole mandate;
 - (f) include, or cause to be included, or accept the benefit of, any clause in a contract of sale or lease of immovable property negotiated by him or her, whereby a sole mandate is directly or indirectly conferred upon him or her to sell or let the said immovable property at any time after the conclusion of the said contract;
 - (g) accept any mandate or instructions for work in respect of immovable property if his or her interest therein would compete with his or her obligations towards an existing client in respect of the same immovable property without first disclosing such interest in writing to such client;
 - (h) 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;
 - (i) accept a mandate in respect of any immovable property if the performance of the mandate requires specialised skill or knowledge falling outside his or her field of competence, unless he or she will in the performance of the mandate be assisted by a person who has the required skill or knowledge and this fact is disclosed in writing to the client;
 - (j) accept a sole mandate to sell or let immovable property, unless he or she has explained in writing to the client -
 - (i) the legal implications should the client during the currency of the sole mandate or thereafter sell or let the property without the assistance of the estate agent, or through the intervention of another estate agent; and
 - (ii) what specific obligations in respect of the marketing of the property will be assumed by the estate agent in his or her endeavour to perform the mandate,

and such explanations, if contained in a printed or typed sole mandate document shall be in lettering not smaller than that generally used in the remainder of the document.

Duty to disclose

4. (1) An estate agent shall -
 - (a) convey to a purchaser or lessee or a prospective purchaser or lessee of immovable property in respect of which a mandate has been given to him or her to sell, let, buy or hire, all facts concerning such property as are, or should reasonably in the circumstances be, within his or her personal knowledge and which are or could be material to a prospective purchaser or lessee thereof;
 - (b) if he or she conducts his or her business in terms of a franchise, disclose clearly and unambiguously in all his or her correspondence, circulars, advertisements and other documentation that he or she operates in terms of a franchise and state thereon his or her name and the name of the franchiser;
 - (c) if he or she conducts his or her business under a trade name or style other than his or her own name, clearly disclose his or her full name in all correspondence, circulars and other documentation.
 - (d) not perform or attempt to perform any mandate in respect of a particular property if a current prior mandate, which conflicts with the aforesaid mandate, has been accepted by him or her, unless he has disclosed to the person who has given the later mandate the existence of such prior mandate, and the fact that he or she will not be the estate agent's client in respect of that property;
- (2) No estate agent shall -
 - (a) purchase directly or indirectly for himself or herself, or acquire any interest in, or conclude a lease in respect of, any immovable property in respect of which he or she has a mandate, without the full knowledge and consent of the person who conferred the mandate; or
 - (b) sell or let to any prospective purchaser or lessee who has retained his or her services any immovable property owned by him or her or in which he or she has any direct or indirect interest, without disclosing to that purchaser or lessee his or her interest in such immovable property.

Duty not to make misrepresentations or false statements or to use harmful marketing techniques

5. No estate agent shall -
 - (a) in connection with any mandate given to him or her, publish or cause to be published any advertisement which could create the impression that it was

published by the owner, seller or lessor of immovable property, or by a prospective purchaser or lessee of immovable property;

- (b) in connection with his or her activities as an estate agent -
 - (i) prepare or make, or assist any other person to prepare or make, either orally or in writing, any statement which he or she knows or ought to know is false; or
 - (ii) record in any book or account or other record any information which he or she knows or ought to know is false, or keep any book, account or record containing any such information;
- (c) claim to be an expert or to have specialised knowledge in respect of any estate agency service if, in fact, he or she is not such an expert or does not have such special knowledge.
- (d) advertise or otherwise market immovable property in respect of which he or she has been given a mandate to sell or let, at a price or rental other than that agreed upon with the seller or lessor of the property;
- (e) without derogating from the generality of the foregoing -
 - (i) wilfully or negligently mislead or misrepresent in regard to any matter pertaining to the immovable property in respect of which he or she has a mandate;
 - (ii) use any harmful or misleading marketing technique or method to influence any person to confer upon him or her a mandate to render any estate agency service or to sell, purchase, let or hire immovable property, having regard to the general experience which such person has concerning property transactions and the circumstances surrounding the transaction or proposed transaction;
- (f) use any firm name or trading name in respect of his or her business which may give rise to confusion on the part of the public in respect of the nature of the business carried on by him or her;
- (g) inform a seller or purchaser, or prospective seller or purchaser, of immovable property in respect of which he or she has been given a mandate to sell or purchase, that he or she has obtained an offer in respect of the property from a purchaser or the seller, as the case may be, unless such offer -
 - (i) is in writing;
 - (ii) has been signed by the offeror; and
 - (iii) is to the knowledge of the estate agent concerned, a *bona fide* offer;
- (h) affix any board or notice to immovable property indicating that such property is for sale or hire or has been sold or let, unless -

- (i) the seller or lessor, as the case may be, has given his or her written consent to do so; and
- (ii) he or she has in fact been given a mandate to sell or let the property, or has in fact sold or let the property, as the case may be.

Duties in respect of offers and contracts

6. (1) No estate agent -

- (a) who has a mandate to sell or purchase immovable property shall wilfully fail to present or cause to be presented to the seller or purchaser concerned, any offer to purchase or sell such property, received prior to the conclusion of a contract of sale in respect of such property unless the seller or purchaser, as the case may be, has instructed him or her expressly not to present such offer;
- (b) who has a mandate to sell immovable property, may present competing offers to purchase the property, in such a manner to induce the seller to accept any particular offer without regard to the advantages or disadvantages of each offer for the seller;
- (c) shall amend any provision of a signed offer, prior to rejection thereof, or a written mandate or any contract of sale or lease, without the knowledge and express consent of the offeror or the parties to the contract, as the case may be.

(2) An estate agent shall -

- (a) explain to every prospective party to any written offer or contract negotiated or procured by him or her in his or her capacity as an estate agent, prior to signature thereof by such party, the meaning and consequences of the material provisions of such offer or contract, or, if he or she is unable to do so refer such party to a person who can do so;
- (b) if he or she knows that an offer submitted by him or her as an estate agent to any party has been accepted, or has not been accepted by the expiry date thereof, forthwith notify the offeror of such fact;
- (c) without undue delay furnish every contracting party with a copy of an agreement of sale, lease, option or mandate with which he or she is concerned as an estate agent, and also of an offer to purchase or lease if the offeror specifically requests a copy thereof.

Prohibition against undue influence

7. No estate agent shall without good and sufficient cause, either directly or indirectly, in any manner whatsoever, solicit, encourage, persuade or influence any party or potential party to a pending or a completed transaction to utilise or refrain from utilising -

- (a) the services of any particular legal practitioner, conveyancer or firm of legal practitioners;
- (b) the services or financial assistance offered by any financial institution to members of the public in general; or
- (c) the financial assistance offered to such party by any person.

Remuneration

8. No estate agent shall -

- (a) in connection with any contract of sale or lease negotiated by him or her which is subject to a suspensive condition or a resolutive condition, demand or receive directly or indirectly any remuneration, commission, benefit or gain before the suspensive condition is fulfilled or before it is established that the contract can no longer lapse through the operation of the resolutive condition, as the case may be: Provided that this provision shall not apply if -
 - (i) the party liable for the payment of the remuneration, commission, benefit or gain, in a written document executed independently of the contract in question, has expressly consented to such payment at any time, notwithstanding the fact that the contract is subject to a suspensive or resolutive condition, as the case may be; and
 - (ii) such document contains an explanation of the implications and financial risks attached to such payment; and
 - (iii) such document is signed by both such party and the estate agent;
- (b) convey to his or her client or any other party to a completed or proposed transaction in which he or she acted or acts as an estate agent, that he or she is precluded by law from charging less than a particular commission or fee, or that such commission or fee is prescribed by law, the board, or the institute of estate agents;
- (c) introduce a prospective purchaser or lessee to any immovable property or to the seller or lessor thereof, if he or she knows, or has reason to believe, that such person has already been introduced to such property or the seller or lessor thereof by another estate agent and that there is a likelihood that his or her client may have to pay commission to that estate agent, or any other estate agent, should the sale or lease be concluded through his or her intervention: Provided that this provision shall not apply if the estate agent has informed his or her client of such likelihood and obtained his or her written consent to introduce such party to the property or the seller or lessor in question;
- (d) include, or cause to be included, or accept the benefit of, any clause in a mandate or in a contract of sale or lease of immovable property, providing for payment to him or her by the seller or lessor of immovable property, of

any remuneration, commission, benefit or gain arising from or connected with a contract of sale or lease, regardless of the fact whether the purchaser or lessee is financially able to fulfil his or her obligations in terms of the contract: Provided that this provision shall not apply -

- (i) the seller or lessor has, prior to his or her signature of the contract or mandate, as the case may be, consented in writing in a document executed independently of the said mandate and contract, to such payment; and
 - (ii) such document contains an explanation of the implications and financial risks attached to such payment; and
 - (iii) such document is signed by both the estate agent and the seller or lessor;
- (e) include, or cause to be included, or accept the benefit of, any clause in a contract of sale or lease of immovable property negotiated by him or her, entitling him or her to deduct from any money entrusted to him or her in terms of the contract, any remuneration, commission, benefit or gain arising from or connected with such contract, but this provision shall not be construed as prohibiting an estate agent from making such deduction when such money is actually paid over by him or her to the party entitled thereto and such party is in terms of the said contract liable for the payment of such remuneration, commission, benefit or gain.

Trust money and interest

9. An estate agent -

- (a) shall not solicit or influence any person entitled to trust funds in the agent's possession or under his or her control to make over or pay to the estate agent directly or indirectly any interest on moneys deposited or invested in terms of section 32(1) or (2) of the Act;
- (b) shall, before he or she receives any money in trust in respect of a contract of sale or lease, disclose to the parties concerned that, unless they agree in writing to whom interest earned on such money must be paid, the interest shall, in terms of section 32(2)(c) of the Act, accrue to the Estate Agents Fidelity Fund;
- (c) shall, if any money is invested by him or her pursuant to section 32(2)(a) of the Act or pursuant to an instruction by the party entitled to the interest on money held in trust by the estate agent -
 - (i) invest such money at the best interest rate available in the circumstances at a bank or building society; and
 - (ii) pay the full amount of the interest which accrued on the investment to the party entitled to such interest, or the board, as the case may be,

subject to any written agreement in this regard between him or her and such party;

- (d) shall not include, or cause to be included, or accept the benefit of, any clause in a contract of sale of immovable property negotiated by him or her, 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: Provided that this provision shall not apply if -
- (i) the purchaser has prior to his or her signature of the contract in question, consented in writing, in a document executed independently of the said contract, to such payment; and
 - (ii) such document contains an explanation of the implications and financial risks attached to such payment; and
 - (iii) such document is signed by the seller and the purchaser and the estate agent.

Confidentiality

10. No estate agent shall, without just cause, divulge to any third party any confidential information obtained by him or her concerning the business affairs, trade secrets or technical methods or processes of a client or any party to a transaction in respect of which he or she acted as an estate agent.

Vicarious responsibility

11. Every estate agent who is the sole proprietor of an estate agency business or a partner in a partnership or a director of a company or a member of a close corporation contemplated under the definition of "estate agent" in section 1 of the Act carrying on the business of an estate agent, shall be held responsible for any contravention of or failure to comply with this code of conduct by any other partner, director, or member or by any estate agent in the service of such sole proprietorship, partnership, company or close corporation, unless he or she has prior to such contravention or failure to comply taken all reasonable steps to prevent the same and could not in the circumstances have prevented such contravention or failure to comply.
