
AN ESTATE AGENT'S CLIENT FOR THE PURPOSES OF FICA

1 Introduction

The Financial Intelligence Centre Act 38 of 2001 ("FICA") forms an integral part of the government's strategy to combat money laundering. It establishes a statutory body called the Financial Intelligence Centre ("FIC") and imposes a number of duties on certain institutions and persons (referred to in the Act as "accountable institutions"). Nineteen of these accountable institutions are listed in Schedule I to the Act, including attorneys, banks, public accountants, investment advisors, long-term insurers and estate agents. The duties to be complied with by the accountable institutions can be grouped under four broad categories, namely:

- (a) The duty to establish and verify the identity of clients (commonly known as the "know your client" requirements) (s 21).
- (b) Reporting duties, namely the duty to –
 - (i) advise the FIC, when requested to do so, whether a specified person is or has been a client of the accountable institution or is acting or has acted on behalf of any of the accountable institution's clients, or whether a client of the accountable institution is acting or has acted for a specified person (s 27);
 - (ii) report to the FIC cash transactions over a prescribed limit (s 28); and
 - (iii) report to the FIC electronic transfers of money over a prescribed limit to and from South Africa (s 31).
- (c) The duty to report suspicious transactions (s 29).
- (d) Internal administrative duties, namely the duty to
 - (i) keep record of clients and transactions (s 22);
 - (ii) formulate and implement internal rules to ensure compliance with the Act (s 42); and
 - (iii) train staff to enable them to comply with the Act and the applicable internal rules, and the duty to appoint a compliance officer to monitor compliance (s 43).

Failure to comply with the Act constitutes an offence, exposing the accountable institution to stiff penalties. A fine up to R1-million or imprisonment for a period not exceeding five years can be imposed for

failure to formulate and implement internal rules, provide staff training or to appoint a compliance officer. Non-compliance with the other duties mentioned invites imprisonment up to 15 years or a fine up to R10-million.

The Act furthermore imposes a duty on “supervisory bodies” to supervise compliance with the provisions of the Act by each accountable institution regulated or supervised by it. The supervisory bodies are listed in Schedule II and include the Financial Services Board, the Registrar of Companies, the Public Accountants and Auditors Board, the Law Society of South Africa and the Estate Agency Affairs Board. Each supervisory body is expected to utilise its regulatory powers to address contraventions of the Act by the accountable institutions over which it has jurisdiction. In appropriate instances professional bodies such as the Law Society and the Estate Agency Affairs Board can be expected to take disciplinary steps against offenders. These measures, read with the heavy penalties that can be imposed, illustrate clearly the legislature’s intention that compliance with the Act is to be taken seriously by all accountable institutions.

The duties listed in sections 21, 22, 27 and 28 come into play only if and when an accountable institution has dealings with *clients*. This begs the question: who are an accountable institution’s “clients” for the purposes of FICA? The expression “client” is not defined in the Act and may conceivably have different meanings for different accountable institutions.

This note focuses on the meaning of “client” from estate agents’ point of view. Being an intermediary in a property transaction, an estate agent has contact and dealings with a variety of people, including prospective buyers and sellers, actual buyers and sellers, financial institutions, loan consultants, conveyancers, newspaper publishers and marketing agencies. To comply with FICA it is of the utmost importance for an estate agency firm to know who its client is. An estate agency firm may receive instructions from sellers and lessors, as well as buyers and tenants. A transaction may be structured on the basis that the firm’s remuneration (commission) is paid by the buyer/tenant, even though the seller/lessor may have given the instructions to sell or let. Sale and lease agreements negotiated by estate agents usually contain provisions regarding payment of a deposit by the buyer or lessee, to be kept in trust by the estate agent and to be dealt with by it in the manner specified in the agreement. In these situations, is the client the buyer (lessee), the seller (lessor) or perhaps both?

2 General meaning of the word “client”

The Reader’s Digest *Oxford Complete Wordfinder* defines “client” as

- “1. A person using the services of a lawyer, architect, social worker or other professional person.
2. A customer.

3. *Rom. Hist.* A plebeian under the protection of a patrician.
4. *archaic.* A dependant or hanger-on.”

The expression “clientele” is defined as

- “1. Clients collectively.
2. Customers, esp. of a shop.
3. The patrons of a theatre, etc.”

The code of conduct compiled by the Estate Agency Affairs Board under the Estate Agency Affairs Act 112 of 1976 defines “client” as:

“[T]he person who has given an estate agent a mandate, provided that should an estate agent have conflicting mandates in respect of a particular immovable property, the person whose mandate has first been accepted by the estate agent is regarded as the client”.

For the purposes of the code of conduct the word “mandate” means “an instruction or an authority given to, and accepted by, an estate agent to render an estate agency service”.

In South Africa estate agents commonly receive mandates from sellers and lessors of properties. So-called “buyer agency”, where the estate agent acts on behalf of (or on the instructions of) a buyer or lessee, is not prohibited but is not often encountered. For the purposes of the code of conduct, therefore, an estate agent’s client is normally the seller or lessor of a property, but it could be a buyer or lessee if the latter has given the estate agent a mandate to render an estate agency service. Accordingly, in the usual situation where an estate agent is given a mandate to find a buyer, none of the prospective buyers introduced to the property, nor the buyer with whom the sale is eventually negotiated, would be the client since the agent received the mandate from the seller, not the buyer.

It is a debatable question whether this is also the approach to be followed to determine who an estate agent’s client is for the purposes of FICA. In my view a “client” for the purposes of FICA includes, but is not confined to, an estate agent’s mandator. Taking into account the dictionary meaning referred to above, it would be more correct to say that from an estate agent’s perspective a “client” for the purposes of FICA is *any person who makes use of the services offered by an estate agent in its capacity as such, or to whom such services are specifically offered or made available*. Business contacts and customers are therefore an estate agent’s clients for the purposes of FICA only if they use, or are offered, the estate agent’s estate agency services. Persons with whom an estate agent has dealings unrelated to estate agency services are not clients.

The nature of the services rendered by estate agents is apparent from the definition of “estate agent” in section 1 of the Estate Agency Affairs Act. There are five categories of estate agents described in the Act (see Delpont

South African Property Practice and the Law (1987-) 278) and what is commonly known as a “principal” estate agent is defined in section 1 as:

“[A]ny person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person –

- (i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor; or
- (ii) lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or
- (iii) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or
- (iv) renders any such other service as the minister on the recommendation of the board may specify from time to time by notice in the *Gazette*.”

For present purposes it is not necessary to focus on the services specified under subparagraph (iv). Having regard to subparagraphs (i)-(iii) the services rendered by an estate agent in its capacity as such comprise selling, buying, letting or hiring of immovable property and business undertakings, or negotiating in connection therewith. These services are made available to, and are used, by both buyers and sellers, and lessors and lessees. Accordingly, for the purposes of FICA an estate agent’s “clients” would be sellers, buyers, lessors and lessees (actual or prospective) of immovable property or businesses, with whom the estate agent has dealings in its capacity as such.

Based on this approach, persons who, for example, supply an estate agency firm with computer equipment and stationery are not using the firm’s estate agency services as such and are clearly not “clients”. The same holds true for newspaper publishers and other agencies used by an estate agent to market a property: they are not using any estate agency service and no such service is offered or made available to them. Perhaps more difficult is the position of loan consultants and mortgage bond originators. Take the case where a loan consultant approaches an estate agent with a request to negotiate a particular sale transaction on the basis that mortgage bond finance is to be arranged through the loan consultant in question, for which the estate agent will be paid a fee. Does this make the loan consultant the estate agent’s client? Obviously the estate agent is not negotiating any sale agreement with the loan consultant as such, but it could be argued that the estate agent is negotiating with the loan consultant “in connection therewith”.

In my view loan consultants and mortgage bond originators are not an estate agency firm’s clients for the purposes of FICA, even though they may be paying the estate agent a fee. The fee is nothing but a referral fee and is not paid for estate agency services rendered by the estate agent on the instructions of, or on behalf of, the loan consultant. The estate agent is

actually making use of the services offered by the mortgage bond originator or loan consultant, not the other way around.

The conclusion reached above regarding the meaning of “client” does not mean that an estate agent must necessarily establish and verify the identity of each and every client as required by section 21 of FICA. It neither means that a report must be submitted to the FIC under section 28 each and every time an estate agent receives cash from a client over the prescribed limit. Similarly, an estate agent is not required to keep a record of each and every client’s identity under section 22. These duties arise in respect of *certain* clients only. On the other hand, the duty under section 27, namely to advise the FIC, when requested to do so, whether a specified person is or has been a client arises in respect of *all* clients. This is examined next.

3 Duties in respect of clients under sections 21, 22 and 28 of FICA

Section 21(1) reads as follows:

- “21(1) An accountable institution may not establish a business relationship or conclude a single transaction with a client unless the accountable institution has taken the prescribed steps –
- (a) to establish and verify the identity of the client;
 - (b) if the client is acting on behalf of another person, to establish and verify –
 - (i) the identity of that other person; and
 - (ii) the client’s authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and
 - (c) if another person is acting on behalf of the client, to establish and verify –
 - (i) the identity of that other person; and
 - (ii) that other person’s authority to act on behalf of the client.”

Section 22(1) reads:

- “22(1) Whenever an accountable institution establishes a business relationship or concludes a transaction with a client, whether the transaction is a single transaction or concluded in the course of a business relationship which that accountable institution has with a client, the accountable institution must keep record of –
- (a) the identity of the client;
 - (b) ...”

Sections 21 and 22 come into play only if an accountable institution *establishes a business relationship or concludes a single transaction* with a client. In other words, the sections apply only if there is (i) a client with whom (ii) a business relationship has been established or a single transaction has been concluded.

Section 28 also applies only if an accountable institution has concluded a *transaction* with a client. It reads as follows:

- “28. An accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction

concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount –

- (a) is paid by the accountable institution or reporting institution to the client, or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or
- (b) is received by the accountable institution or reporting institution from the client, or from a person acting on behalf of the client, or from a person on whose behalf the client is acting.”

“Business relationship” is defined in section 1 as:

“[A]n arrangement between a client and an accountable institution for the purpose of concluding transactions on a regular basis”.

What is clear from this is that there can be no “business relationship” unless a client and an accountable institution intend concluding *transactions* on a regular basis. In other words, if a client and an accountable institution do not intend concluding any “transactions” there can be no “business relationship”. Therefore, for the purposes of sections 21, 22 and 28 of FICA the *conclusion of a transaction* is the key element. What must be determined is whether a client and an accountable institution (i) concluded (or, in respect of s 21, intend to conclude) (ii) between them (iii) a transaction.

The expression “transaction” is defined in section 1 as a

“transaction concluded between a client and an accountable institution in accordance with the type of business carried on by that institution”.

A “single transaction” is a “transaction other than a transaction concluded in the course of a business relationship”.

These definitions are not very helpful in determining exactly what constitutes a “transaction” for the purposes of FICA. The expression is defined in the Reader’s Digest *Oxford Complete Word Finder* as follows:

“1.A piece of esp. commercial business done; a deal (a profitable transaction); the management of business etc.”

Section 4(c) of the Act imposes a duty on the FIC to monitor and give guidance to accountable institutions and other persons regarding the performance by them of their duties and their compliance with the provisions of the Act. Pursuant to this the FIC issued guidance notes to financial services industries regulated by the Financial Services Board concerning the meaning of a “transaction” in the financial services industries (GN 735 in GG 26469 of 2004-06-18). The guidance notes are useful also in determining what constitutes a transaction between clients and accountable institutions other than financial services providers. Included in the guidance notes are the following statements:

- The term “transaction” may have different meanings depending on the type of business undertaken by different accountable institutions and

would be applied differently among them. In short, the term must be applied in each instance in accordance with the nature of the business carried on by the accountable institution in question.

- The definition of “transaction” in the Act indicates that the term refers to activities which take place *between* an accountable institution and a client.
- Applying the dictionary meaning of the term “transaction”, a transaction can generally be described as “an instance of commercial activity between two or more parties”.
- Transactions are concluded on the basis of agreements between the parties to a transaction. These agreements must be aimed at a piece of business done between an accountable institution and a client, in accordance with the nature of the business carried on by the institution concerned. A basic guideline, which can be inferred from this, is that any instruction or request by a client to an accountable institution to perform some act or to give effect to the business relationship between them can be regarded as a transaction.
- For the purposes of the duty to establish and verify clients’ identities, the term “transaction” is not to be understood to include activities “which happen automatically, or which an intermediary will perform automatically, without instructions from the client”. For example, periodic contractual payments by clients to institutions and periodic automatic increases in such payments, as well as further business that accountable institutions may do with others in the course of giving effect to the clients’ original mandate, do not constitute “transactions”.

A transaction for the purposes of FICA clearly includes, but is not limited to, *contracts* concluded between a client and an accountable institution in the normal course of business. For example, a void contract or a gentlemen’s agreement may also amount to a *transaction* concluded between a client and an accountable institution.

An accountable institution need not comply with sections 21, 22 and 28 of FICA in situations where it merely *negotiates* a transaction with a client, or where it merely has contact or discussions with a client, or passes information to a client, about a transaction. What triggers the application of the sections is the *conclusion* of a transaction between the client and the accountable institution. The word “conclude” is defined in the *Chambers Dictionary* as “to close; to end; to decide; to settle or arrange finally”. In the context in which the word is used in FICA it could also mean “to enter into”.

It is submitted that what FICA envisages is the entering into of a commercial deal to which the client and the accountable institution are parties. In other words, where an accountable institution has business dealings with a client which –

-
- (a) do not result in the closing of a commercial deal between them; or
 - (b) lead to the closing of a deal between the client and a third party,

the accountable institution's commercial business with the client is not a "transaction" for the purposes of FICA. In such a situation there may well be commercial business or contact with the client, but no transaction is *concluded* between the client and the accountable institution.

In the ordinary course of events an estate agent given a mandate to find a buyer or tenant does not conclude any transaction between itself and the buyer or tenant. There are merely negotiations between the estate agent and the prospective tenant or buyer. The transaction as such is concluded between the seller/buyer and lessor/tenant. The only "transaction" to which the estate agent is a party, is the mandate agreement between it and the seller/lessor. It follows that in situations where an estate agent receives a mandate from a seller or lessor, a transaction is concluded between the estate agent and the seller/lessor (client) for the purposes of FICA. The estate agent is therefore obliged to establish and verify the identity of the seller or lessor as required by section 21, and to keep a record of such identity as laid down in section 22. The same would apply if an estate agent receives a mandate from a buyer or lessee to find a property. In these situations the buyer or lessee would be the client and a transaction (being the mandate) is concluded between the estate agent and the buyer/lessee.

It follows that an estate agent given a mandate to find a buyer or tenant for a property need not establish the identity of a prospective buyer or tenant whom it introduces to the property. There is no transaction concluded between the estate agent and the prospective buyer or tenant. The question may be asked whether this position changes once the estate agent succeeds in finding a buyer or lessee and a sale or lease agreement is concluded between the seller/lessor and buyer/lessee. In practice, sale or lease agreements negotiated by estate agents often contain a *stipulatio alteri* conferring certain benefits on the estate agent. For example, it is often agreed that the seller (the estate agent's client) would pay the commission, but that the estate agent may claim commission from the buyer should the latter fail to fulfil his obligations under the agreement. Also, sale and lease agreements often impose a duty on the buyer or the lessee to pay a deposit to the estate agent to be kept in trust and applied in the manner laid down in the agreement. Is there for purposes of FICA a transaction concluded between the estate agent and the buyer/lessee when the estate agent accepts the benefit of the *stipulatio alteri* or receives the deposit?

In my view the question must be answered in the negative. The rights acquired by a beneficiary under a *stipulatio alteri* are not obtained by reason of any commercial deal concluded between the beneficiary and the *promittens*. The beneficiary derives his rights from the original contract

between the *stipulans* (seller/lessor) and the *promittens* (buyer/lessee) and not from a contract of his own making (Van der Merwe *et al Contract. General Principles* (1993) 191). Therefore, an estate agent who obtains the right under a *stipulatio alteri* in a sale agreement to recover commission from the buyer in given circumstances, does not enter into a transaction with the buyer. Similarly, an estate agent who merely receives a deposit from a tenant or buyer does not conclude any transaction between itself and the tenant or buyer. The estate agent's duty to accept the deposit in trust is derived from instructions given to the estate agent by the seller/lessor in terms of the latter's mandate and/or the provisions of the sale or lease agreement concluded between the seller/lessor and buyer/lessee.

The same applies where a letting agent, acting for a lessor, collects or receives rental payments from a tenant. Mere receipt or collection of the rentals does not constitute a commercial deal concluded between the estate agent and the tenant. The receipt or collection may well constitute some commercial activity between the estate agent and the tenant, but this is not as a result of any arrangement concluded between the estate agent and the tenant. The arrangement or transaction giving rise to the rental payment to the estate agent is the lease agreement concluded between the lessor and the lessee.

On this approach it follows that where an estate agent, acting for a seller or lessor in terms of a mandate, receives a cash deposit or other cash payments from a buyer or tenant, no duty is imposed on the estate agent under section 28 of FICA to report receipt of the payment to the FIC if the amount received is in excess of the prescribed limit. Although the tenant or buyer may be a client of the estate agent for the purposes of FICA, there is no transaction concluded with such client by the estate agent in terms of which an amount of cash in excess of the prescribed amount is received by the estate agent from the client (tenant/buyer). This does not mean, of course, that an estate agent would never be concerned with the reporting duty under section 28 of FICA. A duty to report a cash transaction will arise where, for example, an estate agent has an arrangement with a lessor that all rentals received by the estate agent from tenants must be paid over by the estate agent to the lessor in cash (banknotes), and the amount paid over on a particular occasion exceeds the prescribed amount.

4 The duty to advise the FIC about clients: section 27

Section 27 reads as follows:

- “27. If an authorised representative of the Centre requests an accountable institution to advise whether –
- (a) a specified person is or has been a client of the accountable institution;
 - (b) ...;
 - (c) ...;

the accountable institution must inform the Centre accordingly.”

Section 27 applies not only in respect of clients with whom an accountable institution has concluded transactions or established business relationships. As explained above, all persons making use of an estate agent’s professional services, or to whom such services are made available, are “clients” for the purposes of FICA. In other words, a prospective buyer introduced to a property would be the estate agent’s client even though no sale materialised. By the same token, a tenant paying rentals to an estate agency firm is the firm’s client for the purposes of FICA.

Section 27 does not impose a duty on an accountable institution to provide to the FIC any details about a client. It merely imposes the duty to advise the FIC, upon request, whether a specified person is or has been the accountable institution’s client. The Act does not require of accountable institutions to keep any record of clients with whom it has not concluded transactions or established business relationships. When marketing a property an estate agent may be in contact with many prospective buyers without noting their names in writing. It is submitted that an estate agent would not fall foul of section 27 if it cannot remember the name of a client with whom it has not established a business relationship or concluded a transaction.

5 Conclusion

The conclusion reached in this note can be summarised as follows:

- 1 For the purposes of FICA an estate agent’s client is any person using an estate agent’s services or to whom such services are made available. It includes the estate agent’s mandator as well as prospective buyers or lessees introduced to a property by an estate agent acting for a seller or lessor.
- 2 An estate agent need not establish and verify the identity of each and every client, or keep a record of each and every client. This must be done only in respect of clients with whom the estate agent has established a business relationship or concluded a transaction. Ordinarily, the only transaction concluded with a client by an estate agent is the mandate agreement embodying the instruction or power of attorney to render an estate agency service. In most instances a mandate is obtained from a seller or lessor of a property, in which event the identity of that person must be established and verified. An estate agent acting in terms of a mandate obtained from a seller or lessor need not establish and verify the identity of every prospective purchaser or tenant introduced to the property.

- 3 An estate agent who receives cash from a client in excess of the prescribed amount need only report the cash payment to the FIC under section 28 of FICA if the payment has its roots in a transaction concluded by the estate agent with the client. Since estate agents acting for sellers or lessors normally do not conclude transactions with buyers or lessees, the general rule is that no duty arises to report cash payments received from tenants or buyers.
- 4 When requested to do so, an estate agent must inform the FIC whether or not a specified person is or has been the estate agent's client. This duty arises whether or not the estate agent has established a business relationship or concluded a transaction with the client in question.

Henk Delport
University of Port Elizabeth