miltons
matsemela

The Conveyancers

Fica and Property Practice.

1. The Financial Intelligence Centre Act [FICA] is here to stay.

As from the 1st July 2003 FICA kicked into operation and has become part and parcel of the daily business lives of a number of enterprises including estate agents, banks and attorneys. Ignoring the legislation is not an option as the penalties associated therewith are draconian. A maximum fine of R10 million and a maximum jail sentence of 15 years is provided for.

2. Why has it been introduced

The government purports to have introduced FICA to bring the Republic into line with other countries in the world that allegedly have similar legislation designed to reveal the movement of monies derived from unlawful activities and thereby curb money laundering. The concept of money laundering describes the movement of money through various kinds of commercial transactions so that money which commenced as "unexplainable" can at the end of the process be "explained" and therefore become usable without consequence. It is however interesting to note that the act specifically includes under its main objectives the detection of income tax avoidance activities and the laudable principle of international compatibility is accordingly somewhat questionable.

3. What does FICA expect of us

The act can be divided into two portions in terms of its expectations of us, they are:

3.1 The identification and verification of the client

3.1.1 At first blush the requirements of the act do not appear to be particularly onerous requirements and could be said to require little more of us than that which we would in any event be doing in the ordinary conduct of our businesses. On closer analysis of the regulations which accompany FICA it does however become clear that in many instances the expectations are ridiculously time consuming in nature and extent.

3.1.2 The concept of "client" is not discussed in the act and can therefore at this time [until the Financial Intelligence Centre [FIC] fixes up this obvious error] be restricted to the person who instructs / mandates us and who remunerates us. From an estate agent's point of view therefore the "client" is invariably the seller and the obligation to identify and verify is therefore restricted to the seller alone. This is obviously rather silly as it is the purchaser who is more likely to be the party carrying the unlawful money and seeking thereby to commence the laundering process!

3.1.3 The information and documentation which we are required to obtain from and about the client depends on the nature of the client [i.e. is the client a human being, a close corporation, a company or a trust]. For ordinary human beings the requirement of the act are

perfectly reasonable and relate only to the full names of the client, his ID number, his date of birth and his physical address. The verification process is equally uncomplicated and can easily be achieved by obtaining a copy of the photo page of the client's ID book or passport. His physical address can be verified by way of a copy of a utility account or similar correspondence addressed to the client at the stated physical address. With close corporations, companies and trusts the process is a lot more challenging and in this regard you are invited to give attention to the suggested questionnaires to be given to such clients annexed hereto. One glance at the questionnaires will alert you to the fact that accepting a mandate from any one of these kinds of clients [sellers] will / could be a huge administrative challenge. The act also contemplates the obligation upon us to obtain and verify the income tax reference / registration number of our client but this component has fortunately not yet kicked into operation. As and when this occurs, the burden upon us will become even more significant as the verification of the income tax number will probably require interaction with the offices of the Receiver of Revenue!

3.1.4 We are furthermore required to retain records indicating the nature of the transaction concluded with the client, the amount of money involved and the details of any bank accounts involved. This is best achieved by retaining a copy of the Deed of Sale, a copy of any cheque paid to you and your own bank statements for that period.

3.1.5 All records must be kept for a period of 5 years from the date on which the transaction was concluded.

3.1.6 Although the act says that we are not allowed to render any service to a client until all the above is complete, the regulations fortunately relax this requirement by allowing us to start the rendering of the service but not to complete it. From an estate agent's point of view you can therefore take a mandate but cannot present and finalise an offer until full compliance has been achieved.

3.1.7 Every affected business is required to create structures to ensure and police compliance with the act which must include the training of staff, the creating of disciplinary steps against staff for non-compliance and the appointment of a compliance officer to oversee the whole drill. Accepting the appointment of "compliance officer" must be carefully considered as the person so appointed could at the end of the day become the "fall guy" if things go wrong.

3.2 Reporting

3.2.1 The second part of the act creates the obligation upon us to report certain facts and events to the FIC.

3.2.2 The act contemplates that in due course there will be an obligation to report any cash received and any money transferred to our account from foreign accounts which exceed certain amounts that will be prescribed. As no amount has yet been prescribed this obligation is not yet in force.

3.2.3 The act requires us to report within 15 days on any "suspicious transactions" which come to our attention whether involving our client [the seller] or the purchaser. The concept of "suspicious transaction" is not defined but by virtue of other portions of the act can be said to constitute any transaction which common sense tells you is abnormal, without sound reason or inappropriate in the circumstances.

3.2.4 The report must be made in prescribed format an example of which is annexed hereto. The extent of the information required to be inserted into the prescribed form indicates the considerable degree of further enquiries / investigation which is required of us to pursue once our suspicion is aroused. The regulations in fact make it clear that if we have already received any money in terms of the transaction, we are specifically [if so aroused] requested to ask / enquire as to the source of the funds:

3.2.5 You are not permitted to warn the party who you report to the FIC of the fact that you are reporting him but are permitted to continue to render your services to him until the FIC tells you to stop.

3.2.6 You can be specifically appointed to report on an ongoing basis your interactions with a specified client and are obliged to carry out this instruction again without informing the client of the fact that you are reporting to the FIC.

4. What effect will FICA have on us and our relationships with our clients and purchasers

4.1 The act turns us into spies on our own clients and in certain cases into "super spies" [see 3.2.6 above].

4.2 The act will judge our performance as spies [and prosecute us appropriately] on the standard of expertise which can be expected of a spy who is at all times both "diligent" and "vigilant". We will furthermore be deemed to have the experience, knowledge, skill and training which a person occupying our position should have. The fact that the individual estate agent [or attorney or bank] might not him or herself be particularly bright or particularly experienced will not be taken into account and will not serve as an excuse before the court of prosecution.

4.3 We will be expected to be persons of great insensitivity for only such persons can happily continue to interact with a client after having already "reported" him.

4.4 We will be forced to accept irreparable harm to the trusted relationship of confidentiality which exists between us and our clients and which is enshrined in our governing statutes and common law. These duties of confidentiality [save for the attorney's profession and only to a limited extent] are specifically overridden by FICA.

4.5 We will be forced to expose ourselves to extreme personal danger. Although the act purports to protect us by providing that:

4.5.1 the FIC may not reveal the fact that we have reported to it;

4.5.2 that we cannot be sued by our own client or the party we reported on;

4.5.3 that we cannot be compelled to testify in any proceeding against the party we reported on.

The protection is potentially inadequate. Besides the obvious risk of a "leak" of information from the FIC, the act happily permits the FIC to introduce with very little limitation at the trial of the matter by way of certificate a summary of that which we reported on. That certificate and its contents are quite likely to lay the trail for the accused party to trace us as the spy who "sold

them out". As such accused persons seldom solve their "problems" in normal court fashion, the protection given to us by the act is somewhat meaningless and we could well find ourselves wearing snugly fitting concrete boots and decorating the floor of the nearest harbour/lake!

5. What do we do about FICA

5.1 As far as portion 1 of your obligations are concerned [i.e. identification and reporting] you should have little difficulty from a moral or ethical point of view with compliance.

5.2 You should write to your client when taking instructions to inform your client of your obligations under FICA and a suggested letter for this purpose is annexed hereto.

5.3 Insofar as your "spying obligations" are concerned, every person will have to take their own stance as guided by their own conscience and live with the consequences. The writer has certainly taken his stance. What such stance is will have to remain within his private domain!

Prepared by Milton Koumbatis