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Attorneys Notaries Conveyancers

1st Floor, 2 Albury Park, Albury Road, Dunkeld West, 2196. Docex 11 Hyde Park. t +27 11 560 7100 f +27 11 759 7960. Stellenbosch Office: t +27 82 287 3173

PROPERTY PRACTITIONERS ACT

1. The estate agency profession has been regulated by the Estate Agency Act since 1976. After the Property Practitioners Bill had been passed by Parliament, the National Assembly and the National Council of Provinces it was signed into law on 2 October 2019. Upon promulgation by the President in Government Gazette it will become law.
2. The objectives of the new Act are to:
 - Replace the Estate Agency Affairs Board (EAAB) with the Property Practitioners Regulatory Authority (PPRA)
 - Regulate Property Practitioners
 - License Property Practitioners
 - Provide enhanced consumer protection
 - Provide an internal dispute resolution in the property market
 - Provide education and training
 - Transform the industry by promoting the interests of historically disadvantaged individuals and small and medium sized enterprises
 - Promote home ownership in affordable and secondary housing market
3. A big change relates to the expanded definition of a “Property Practitioner” which now in addition to estate agents also includes a person and/or business that is/are:
 - commercial brokers
 - mortgage brokers, also known as mortgage originators
 - bridging finance companies (excluding registered financial institutions)
 - property valuers
 - home inspectors
 - property managers (excluding a managing agent as defined in Section 1 of the Community Schemes Ombud Service Act)
 - agents that sell time-share or fractional ownership
 - anyone who acts as an intermediary for the purpose of bringing about a sale of a property or a business in any other way acts or provides services as an intermediary or facilitator with the primary purpose to, or to attempt to affect the conclusion of an agreement to sell and purchase, or hire or let, as the case may be, a property or business undertaking, including a home ownership association
 - managers of a Property Practitioners business, and anyone who perform any function whether directly or indirectly in connection with the sale or letting of property or business as well canvassers (see a i. and ii. of the definitions)
 - Digital portals that publicly exhibit properties/ businesses for sale/rent by way of electronic means (Property24 and Private Property and companies that receive rental on behalf of others like PayProp)
 - Employees of attorneys that act as agents (despite being covered by the Attorneys Fidelity Fund)
 - Anyone who was a Property Practitioner at the time of committing an offence under the Act so as to enable the PPRA to sanction a person/ business even after they cease to operate as a Property Practitioner.

The Act specifically excludes:

- A person who does not carry out any of the above functions in the ordinary course of business
- A natural person who sells his own property, even if it is in the ordinary course of business
- Attorneys, Candidate Attorneys and the Sheriffs of the Court.

4. The Act has very broad application and specifically provides in section 2 thereof as follows –
“This Act applies to the marketing, promotion, managing, sale, letting, financing and purchase of immovable property and any rights, obligations, interests, duties or powers associated or relevant to such property”.

This wide net will result in more revenue for the PPRA but will challenge the resources of the PPRA.

5. The industry will be regulated by a body called the Property Practitioners Regulatory Authority (PPRA) which will replace the Estate Agents Affairs Board and whose duties will be:
- Regulate the conduct of Property Practitioners
 - Protect and educate consumers
 - Education/ training/ development of Property Practitioners
 - Transform the property sector

The PPRA will be overseen by a board with a CEO that will be appointed for 5-years at a time and can serve two terms.

6. The **Transformation** Charter for the property sector, which was finalised in 2017, is confirmed in chapter 4 of the Property Practitioners Act to apply to all Property Practitioners. When organs of the state (An "organ of state" includes all spheres of government and statutory bodies exercising a public power or constitutional powers/functions) use the services of a Property Practitioner they are obliged to use the services of Property Practitioners who comply with broad-based black economic empowerment and empowerment equity legislation and policies.

The PPRA must also assess the level of transformation within the industry and take steps to speed it up and create a Property Sector Transformation Fund to, for instance, promote the education and training of the historically disadvantaged.

The PPRA must also establish a Property Sector Research Centre as the central repository for expert knowledge in the property sector to support the realisation of South Africa's transformation into a knowledge-based economy where knowledge translates into social-economic benefits.

7. Compliance Enforcement will be conducted by **Inspectors** who will have wide-ranging powers of search and seizure and they will identify themselves with Certificates of Appointment and Identification Cards.

Inspectors will be entitled to enter business premises (as opposed to private residences where the Inspector is obliged to give advance notice first) without a search warrant and demand access to business records and documents.

Inspectors are entitled to confiscate and remove records or data which might be used in legal proceedings against the Property Practitioner.

It is anticipated that the Minister will publish regulations which will distinguish between contravention (where compliance notices and fines will be issued without the need for criminal prosecution) of the Act that are minor and contraventions which are substantial.

The Minister will determine fine limits and fines will be paid to the PPRA.

8. The PPRA is obliged to handle **complaints** lodged against any Property Practitioner where the complaints relate to financing, marketing, letting, hiring, sale and purchase of property.

The Act regulates the procedure and time limits in detail:

- The PPRA must acknowledge receipt within 7 days and issue a case number

The PPRA can refer the dispute to either mediation or adjudication:

- If the dispute goes to mediation the PPRA must appoint a mediator within 7-days, whereafter the mediator has a further 7-days to set a date for mediation (which must be within a 30-day period)

The PPRA must have matters Adjudicated where Property Practitioners:

- fail to comply with compliance notices, or
- fail to pay fines, or
- mediation failed, or
- receive serious complaints or commit serious contraventions

Adjudication will take place before an independent legally qualified person who may also appoint assessors for assistance.

Once appointed the Adjudicator will have 14-days to set the matter down for hearing (which hearing must take place within 60-days). The Act does not state how long the PPRA has to appoint an Adjudicator.

The decision of the Adjudicator has the same force as a judgment of the Magistrates Court and the Adjudicator can order the PPRA to pay up to 80% of the fine to the complainants as compensation.

The Act provides for an appeal process if any of the parties disagree with the decision of the Adjudicator. The Adjudication Appeal Committee will consist of three independent suitably qualified persons who will have 14-days to set the matter down for hearing (which hearing must take place within 60-days).

Note that the Act provides specifically for disputes between Property Practitioners, and the Property Practitioners will have to pay to get their internal disputes resolved.

9. Finances

The Act sets out that the PPRA will be funded by Parliament, from fees paid by Property Practitioners, from interest generated from investment of surplus funds (not immediately required to meet expenditure) of the PPRA.

The Act also empowers the PPRA to recover the costs that it has expended in carrying out inspections, investigations and disciplinary proceedings, or in carrying out audits on trust accounts from the Property Practitioner at fault.

The PPRA will control the management and administration of the fund but will also have the power with the approval of the Minister to outsource the management and administration of the fund to any portfolio company or financial institution.

10. The Fidelity Fund

The Estate Agency Fidelity Fund will now become the Property Practitioners Fidelity Fund and all income of the PPRA will be deposited to the Fidelity Fund (such as fees, investment income, claims payments, fines, insurance pay-outs and all interest).

The main purpose of the Fund is to reimburse people who suffer loss as a result of theft of trust money by a Property Practitioner who held a Fidelity Fund Certificate at the time of the theft or parties who suffer loss because the Property Practitioner did not keep a trust account or did not deposit trust money into the trust account.

If a party has a claim against the Fidelity Fund they must:

- give notice of the claim within 3-years
- they must respond to any written request that the Fidelity Fund might make within this 3-year period.

If these requirements are not met, the claim against the Fidelity Fund will lapse.

Before anyone can lodge a claim against the Fidelity Fund they must have laid criminal charges against the Property Practitioner who was guilty of the offence (Section 36(2)) (Previously the person making a claim against the Fidelity Fund first had to exhaust all legal rights and remedies to recover money from the estate agent).

If the Fidelity Fund repudiates the claim, the claim will prescribe unless the claimant issues a court summons within a period of three years from the date of the repudiation.

The Fidelity Fund is mandated to pay for the following:

- all compensation claims established against the Fund (Minister has the power to cap the amounts to protect the FF against insolvency). (Note that compensation payable from the fund is limited to reimburse members of the public who suffered loss as a result of the actions of a Property Practitioner)
- Contributions to costs of a claimant (at the discretion of the PPRA)
- All costs of the management, control and administration of the Fidelity Fund
- The Fidelity funds legal and accounting and other expenses
- All Insurance Premiums for indemnity insurance (the PPRA has the authority to arrange a group insurance scheme to cover Property Practitioners against claims made by the public on the grounds of malpractice, thereby providing wider insurance cover for Property Practitioners)
- The Fidelity fund may also pay out grants for these purposes
- Maintaining the standards of conduct, education and training
- Transformation
- Continued operation of organisations similar to REBOSA and the Institute of Estate Agents.

All Property Practitioners will need to pay fees to the Fidelity Fund for their Fidelity Fund Certificates.

Any person who lodges a claim against the Fidelity Fund has to co-operate to enable the claim to be properly investigated, failing which the Fidelity Fund can withhold payment of their compensation.

If the Fidelity Fund denies a claim, they have three years from dismissal of claim to issue summons against the Fidelity Fund to enforce payment.

11. Application for a Fidelity Fund Certificate

Every Property Practitioner must apply to the PPRA and pay the fee for a Fidelity Fund Certificate (FFC).

- These applications only have to be made every three years
- If the Property Practitioner is a trust, it must also apply for a registration certificate
- Once the application for the FFC has been received, and provided it complies with all requirements and the applicant is not disqualified, the PPRA must issue a certificate which must be valid “until 31 December of the year to which the application relates” which is patently a draughting error as it contradicts the validity for 3-year period
- If the application is late or if the application is not accompanied by the fee, a penalty will be raised which penalty must to be paid before a FFC will be issued.
- There is a prohibition against the use or display a lapsed FFC
- You must produce the FFC to any person who requests it
- If your contact details change during the validity period of the FFC, you must notify the PPRA within 14-days and failure to do so is an offence.

12. Mandatory time periods to issue a FFC

Once the PPRA receives the application for a Fidelity Fund Certificate, it has 30-working days to consider the application. Only on good grounds, provided in writing by the PPRA, may the 30-day period be extended by a maximum of 20 additional working days.

The period of 30-working days contemplated in subsection 48 (1) commences afresh if the Authority requests the applicant to submit additional information or to correct the said application.

If the Authority has failed to issue the FFC within the prescribed period the application is deemed to have been approved and the PPRA must, upon written request by the applicant, within 10-working days, issue the applicant with the relevant certificate.

13. Prohibition on rendering services without an FFC

You are not entitled to act as a Property Practitioner unless you have a FFC. Trading without a FFC is an offence.

All employees who acts as Property Practitioners must also have FFC's and so must every director of a company, every member of a close corporation, every trustee of a trust and every partner in a partnership.

Previously, in terms of the Estate Agency Affairs Act, an estate agent was unable to enforce a claim for commission if they did not have an up to date FFC at the time of concluding the transaction. If the commission has been paid, however, the estate agent was able to keep the money.

In the Property Practitioners Act the position has changed which now clearly provides that the offending Property Practitioner must refund the amount received during such contravention. Failure to repay the amount will make the Property Practitioner guilty of an offence and liable for a fine or a prison sentence of up to 10 years.

So, if at the time that the Property Practitioner performed any act as a Property Practitioner, he was not in possession of a valid FFC he cannot claim remuneration. Practitioners who received payment to which they are not entitled are obligated to pay these amounts to the Fidelity Fund and if these amounts are not re-claimed within 3- years, the money will accrue to the Fidelity Fund.

Conveyancing attorneys are prohibited from paying out commission unless the Property Practitioner has provided the conveyancer with a certificated copy of their FFC, valid during the period or on the date of the transaction to which such payment relates, AND on the date of such payment. Therefore, the FFC has to be valid from the date of the conclusion of the agreement as well as on the date of registration of transfer.

14. Disqualification from a FFC

Section 48 of the new Act specifically states that the PPRA may not issue a Fidelity Fund certificate to certain mentioned parties.

Some of the more prominent prohibitions are anyone who:

- Is a non-South African citizen and does not lawfully reside in the Republic;
- has, at any time in the preceding five years, been found guilty of contravening this Act, the Estate Agency Affairs Act, or any similar legislation in any other jurisdiction;
- has been found in any civil or criminal proceedings by a court of law to have acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of a fiduciary duty, or of any other offence for which such person has been sentenced to imprisonment without the option of a fine;
- is of unsound mind;
- has, at any time in the preceding five years by reason of improper conduct, been dismissed from a position of trust;
- is an unrehabilitated insolvent;
- is not in possession of a valid tax clearance certificate;
- whose name, or the name of a juristic person of whom the person was a director, member, trustee, partner, shareholder, holder of membership or other beneficial interest has been listed by the National Treasury on its Register for Tender Defaulters; or
- has been prohibited by any legislation from practicing as a Property Practitioner or from occupying a position of trust, including any juristic person to whom the disqualifications in subparagraphs (ii), (iii), (vi) and (vii) of section 49 (a) apply;
- has been found guilty by a competent tribunal or a court of law of unfairly differentiating, distinguishing or excluding directly or indirectly anyone on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;
- is not in possession of a valid BEE certificate;
- any Property Practitioner who or, if such Property Practitioner is a company, any director or member of management of that company, or if such Property Practitioner is a close corporation, any member referred to in paragraph (a) of the definition of “Property Practitioner” in section 1, or if such Property Practitioner is a trust, any trustee, or if such Property Practitioner is a partnership, any partner, who
 - in the preceding five years has been found guilty of contravention of this Act or the Estate Agency Affairs Act, 1976;
 - does not comply with the prescribed standard of training;
 - does not have the practical experience determined by the Authority; or
 - has at any time been guilty of any act or omission in respect of which any person had to be compensated pursuant to the provisions of section 38 from the Fund, unless the Property Practitioner has repaid the relevant amount in full to the Authority, or the Authority is of the opinion that satisfactory arrangements for the settlement of such amount have been made and has confirmed such arrangements;
- any Property Practitioner contemplated in paragraph (a) of the definition of “Property Practitioner” in section 1, if such Property Practitioner carries or intends to carry on business as a Property Practitioner under a trade name which is identical or confusingly similar to the trade name of another Property Practitioner
 - already issued with a Fidelity Fund Certificate or
 - whose Fidelity Fund Certificate is suspended or has lapsed or has been withdrawn in terms of this Act.

15. BEE requirement

The Act does not specify the specific requirements or level for the BEE certificate, so it can be assumed that a valid BEE certificate meeting the minimum level of BEE compliance will be sufficient to meet this requirement. But, to meet the minimum level of BEE compliance and get a valid BEE certificate, an estate agent or agency will have to comply with the targets and requirements as set out in the Property Sector Code for BEE.

- The only exemption is where the estate agency's annual turnover is less than the threshold set for Exempt Micro Enterprises ("EME's"), in which case the estate agency will be exempt from having to comply with the scorecard elements of the Property Sector BEE Code ("Property Code") and will qualify the estate agency as an automatic Level 4 contributor to BEE.
- Many estate agencies are relatively small but be aware that the thresholds in the Property Code applicable to estate agents are much lower than that of the Amended Generic BEE Codes ("Amended Codes").
- The threshold for EME's under the Property Code is set at R2,5 million turnover per year as opposed to R10 million per year under the Amended Generic Codes. This limits the impact of the exemption to the smallest estate agencies which have an annual turnover of less than R2.5 million.
- The threshold for QSE's under the Property Code is also lower than under the Amended Generic Codes and set at between R2.5 million and R35 million, with estate agencies with an annual turnover of R35 million or more, having to report under the Generic scorecard of the Property Code.
- The turnover of an estate agency will be based on income or commission received by the estate agency and not the sales values of property being sold.

16. Display of FFC

A holder of a Fidelity Fund Certificate is obliged display it at their place of business

They must also make reference to it on their letterhead and on their marketing material.

Any agreement relating to a property transaction which the Property Practitioner concludes must also contain a prescribed clause in which the validity of the Property Practitioner's FFC is guaranteed. Failure to comply constitutes an offence.

17. Trust accounts

The Property Practitioner must furnish the PPRA with full details of all the separate trust banking accounts as well as details of the auditor appointed to audit these accounts.

Money not immediately required may be deposited into an interest-bearing account where interest accrues to the client and must contain a reference to Section 54(2) of the Act.

Trust accounts must be balanced on a monthly basis and must be audited within 6- months of the Property Practitioner's financial year end and the audited reports must be sent to the PPRA.

Smaller business with an annual turnover of less than R2.5 million will not need to have their trust accounts audited and the trust account can be reviewed by a registered accountant.

18. Mandatory Insurance

The minister of Human Settlements may now prescribe indemnity insurance which Property Practitioners must take out to provide redress for persons affected by a Property Practitioner breaching the code of conduct or committing an offence in terms of the Act.

19. Limitations on relationships with other Service Providers

Property Practitioners are not entitled to enter into any arrangements, whether formal or informal, in terms of which a consumer is obliged or encouraged to use a particular service provider, including an attorney, to render any service in respect of any transaction of which that Property Practitioner was the effective cause. Contracts of this nature are now illegal and the Minister is also entitled, by way of regulation, to prohibit other relationships which might harm the consumer.

Once again, the sanction for breaching this rule is that the Property Practitioner is not entitled to be paid their commission, and the other party, possibly the conveyancing attorney, will not be entitled to charge their fee. Once again, even if the commission/fees have been paid, the consumer would be entitled to claim repayment, and if the Property Practitioner or other party did not pay within 30-days they would be guilty of an offence in terms of the Act.

20. Certificates of Compliance

The Act attempts to make it clear that a Property Practitioner is not entitled to interfere with the contractor who will be issuing the electrical, beetle, or water certificate, or receive or offer any incentives related to this process.

21. Code of Conduct

The new Act provides for a Code of Conduct which we assume will be similar to the current Code. A breach of the Code is now an offence in terms of the Act.

22. Sanctionable Conduct

Certain offences that were contained in the current Code have now been identified as sanctionable in the Act.

- You are not entitled to receive payment from two persons who are involved in the same transaction, whose interests are not in all material respects identical, unless these parties agree to this in writing. Consequently, if you want to be paid commission from both the seller and the buyer, they must both agree to this in writing.
- If you fail to pay any money due to the Property Practitioner Regulatory Authority within one month after the money is due.
- If the PPRA ask for information which they need to exercise their powers under the Act, you must provide this information within the period that the PPRA stipulate, or you will be guilty of an offence.
- The Act also makes it an offence if you fail to give a full and proper explanation, in writing, of any act performed as a Property Practitioner, within 30-days of being requested to do so by the Property Practitioner Regulatory Authority.
- If you fail to comply with or contravene an of the provisions of the Code of Conduct.
- It is also an offence if you fail to inform the Property Practitioner Regulatory Authority within 14-days of a change in your contact details.
- If you discriminate against any consumer based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
- Committing any criminal offence while performing the function of a Property Practitioner.

If you are found guilty of an offence, the PPRA can withdraw your FFC, you can be fined, or you can be reprimanded, and your transgressions noted on their website.

23. Undesirable practices

The Minister may, in consultation with the Board and by notice in the Government Gazette, declare any business practice in the property market to be undesirable and therefore prohibited.

This section lists the considerations such as free choice, relationships between Property Practitioners or Property Practitioners and specific consumers or the general public, prejudice to or adversely affecting consumers.

Subsection 3 of section 62 specifically states that a Property Practitioner is not entitled to any remuneration or other payment in respect of or arising from the performance of any property purchase transaction prior to the transfer of the property and registration in the name of the purchaser.

24. Candidate Practitioners

Candidate Property Practitioners are not entitled to draft or complete any document or to draft any clause in a mandate, a deed of sale or a lease. A Property Practitioner who allows this to happen will not be entitled to be paid for their services. This is regardless of whether or not the Property Practitioner was aware of the contravention at the time.

25. Consumer Protection

The defects disclosure form is now going to become law. A Property Practitioner will not be entitled to accept a mandate for sale or lease, unless the owner of the property has furnished the signed mandatory disclosure form. As yet, the mandatory disclosure form has not been published and we expect it will be similar to the form published by EAAB.

This form will also have to be signed by the purchaser/tenant and attached to the contract. In the event that this is not done, it will be deemed that the owner of the property has not disclosed any defects or deficiencies in the property to the purchaser/tenant.

A Property Practitioner who does not comply with this requirement will be guilty of an offence and may be held liable by an affected consumer.

The Act also stipulates that agreements of sale, agreements of lease and the mandatory disclosure form must be drafted at the cost of the developer or the seller (reference to landlords has been omitted).

Charging a tenant for a lease therefore, is no longer permitted. The PPRA are however obliged to publish updated versions of guideline agreements on their website and these should be available for free.

The section on Consumer Protection contains a short sentence stating that a Property Practitioner owes a buyer and a seller "a duty of care". The duty of care is a concept taken from our law of delict. Accordingly, if a Property Practitioner fails to look after the interests of both the buyer and the seller, and the buyer or the seller suffer damages as a result of this, the Property Practitioner can be sued.

The Act omits to make reference to landlords and tenants also in regards to the duty of care. The section also does not recognise that an agent owes a primary duty to his or her client, and a subsidiary duty to others involved in the transaction (as stated in the current Code of Conduct).

Although care has been taken to ensure the accuracy of the above information, FN Inc and its members, employees, agents and representatives cannot be held liable for any loss suffered, as a result of the use of this information.

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