

A BRIEF OVERVIEW OF THE PROPERTY PRACTITIONERS BILL

The Property Practitioners Bill, 2018 is intended to replace and repeal the Estate Agency Affairs Act of 112 of 1976 and is intended to govern amongst others estate agents. It was introduced to the National Assembly on 14 June 2018 and was passed by the National Assembly on 4 December 2018. It has since been passed by the National Council of Provinces on 28 March 2019 and has been sent to the President for assent.

The Bill has been amended since it was first published and our previous newsflash commented on the Bill in its initial form. This newsflash is a based on the Bill in its current form as amended and approved (B21B -2018) is intended to provide a summary and a brief outline of the proposed changes which will be relevant and applicable to “property practitioners”.

The definition of “property practitioners” is extensive and will regulate all estate agents, the Bill defines property practitioners as:

“property practitioner”—

- (a) means any natural or juristic person who or which for the acquisition of gain on his, her or its own account or in partnership, in any manner holds himself, herself or itself out as a person who or which, directly or indirectly, on the instructions of or on behalf of any other person—*
 - (i) by auction or otherwise sells, purchases, manages or publicly exhibits for sale property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser in respect thereof;*
 - (ii) lets or hires or publicly exhibits for hire property or any business undertaking by electronic or any other means or negotiates in connection therewith or canvasses or undertakes or offers to canvas a lessee or lessor in respect thereof;*
 - (iii) collects or receives any monies payable on account of a lease of a property or a business undertaking;*
 - (iv) provides, procures, facilitates, secures or otherwise obtains or markets financing for or in connection with the management, sale or lease of a property or a business undertaking, including a provider of bridging finance and a bond broker, but excluding any person*

contemplated in the definition of “financial institution” in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990);

(v) in any other way acts or provides services as intermediary or facilitator with the primary purpose to, or to attempt to effect the conclusion of an agreement to sell and purchase, or hire or let, as the case may be, a property or business undertaking, including, if performing the acts mentioned in this subparagraph, a home ownership association, but does not include—

(aa) a person who does not do so in the ordinary course of business;

(bb) where the person is a natural person and that person in the ordinary course of business offers a property for sale which belongs to him or her in his or her personal capacity; 2

(cc) an attorney or candidate attorney as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979); or

(dd) a sheriff as defined in section 1 of the Sheriffs Act, 1986 (Act No. 90 of 1986), when he or she performs any functions contemplated in paragraph (a) of this definition, irrespective of whether or not he or she has been ordered by a court of law to do so; or

(vi) renders any other service specified by the Minister on the recommendation of the Board from time to time by notice in the Gazette;

(b) includes any person who sells, by auction or otherwise, or markets, promotes or advertises any part, unit or section of, or rights or shares, including time share and fractional ownership, in a property or property development;

(c) includes any person who for remuneration manages a property on behalf of another;

(d) includes a trust in respect of which the trustee, for the acquisition of gain on the account of the trust, directly or indirectly in any manner holds out that it is a business which, on the instruction of or on behalf of any other person, performs any act referred to in paragraph (a);

(e) for the purposes of sections 34, 46, 48, 59, 60, 61 and 65 includes—

(i) any director of a company or a member of a close corporation who is a property practitioner as defined in paragraph (a);

- (ii) any person who is employed by a property practitioner as envisaged in paragraph (a) and performs on his, her or its behalf any act referred to in subparagraph (i), (ii), (iv), (v) or (vi) of that paragraph;
- (iii) any trustee of a trust which is a property practitioner as envisaged in paragraph (d);
- (iv) any person who is employed by a property practitioner as envisaged in paragraph (b) and performs on its behalf any act referred to in subparagraph (i), (ii), (iv), (v) or (vi) of paragraph (a); and
- (v) any person who is employed by a property practitioner contemplated in paragraph (a) or (b) to manage, supervise or control the day-to-day operations of the business of that property practitioner;

(f) includes any person who is employed by or renders services to an attorney or a professional company as defined in section 1 of the Attorneys Act, 1979, other than an attorney or candidate attorney, and whose duties consist wholly or primarily of the performance of any act referred to in subparagraph (i), (ii), (iii), (iv), (v) or (vi) of paragraph (a), on behalf of such attorney or professional company whose actions will be specifically covered by the Attorneys' Fidelity Fund and not the Property Practitioners Fidelity Fund;

(g) for the purposes of section 61 and any regulation made under section 70, includes any person who was a property practitioner at the time when he or she was guilty of any act or omission which allegedly constitutes sanctionable conduct referred to in section 62,

but does not include an attorney who, on his own account or as a partner in a firm of attorneys or as a member of a professional company, as defined in section 1 of the Attorneys Act, 1979, or a candidate attorney as defined in that section, who performs any act referred to in paragraph (a), in the course of and in the name of and from the premises of such attorney's or professional company's practice, provided that such an act may not be performed—

- (i) in partnership with any person other than a partner in the practice of that attorney as defined in section 1 of the Attorneys Act, 1979; or
- (ii) through the medium of or as a director of a company other than such professional company, and “**advertise**” for the purposes of this definition does not include advertising in compliance with the provisions of any other law;

Application of the Act (Chapter 1)

The Act applies to the marketing, promotion, managing, sale, letting, financing and purchase of immovable property, and to any rights, obligations, interests, duties or powers associated with or relevant to such property.

It is possible to apply for an exemption from the application of the Act in terms of section 4.

Certain persons are excluded from the definition of property practitioner in the Bill. This exclusion applies to a person offering a property for sale which belongs to him/her/it in his/her/its personal capacity. It also excludes a sheriff acting in an intermediary/facilitating capacity when he performs any functions contemplated in the Bill, irrespective of whether or not he or she has been ordered by a court of law to do so. In addition, attorneys and candidates are excluded from the definition of property practitioner.

Property Practitioners Regulatory Authority (Chapters 1, 2 and 3)

The Property Practitioners Regulatory Authority (the “Authority”) will be the new regulatory body of property practitioners and will be governed by and will act through the Board of the Authority. This Authority will replace the Estate Agency Affairs Board and will be funded by Government monies and fees paid by property practitioners. The Act deals with administrative matters such as the composition, appointment, disqualification, and termination of members of the Board, powers and duties of the Board, meetings, committees and dissolution of the Board, appointment of the CEO and staff of the Authority.

The Authority must in performing its functions, amongst others:

- regulate the conduct of the property practitioners in dealing with consumers;
- regulate the conduct of property practitioners in so far as marketing, managing, financing, letting, renting, hiring, sale and purchase of property are concerned;
- ensure that the Act is complied with;
- ensure that consumers are protected from undesirable and sanctionable practices (set out in sections 62 and 63);
- regulate any other conduct which falls within the ambit of the Act in as far as property practitioners and consumers in this market are concerned;
- provide for the education, training and development of property practitioners and candidate property practitioners;
- educate and inform consumers of their rights;
- implement measures to ensure that the property sector is transformed.

Transformation of property sector (Chapter 4)

The Property Sector Transformation Charter Code applies to all property practitioners.

When procuring property related goods and services, all organs of state must utilise the services of property practitioners who comply with the broad-based black economic empowerment and employment equity legislation and policies.

The Authority must from time to time—

- (a) implement and assess measures to progressively promote an inclusive and integrated property sector;
- (b) implement appropriate measures and assess the state of transformation within the property sector;
- (c) create such mechanisms for the continuous monitoring and evaluation of the sector performance on the transformation imperatives and granting of incentives as may be prescribed; and
- (d) introduce measures to be implemented, which may include incubation and capacity building programmes to redress the imbalances of the past.

Section 21 deals with the establishment of the Property Sector Transformation Fund.

The Minister may prescribe measures to promote economic transformation by facilitating the accessibility of finance for property ownership, property development and investment in order to enable meaningful participation of historically disadvantaged individuals including women, youth and people with disabilities.

The Authority must utilise the Property Sector Transformation Fund in such a manner as may be prescribed, which may include the following transformation and empowerment programmes:

- (a) Principalisation Programme, to promote Black owned firms and principals.
- (b) Regularisation Programme, to promote and encourage participation of the historically disadvantaged due to non-compliance.
- (c) Consumer Awareness Programme, to promote awareness of property transactions and business undertaking.
- (d) Work Readiness Programme, to promote and enhance participation of the historically disadvantaged in the property sector.

The Authority must in consultation with the services of SETA (the Sector Education and Training Authority) develop special dispensation for the training and development of the historically disadvantaged which must include recognition of prior learning.

Inspectors and Compliance (Chapter 5)

The Authority (through the CEO) must appoint duly qualified persons to act as inspectors to determine whether the Act is being complied with. The inspector may at any reasonable time and without prior notice, conduct an inspection and may without a warrant:

- (a) enter and inspect any business premises, except a private residence, of a property practitioner;
- (b) require the property practitioner, manager, employee or an agent of the property practitioner to—
 - (i) produce to him or her the fidelity fund certificate of that property practitioner;
 - (ii) produce to him or her any book, record or other document related to the inspection and in the possession or under the control of that property practitioner, manager, employee or agent; or 5
 - (iii) furnish him or her with such information in respect of the fidelity fund certificate, book, record or other document at such a place and in such manner as the inspector may determine; and
- (c) examine or make extracts from, or copies of, any such fidelity fund certificate, book, record or other document.

If a property practitioner conducts business from his private residence the inspector is required to notify the property practitioner in advance of such inspection and the details of the inspection.

If the inspector obtained a warrant from a judge or magistrate, then he/she has wider search and inspection powers.

Fidelity Fund and Indemnity Insurance (Chapter 7)

The Estate Agents Fidelity Fund (in terms of the Estate Agents Affairs Act) will continue to operate but under the name Property Practitioners Fidelity Fund. The running costs of the Authority including insurance premiums will also be paid from this fund.

The primary purpose of the fund is to reimburse persons who suffer financial loss as a result of –

- theft of trust money committed by a property practitioner who was in possession of a Fidelity Fund certificate at the time of the theft; or
- the failure by a property practitioner to apply timeously or to make payment for, his or her Fidelity Fund Certificate.

No person has any claim against the Authority unless the claimant has—

- within three years after the circumstances giving rise to a claim came into being, given notice to the Authority of such claim; or
- within the three-year period contemplated in paragraph above after a written request was sent to him or her by the Authority, furnished to the Authority such proof as it may reasonably require.

Anyone seeking to claim compensation from the Fund must give notice thereof to the Authority in the prescribed manner, the Act further provides that a person can't claim against the Authority in respect of theft of trust money by a property practitioner unless such a person has, before lodging a claim with the Authority, laid a criminal charge against that property practitioner. As such it is clear that theft of trust monies will be dealt with seriously by the Authority and that criminal sanctions will be imposed.

In terms of section 43 no person may commence an action against the Authority for payment from the Fund after the expiry of 3 years from the date that the Authority rejects a claim or requires compliance in terms of section 42. A claimant may not recover from the Authority any amount larger than the difference between the amount of the loss suffered and the amount or other benefits received from another source in respect of such loss (such as insurance).

No right of action lies against the Authority in respect of any loss suffered by:

- the spouse, life partner, business partner or immediate family member of a property practitioner by reason of any negligent or intentional conduct including theft committed by such property practitioner; or
- any property practitioner by reason of any negligent or intentional conduct including theft committed—
 - by his, her or its business partner;
 - if such property practitioner is a company, by any director of such company;
 - if he or she is a director of a company, by any co-director in such company;

- if such property practitioner is a close corporation, by any member of such corporation;
- if he or she is a partner in a partnership, by any other partner of such partnership; or
- by any person employed by him or her as a property practitioner;
- any person as a result of negligent or intentional conduct including theft, or as a result of any other act or omission in connection with trust monies held or received on account of any other person, by any person referred to in paragraph (d) of the definition of “property practitioner” in section 1.

Fidelity Fund Certificates (Chapter 8)

In terms of section 47 every property practitioner must every 3 (three) years apply to the Authority for a Fidelity Fund certificate and such application must be accompanied by the prescribed fees and penalty fees applicable if any (penalties are payable if the application is made late or the fees were not paid with the application).

The Authority must supply the certificate within 30 days (unless extended by the Authority for a period of up to 20 working days on “good grounds” in writing), failing which it is deemed that the application for the certificate was compliant and the practitioner may then make demand for the issue of the certificate within 10 working days.

Property practitioners must notify the Authority within 14 days of any change in contact details.

Certain disqualifications apply, as set out in section 50, in which circumstances the Authority may not issue a Fidelity Fund certificate, one of which is if the property practitioner is not in possession of a BEE certificate. The Bill does not further deal with minimum levels in this regard and does not otherwise deal with this aspect in detail.

No-one may act as a property practitioner unless he or she or it is in possession of a Fidelity Fund certificate, or if he or she or it employs any other person as a property practitioner, that person is also in possession of a Fidelity Fund certificate. If an entity is a company, close corporation, a trust or a partnership, then every director of such a company, every member of such a close corporation, every trustee of such a trust and every partner of such a partnership, as the case may be, must be in possession of the Fidelity Fund certificate.

A person who contravenes this requirement must immediately upon receipt of a request from any relevant party in writing repay any amount received in respect of or as a result of any property transaction during such contravention (section 48 (4)) and is not entitled to remuneration in terms of Section 56. A conveyancer may not pay any monies to a property practitioner unless he or she received a copy of the practitioner's certificate (section 56 (5)).

The Authority in terms of section 52 may, on its own initiative, in terms of an order of a court of law, or in terms of an order from an adjudicator withdraw a Fidelity Fund certificate in certain circumstances which include if any person is summoned to appear before the Authority and without just cause fails to comply with the summons and has prior to such date not been excused by the Authority from appearing.

Importantly the Fidelity Fund certificate must be prominently displayed in every place of business from where property transactions are conducted to enable consumers to easily inspect it, ensure that the prescribed sentence regarding holding a Fidelity Fund certificate is reproduced in legible lettering on any letter head or marketing material relating to that property practitioner; and in any agreement relating to property transactions, include the prescribed clause which ensures that he, she or it guarantees the validity of the certificate.

Conduct of Property Practitioners (Chapter 9)

The Minister in consultation with the Authority must prescribe a code of conduct to be complied with, which must be published on the Department and Authority's websites. On request a property practitioner must provide a consumer with a copy of such code of conduct.

Section 62 of the Act sets out sanctionable conduct of property practitioners which include, if a property practitioner:

- in the same transaction acts as a property practitioner on behalf of two or more persons whose interests are not in all material respects identical and received remuneration from both (unless the parties agree thereto in writing);
- fails to give the Authority a full explanation in writing within 30 days of being called to do so;
- fails to pay any money due to the Authority or in respect of the Fund within one month after such monies become due;
- contravenes any provision of the code of conduct;
- in his or her capacity as a director of a company, or member contemplated in paragraph (b) of the definition of "property practitioner" in section (1), of a close corporation, or trustee of a trust, which is a property practitioner and which

failed to comply with section 50 or 51, did not take all reasonable steps to prevent such failure;

- carries on an undesirable practice prohibited under section 63;
- commits an offence involving an element of dishonesty;
- fails to inform the Authority within 14 days of a change in his, her or its contact details;
- 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 commits a criminal offence while performing a function of a property practitioner;
- fails to comply with or contravenes any provision of this Act.

In terms of section 63 the Minister may after consultation with the Board declare a particular business practice in the property market to be undesirable and prohibited.

In terms of section 64 a candidate property practitioner may not draft, complete any document or clause conferring a mandate or relating to the sale or lease of property. If such person is in contravention of this section, that person and the property practitioner who allowed may not receive remuneration.

In terms of section 65 a franchisee property practitioner must clearly and unambiguously in all of his written communications, advertising and marketing materials that he operates in terms of a franchise agreement as well as the name of the franchisor.

Section 66 prohibits a property practitioner whether by means of financial and other incentives, to influence a person who issues a certificate in respect of the condition or defects of electric wiring; the presence of vermin, the presence of water or damp or any other matter or condition provided for in law. Any contravention hereof is an offence.

Consumer Protection (Chapter 10)

In terms of section 67 a property practitioner may not accept a mandate unless a lessor or seller of the property has provided him with a fully completed and signed mandatory disclosure form and such practitioner must provide a copy of the completed mandatory disclosure form to a prospective lessee or purchaser who intends to make an offer to lease or buy the property. The mandatory disclosure must be signed by all parties and forms an integral part of the agreement. If such disclosure form is not completed, signed or attached the agreement must be interpreted as if no defects or deficiencies in the property were disclosed to the purchaser. If a property practitioner fails to obtain a

completed mandatory disclosure from the seller or lessor the property practitioner may be held liable by the affected consumer.

Section 68 provides that an agreement to sell, or lease and the mandatory disclosure form must be drafted by the seller or developer for his own account. In addition, the Authority must publish updated guideline agreements on its website from time to time.

Section 69 states that the Authority must conduct campaigns to educate and inform the general public of their rights in property transactions and property practitioners of their functions, duties and obligations. Importantly section 69(2) provides that the property practitioner owes a buyer and seller a duty of care. It is noted that no corresponding duty care towards both a lessor and lessee is recorded in the Bill.

Chapter 11 (General)

Section 71 provides that a person convicted of an offence in terms of the Act is liable to a fine or to imprisonment for a period not exceeding 10 years.

Section 75 deals with transitional provisions where members of the Estate Agents Affairs Board become members of the Property Practitioners Board.



Going Beyond

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