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Property Practitioners Act 22 of 2019

Presented by Alan Levy

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Focus of the Presentation

- Provide insight into the Property Practitioners Act 22 of 2019 (“the Act’).
- Explain the manner in which the Act repeals the Estate Agency Affairs Act of 1976 and indicate its application in the field of property law in so far as to discuss the requirements and limitations of property practitioners.
- The following will be highlighted:
 - ✓ the Fidelity fund Certificate and the remuneration of property practitioners;
 - ✓ property market service providers and the code of conduct;
 - ✓ undesirable practises and candidate property practitioners;
 - ✓ The mandatory disclosure form and consumer education and information.

Definitions – Section 1

What is a ‘property practitioner’?

- (a) It is any natural/juristic person who or which for the acquisition of gain on his or 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;

- (iii) collects or receives any monies payable on account of a lease of a property or a business undertaking;
- (iv) provides or procures financing for or in connection with the management, sale or lease of a property – including a provider of bridging finance and a bond broker;
- (v) renders other services specified by the Minister on the recommendation of the Board from the time to time by notice in the *Gazette*;
- (vi) any person who for remuneration manages a property on behalf of another;
- (vii) including a director of a company, a close corporation and certain persons employed by a property practitioner in certain instances.

What is a ‘candidate property practitioner’?

A ‘candidate property practitioner’ is a person who has not yet met all the qualifications or experience required as prescribed, to practise as a property practitioner and who is undergoing training under the supervision of a property practitioner.

Who is the ‘minister’ referred to in the Act?

The ‘Minister’ referred to is the Minister of Human Settlements, currently Lindiwe Sisulu.

Application of the Act – Section 2

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.

Application for Fidelity Fund Certificate – Section 47

By whom and when must a Fidelity Fund Certificate be applied for?

- (1) The Act states that every property practitioner must every 3 years apply to the Property Practitioners Regulatory PPRA (“PPRA”) for a Fidelity Fund Certificate (“FFC”) which application must be accompanied by the prescribed fees.
- (2) The PPRA upon receipt of an application and the relevant fees, if the applicant concerned:
 - (a) meets all the requirements provided for under the Act; and
 - (b) The applicant is not disqualified under section 48 of the Act from being issued with a FFC,issue to the applicant a FFC which is valid until 31 December of the year to which such application relates.

Prohibition of rendering services without a Fidelity Fund Certificate – Section 48

What happens if I act as a property practitioner without a Fidelity Fund Certificate?

- (1) No person/entity may act as a property practitioner unless:
 - (a) he, she or it has been issued with a FFC in terms of section 47 of the Act; or
 - (b) if he, she or it employs any other person as a property practitioner, that person has also been issued with a FFC.
- (2) If any entity is a company, a close corporation, a trust, or a partnership, every director of such company, every member of such close corporation every trustee of such a trust and every partner of such a partnership, must have been issued with a FFC.

- (3) Any person who contravenes/fails to comply with subsection (1) is guilty of an offence.
- (4) A person who contravenes or fails to comply with subsection (1) 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.
- (5) A person who fails to comply with a request contemplated in subsection (4) is guilty of an offence (see section 71, a fine or imprisonment not exceeding 10 years).

Summary

- It is imperative for a person/entity acting as a property practitioner be in possession of a FFC.
- This includes directors of companies, members of a close corporation, every trustee of a trust and every partner of a partnership.
- Any person in contravention of this section, must on receipt of a request, repay any amounts received in respect of the property transaction.
- Non-compliance with the request is an offence.

Disqualified from issue of a Fidelity Fund Certificate – Section 50

When can I not get a Fidelity Fund Certificate?

(1) The PPRA may not issue a FFC to:

(a) any person who:

- (i) is not a South African citizen and does not lawfully reside in the Republic;
- (ii) has, at any time in the preceding 5 years, been found guilty of contravening the Act, the Estate Agency Affairs Act (“EAAA”), or similar legislation in any other jurisdiction;
- (iii) has been found guilty in any civil or criminal proceedings by a court of law to have acted fraudulently, dishonestly, unprofessionally, dishonourably or in breach of fiduciary duty;
- (iv) is of unsound mind;

- (v) has, at any time in the preceding 5 years by reason of improper conduct, been dismissed from a position of trust;
- (vi) is an unrehabilitated insolvent;
- (vii) is not in possession of a valid tax clearance certificate;
- (viii) is prohibited by legislation from practising as a property practitioner or from occupying a position of trust;
- (ix) 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;
- (x) is not in possession of a valid BEE certificate.

(b) 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, or if such property practitioner is a trust, any trustee, or if such property practitioner is a partnership, who:

(i) in the preceding 5 years has been found guilty of contravention of this Act or the EAAA;

(ii) does not comply with the prescribed standard of training;

(iii) does not have the practical experience determined by the PPRA; or

(iv) 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 PPRA, or the PPRA is of the opinion that satisfactory arrangements for the settlement of such amount have been made and has confirmed such arrangements.

Mandatory display of Fidelity Fund Certificate – Section 53

Where do I have to let people know I am the holder of a Fidelity fund Certificate?

(1) The Act stipulates a holder of an FFC must:

- (a) prominently display his/her/its FFC in every place of business from where property transactions are conducted to enable consumers to easily inspect it;
- (b) ensure that the prescribed sentence regarding holding an FFC is reproduced in legible lettering on any letterhead or marketing material relating to that property practitioner;
- (c) in any agreement relating to property transactions entered into by him/her or company, close corporation, partnership, trust or other entity permitted to conduct the business of a property practitioner, include the prescribed clause which ensures that he, she guarantees the validity of the certificate.

(2) Any person who contravenes the above is guilty of an offence.

Property Practitioner not entitled to Remuneration in certain circumstances – Section 56

When can a Property Practitioner not get paid?

- (1) A property practitioner is under no circumstances entitled to any remuneration or other payment arising from the performance of any act referred to in the definition of a property practitioner under Section 1 (a) (i) (ii) (iii) and (iv) unless at the time of the performance of that act, the property practitioner and the company (and every director) is in possession of a valid FFC.

(3) Any property practitioner who receives remuneration in terms of the above paragraph must immediately pay that amount to the property practitioners fidelity fund and any affected seller, purchaser, lessor or lessee may within 3 years of that money having been paid to the fund, submit a claim to the fund and the fund may pay that amount or a portion thereof to the applicant.

(4) A conveyancer may not pay remuneration to a property practitioner unless the conveyancer has been provided with a certified copy of his valid FFC.

Summary

- A property practitioner who doesn't have a valid FFC and who has received remuneration must immediately pay that amount to the fund.
- The affected seller, purchaser, lessor or lessee may within 3 years of that money being paid to the fund, submit a written claim to the fund with proof and the fund may remunerate the applicant which is equitable to the circumstances.
- Unclaimed payments made to the fund within 3 years will irrevocably become the property of the fund.
- Conveyancers may not remunerate property practitioners unless such persons provide the conveyancer with a certified copy of their FFC valid for the duration of the property transaction.

Limitation on relationship with other property market service providers

– Section 58

What arrangements are prohibited with attorneys and other providers?

- (1) A property practitioner may not:
 - (b) enter into agreements whereby a consumer is obliged or encouraged to use a particular service provider including an attorney.
- (2) The Minister may by regulation prohibit any relationship which could harm the interests of consumers.
- (3) A person who renders any service in contravention of this section is not entitled to any remuneration. If payment is made, the service provider must immediately upon request in writing by the affected party repay any such remuneration with interest.
- (4) A person who fails to repay such remuneration with interest within 1 month of the request is guilty of an offence.

Code of Conduct – Section 61

Every property practitioner must comply with the code of conduct.

- (1) The Minister must, after consultation with the PPRA, prescribe a code of conduct which every property practitioner must comply with.
- (2) The PPRA and the Minister must on their respective websites publish the code of conduct current at the time.
- (3) A property practitioner must on request from a consumer provide him or her with a copy of the code of conduct.
- (4) The Board must annually advise the Minister on the efficacy of the code of conduct current at the time.
- (5) The Minister may, after consultation with the PPRA, prescribe norms and standards in respect of advertising and marketing by property practitioners.

Sanctionable Conduct – Section 62

What is sanctionable conduct and what happens if a property practitioner is found guilty of such conduct?

(1) A property practitioner is guilty of sanctionable conduct if he:

- (a) in the same transaction acts as a property practitioner on behalf of 2 or more persons whose interests are not in all material aspects identical in respect of that transaction and receives remuneration from all parties, unless all affected persons agree in writing;
- (b) In respect of any act fails to give a full and proper explanation in writing within 30 days of being called to do so by the PPRA;
- (c) Fails to pay any money due to the PPRA within 1 month of such money becoming due;
- (d) Fails to furnish in writing any information requested by the PPRA in the period determined by PPRA;
- (e) Fails to comply with the code of conduct;

- (f) Fails to comply with Section 50 or 51 of the Act;
- (g) Carries on an undesirable practice prohibited by Section 63;
- (h) Commits an offence involving an element of dishonesty;
- (i) Fails to inform the PPRA within 14 days of a change of his contact details;
- (j) Differentiates 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;
- (k) Fails to comply with or contravenes the Act.

2. If a property practitioner is found guilty of sanctionable conduct, his FFC may be withdrawn, a fine imposed and his transgression noted on the PPRA's website.

Undesirable practices – Section 63

What business practices are undesirable?

- The Minister may declare a practise in the market undesirable and consequently prohibited.
- The Minister and the Board when determining undesirable business practices must consider:
 - (a) the right of every citizen to freely choose their trade, occupation or profession;
 - (b) that the practice concerned has or is likely to have the effect of–
 - (i) damaging the relations between property practitioners and any specific consumer;
 - (ii) unreasonably prejudicing any consumer or category of consumers;
 - (iii) deceiving any consumer or category of consumers;
 - (iv) unfairly affecting any consumer or category of consumers.
 - (c) that if the practice is allowed to continue, the objectives of the Act will be defeated.

Supervision of candidate property practitioners – Section 64

What can a candidate property practitioner do and not do?

- (1) A candidate property practitioner may not draft or complete any document or clause in a document:
 - (a) conferring any mandate of any property practitioner to perform any act referred to in paragraph (a) (c) or (d) of the definition of property practitioner in Section 1; or
 - (b) relating to the sale and lease of property.
- (2) A person who infringes the above and a property practitioner who allows the above act is not entitled to any payment, remuneration, consideration or damages of or by reason of any document or for bringing about the transaction or agreement embodied in that document.
- (3) In any proceedings of sanctionable conduct, it is no defence that the property practitioner was not aware of the acts or omissions of the property practitioner or the candidate property practitioner.

Mandatory disclosure form – Section 67

What must be done with the disclosure form?

- (1) A property practitioner must:
 - (a) not accept a mandate unless the seller or lessor of the property has provided him or her with a fully completed and signed mandatory disclosure in the prescribed form; and
 - (b) provide a copy of the completed mandatory disclosure form to a prospective purchaser or lessee who intends to make an offer for the purchase or lease of a property.
- (2) The completed mandatory disclosure form signed by all parties must be attached to the agreement for the sale or lease of a property, but if the disclosure form was not completed or signed, the agreement must be interpreted as if no defects of the property were disclosed.
- (3) A property practitioner who fails to comply with the above may be held liable by an affected consumer.

Consumer education and information – Section 69

What is included under a property practitioner's duty of care?

- (1) The PPRA must from time to time conduct campaigns to educate and inform the general public of their rights of property transactions and property practitioners of their functions, duties and obligations.
- (2) A property practitioner owes a buyer and a seller a duty of care.

From Alan Levy and the ALA team, many thanks to NAMA and all attendees!

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