

Property Practitioners Bill

On 1 November 2018, the Legal Practice Act came into effect, which, amongst others, replaced the old Attorneys Act of 1979. The legislators have now set their eyes on the Estate Agency Affairs Act, of 1976, which will be replaced by the new Property Practitioners Act (“the New Act”). The President of South Africa has, at the date of writing this article, not yet published the date on which the New Act will come into operation. We have, however, perused the “draft” of the New Act, also referred to as a bill, and noted some of the main changes and additions.

The first, and most noteworthy difference is that the New Act will regulate all property practitioners, whereas the old Estate Agency Affairs Act (“the Old Act”) only sought to regulate estate agents. The definition of property practitioners is extremely wide and includes estate agents, rental agents, mortgage originators, managing agents, providers of bridging finance and anyone who sells or purchases immovable property on the instructions of or on behalf of any other person.

The wide definition of the term “property practitioner” is likely to have unforeseen, prejudicial consequences, which will only become apparent once the New Act has taken effect. Any person can, however, apply to be exempted from compliance with a specific provision of the New Act.

The New Act has also given priority to the transformation of the property sector. We will see a new Property Sector Transformation Charter Code coming into effect. Organs of state will be forced to utilise the services of property practitioners who comply with the B-BBEE and employment equity legislation and policies when procuring property-related goods and services. In addition to this, a Property Sector Transformation Fund will be established to promote and enhance participation of the historically disadvantaged in the property sector.

Any person will also be able to lodge a complaint against a property practitioner in respect of financing, marketing, management, letting, hiring, sale and purchase of property.

Two aspects which will remain mostly unchanged is the Estate Agency Affairs Board and the Estate Agents Fidelity Fund, which will now be called the Property Practitioners Regulatory Authority and the Property Practitioners Fidelity Fund.

If a property practitioner is not in possession of a Fidelity Fund certificate, he/she is not entitled to any payment, as was the case under the Old Act. But the New Act provides that a property practitioner who did indeed receive payment, without holding a Fidelity Fund certificate, must immediately pay such amount to the Fund. The said money will be forfeited to the Fund should it not be claimed within three years. A conveyancer is also not allowed to make payment to a property practitioner unless the conveyancer is provided with a certified copy of a valid Fidelity Fund certificate in respect of that practitioner.

Although the Old Act already disqualified certain persons from qualifying for a Fidelity Fund certificate, the new Act also disqualifies any person who is not a South African citizen, or not in possession of a valid tax clearance certificate or not in possession of a valid BEE certificate. The certificate must be displayed where the holder thereof conducts property transactions, and the fact that someone is holding a certificate must also be included on the letterhead, marketing material and any agreements entered into by the practitioner.

The Fund will still reimburse members of the public who suffered a pecuniary loss by reason of theft of trust money by a property practitioner in possession of a Fidelity Fund certificate. A claimant can also claim a contribution of expenses incurred in establishing a claim, as well as legal costs. However, a claim must now be instituted within three years after the circumstances given rise to the claim came into being. Whereas, in terms of the Old Act, the claim had to be instituted within three months after becoming aware of the theft. A claim under the New Act cannot be instituted before a criminal charge has been laid against the relevant property practitioner.

The New Act also includes additional measures for the protection of consumers. A new Code of Conduct will be introduced, which a property practitioner will have to provide to a consumer on request. A property practitioner will not be allowed to accept a mandate from a seller or lessor unless provided with a signed mandatory disclosure in the prescribed form. The disclosure form must be attached to any agreement for the sale or lease of a property, and a copy must be provided to the purchaser or lessee.

A property practitioner may not enter into any arrangement whereby a consumer will be obliged or encouraged to use a particular attorney to render a service in respect of any transaction of which the property practitioner was the effective

cause. And finally, an offer to purchase must be drafted by the seller for his/her own account.

As indicated above, these are the most prominent changes which will be brought about by the new Property Practitioners Act. There is still a possibility that the New Act might be amended before it becomes effective. The president can also elect to enforce only certain sections of the Act. Despite the uncertainty, one thing remains certain - the new Act will change the way in which we deal with property transactions, as is its purpose.

Janus Olivier, Van Velden-Duffey Inc