Property Practitioners Act: Obligations on property practitioners

By Justine Krige

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What has happened to the Property Practitioners Act, No 22 of 2019 (PPA)? The President has signed the Act into law, however, the date of commencement of the Act is still to be determined. The Act will repeal the Estate Agency Affairs Act, No 112 of 1976 ("EAA Act") in its entirety. Draft regulations were published for public comment in March 2020. However, as things stand, there is no firm indication as to when the PPA will come into force.

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When the PPA comes into force, the Act will place a number of new obligations on property practitioners, not all of which are contained in the EAA Act. So, what are the principal obligations of property practitioners under the PPA?

1. Mandatory display of a Fidelity Fund Certificate (FFC)

A holder of a FFC must: (i) prominently display his, her or its FFC in every place of business where he, she or it conducts property transactions, to enable consumers to easily inspect it; (ii) ensure that the prescribed sentence regarding holding a FFC is reproduced on any letterhead or marketing material; and (iii) in any agreement relating to property transactions, include a prescribed clause guaranteeing the validity of the certificate.

2. Maintaining a trust account

Every property practitioner must: (i) open and keep one or more separate trust account/s; (ii) appoint an auditor; (iii) provide the Property Practitioners Regulatory Authority (Authority) with all information as regards the trust account/s and auditor appointed; (iv) deposit all trust money in the relevant trust account; (v) keep separate accounting records in respect of the trust account/s and cause them to be audited.

3. Duty to keep accounting records and other documents

Every property practitioner must for a period of five years retain: (i) all documents exchanged with the Authority; (ii) all agreements, mandates and mandatory disclosure forms relating to financing, sale, purchase or lease of property; and (iii) any advertising or marketing material relating to the carrying on of business as a property practitioner.

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4. Property practitioner not entitled to remuneration in certain circumstances

A property practitioner is not entitled to any remuneration unless the property practitioner and, if a company, every director of such company, is in possession of a FFC. A conveyancer may not pay any remuneration or other money to a property practitioner unless the property practitioner has provided the conveyancer with a certified copy of his, her or its FFC.

5. Maintaining mandatory indemnity insurance

The minister may, for the purposes of providing redress in respect of the contravention of a code of conduct or other sanctionable conduct in terms of the PPA, prescribe indemnity insurance which a property practitioner must take out and maintain.

6. Complying with a code of conduct

Every property practitioner must comply with the prescribed code of conduct (still to be published by the minister of human settlements).

7. Complying with Property Sector Transformation Charter Code

Every property practitioner must comply with the Property Sector Transformation Charter Code (still to be published).

8. Providing certain mandatory disclosures

To achieve the object of being a consumer-focused piece of legislation designed to protect consumers in the property industry, the PPA obliges property practitioners to deliver a "disclosure form" to a seller/lessor before concluding a mandate, and to a purchaser/lessee before making an offer. The disclosure form must be signed by all parties and attached to the sale or lease agreement. If no disclosure form is signed and attached, the PPA provides that the agreement must be interpreted as if no defects or deficiencies of the property were disclosed to the purchaser. A property practitioner cannot accept a mandate unless the seller or lessor has provided a fully completed and signed disclosure form.

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9. Limitation on relationships with other property market service providers

Section 58(2) of the PPA outlaws any type of practice in which a practitioner provides a consumer with an incentive to use a particular conveyancer or service provider. This is probably one of the most debated sections of the PPA, with significant practical ramifications for the way property practitioners do business.

These obligations are clearly intended for the protection of consumers. Any property practitioner in contravention of the PPA will be required to repay any fees received for a property transaction and may be issued with a fine. Furthermore, any person convicted of an offence in terms of the PPA is liable to pay a fine, or to imprisonment for up to 10 years. Thus, even if property practitioners do not hold monies in trust, they will need to comply with the remaining obligations in terms of the PPA.

Property practitioners are advised to familiarise themselves with these requirements as they may shortly be brought into force and effect.

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