

Minister LN Sisulu
National Department of Human Settlements
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By Email: ministry@dhs.gov.za / francois.hugo@dhs.gov.za

Dear Honourable Minister Sisulu

**RE: Notice 246 of 2017, Gazette No: 40733 PROPERTY PRACTITIONERS BILL,
2016: INPUT FROM REAL BUSINESS ESTATE OWNERS OF SOUTH AFRICA**

1. I address this on behalf of Real Estate Business Owners of South Africa NPC ("REBOSA"), a non-profit Company which represents the interests of business owners and principals of small, medium and large estate agencies operating in South Africa, mostly in the residential real estate sector. REBOSA is committed to raising standards of real estate practice, developing favourable dialogue between real estate specialists, society and government and promoting professionalism and transformation in the industry.
2. REBOSA represents more than 16,000 estate agents, being more than half the total number of registered, practising estate agents in South Africa and is by far the largest representative body for estate agents in South Africa. More information on REBOSA is attached.
3. REBOSA has carefully considered the Property Practitioners Bill, 2016 and I enclose under cover of this, REBOSA'S detailed commentary on the content of the Property Practitioners Bill. I however, have to convey our deep concern in relation to the Property Practitioners Bill. The drafting of the Property Practitioners Bill has been in progress since around 2008; put differently, it has taken a period of approximately nine years for the Property Practitioners Bill to be presented in its current form. Yet, as will be apparent from the comments further along and in the attached document, there are fundamental issues which arise out of the Property Practitioners Bill.

4. REBOSA notes that during the aforesaid period of almost nine years, REBOSA has both submitted written comments and also engaged directly in discussions with, amongst others, the EAAB in relation to certain concerns it has had arising out of the various drafts of the Property Practitioners Bill. Yet, it is apparent that despite such representations/interactions, none of the comments made by REBOSA or any of the other industry organisations, have in any way been accommodated in the Property Practitioners Bill. In this context it should be borne in mind that REBOSA, through its members, has certain perspectives and understandings of the practical effects of not only the current legislation, but also the proposed legislation encapsulated in the Property Practitioners Bill. Such perspectives and understandings are not readily apparent to the EAAB itself, or to the persons who have been responsible for preparing the Property Practitioners Bill. Yet it is clear that a number of the proposals reflected in the Property Practitioners Bill will not only hamper the advancement of the property practitioners' industry in South Africa but will also severely impede the black economic empowerment objectives contemplated in the Property Practitioners Bill. As a result, REBOSA is anxious to know that the concerns now raised by it will be given due regard and weight.
5. Certain aspects of the Property Practitioners Bill may not comply with the constitutional principle of legality, which as you are no doubt aware, is a foundational value of our constitution. Firstly, we note that the legislation contemplates that it will provide "*A mechanism for responding and implementation of directives received from the Minister of Human Settlements, from time to time*" (see section 3 (l)). Secondly we note that the legislation proposes that the power be given to the Authority to "*do all that is necessary or expedient to achieve the objects of this Act*" (see section 5 (4)). We are concerned by the broad and apparently unfettered discretions which appear to be delegated by these provisions.
6. Examples of key concerns that arise in the context of the Property Practitioners Bill are as follows:

- a. The definition of "*property practitioner*" in the Property Practitioners Bill has the effect that a vast number of persons who are not currently regulated by the existing Estate Agency Affairs Act, 1976 will be brought within the ambit of the new legislation. While REBOSA agrees that in certain instances the regulation of parties who are not currently regulated is both desirable and necessary, unfortunately the wideness of the definition of "*property practitioner*" has the effect of drawing within the ambit of the proposed legislation, parties who do not need to be regulated by the EAAB (to be renamed the "Authority" in terms of the Property Practitioners Bill) either because they are already subject to other regulators or otherwise because there is no public benefit purpose in bringing them within the ambit of the legislation.

- b. The Property Practitioners Bill contemplates that every estate agent (including, given the wideness of the definition of "*property practitioner*", persons who are not directly engaged in the purchase and sale of properties) is required to operate trust accounts. It is currently the situation that all estate agents (bearing in mind that the orbit of the current legislation is significantly narrower than what is proposed under the Property Practitioners Bill) are required to operate trust accounts. In today's world it is the exception for a property practitioner to take a deposit in relation to the purchase of the property; in by far the majority of instances, deposits are paid to conveyancers. (Rental deposits is another matter.) Yet, the opening and annual auditing of dormant trust accounts imposes a significant administrative and cost burden upon estate agents and in particular operates most heavily against the smaller and emerging estate agents. Such trust accounts serve no functional purpose either for the estate agent or for the members of the public.
- c. The Property Practitioners Bill still adopts an archaic approach to fidelity fund certificates. In particular, the legislation contemplates that all fidelity fund certificates will still be issued in paper-based format. Not only is this expensive, inefficient and administratively burdensome but given the way much of the draft legislation has been crafted; the absence of possession of the relevant paper-based certificate by the estate agent has severe adverse consequences for the estate agent, even in circumstances where non-possession may not be a consequence of any fault on the part of the estate agent (it may for example arise from administrative delay on the part of the regulator). REBOSA has suggested in the attached document that the issuing of paper-based fidelity fund certificates be dispensed with in its entirety and that an electronic database system be used. It should be noted that an electronic system of enabling the public to verify the fact that an individual is legitimately an estate agent and in possession of a fidelity fund certificate has already been implemented by the EAAB, with considerable success. It is therefore questionable as to why the legislation persists with the concept of a paper-based fidelity fund certificate, together with the manifold problems (which are addressed in more detail in the attached document) which arise out of that. Technological advances should have been factored into the drafting of the Bill. Serious delays are experienced iro the issuing of Fidelity Fund Certificates and REBOSA's proposals will go a long way in addressing same.

- d. There is considerable concern with the omission from the Property Practitioners Bill of any provision that is equivalent to the proviso section 27 of the existing Estate Agency Affairs Act, which reads "*Provided that if in respect of any person who is subject to any disqualification referred to in this section, the board is satisfied that, with due regard to all the relevant considerations, the issue of a fidelity fund certificate to such person will be in the interest of justice, the board may issue and on such conditions as the board may determine, a fidelity fund certificate to such person when he or she applies therefor.*" The result is that the regulator has no discretion whatever to issue a fidelity fund certificate, even when all considerations of justice, fairness and morality call for the issuing of such certificate in the relevant circumstances.
- e. Currently the Fidelity Fund only covers the theft of trust funds from a trust account. The Bill aims to limit that even more too only apply when a registered agent is involved, thereby putting the onus on the unsuspecting consumer to determine the "status" of the agent. Uninformed consumers will suffer. REBOSA proposes that the cover should be extended to any theft of funds by an agent, albeit a registered agent or not.
- f. The requirement of a valid tax clearance certificate will create an impossible burden on the Authority, SARS and the property practitioners.
- g. The requirement of a BEE certificate will create challenges. REBOSA was informed by the EAAB that as many as 85% of estate agencies have gross annual turnovers of less than R2.5 million (R200,000 pm) i.e. very small businesses.
7. The foregoing are merely examples of numerous far-reaching concerns which arise out of the Property Practitioners Bill, which concerns are detailed more fully in the attached document. It is clear to REBOSA that a significant amount of effort will still be required in order for the Property Practitioners Bill to be a progressive piece of legislation which enhances and promotes the development of an inclusive and vibrant property practitioners' industry in South Africa.
8. To this end, REBOSA earnestly requests a meeting with the Honourable Minister to raise these concerns in a cooperative manner; so as to result in legislation which will not impede; but rather promote the South African property practitioners' industry and best benefits black economic empowerment and the public interest. Should you avail yourself to such consultation we believe a positive outcome can be achieved for all concerned.

9. We would also like to put on record that we will appreciate the opportunity to address the portfolio committee on the shortcomings we have identified in the Bill.

I look forward to your receiving your favourable response to our request.

Yours sincerely



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