

REPUBLIC OF SOUTH AFRICA

PROPERTY PRACTITIONERS BILL 2018 COMMENTS

(MINISTER OF HUMAN SETTLEMENT)

**COMMENT**

**To formulate the mortgage bond holders' internal Property Repossession Risk Fund (PRRF) for the protection of both the property owner and mortgage bond holder, insert the added Preamble, insert other sections; and to provide for matters connected therewith.**

**BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—**

## **ADDED PREAMBLE**

**AND WHEREAS** the high rate of property repossessions in South Africa has been confirmed;

**AND WHEREAS** it has consequently become necessary to counteract the inevitable domestic financial instability posed by the property repossession;

**AND WHEREAS** it has also become necessary to manage the inevitable lack of adequate housing through interventions that build and sustain South Africa's social and economic capacity;

**AND WHEREAS** it has also become necessary to preserve and safeguard the constitutional right to decent housing as enshrined in the Universal Declaration of Human Rights, 1948, Art 25; European Convention on Human Rights and Fundamental Freedoms, 1950, Art 8(1); International Convention relating to the status of Refugees, 1951, Art 21; European Social Charter, 1961, Art 16, 19(4) and Art 4 of Additional Protocol; International Covenant on Economic, Social and Cultural Rights, 1966, Art 11; International Convention on the Elimination of All Forms of Racial Discrimination, 1966, Art 5(e)(iii); International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, Art 11(b) and (d); International Convention on the Elimination of All Forms of Discrimination against Women, 1979, Art 14(2)(h); International Convention on the Rights of the Child 1989, Art 27(3). 2 Government of the Republic of South Africa and Others v Grootboom and Others, 2000 (11) BCLR 1169, para 41 within a timeframe that enables economic and social development to proceed in a sustainable manner;

**AND WHEREAS** Section 26(1) of the Constitution Act 200 of 1993 provides that everyone shall have the right of access to adequate housing.

**AND WHEREAS** the omission, refusal, delay and/or neglect of the National Assembly to pass the Bill into an Act of Parliament will be tantamount and analogous to an act of unconstitutionality and illegality;

**AND WHEREAS** government is desirous to utilise the aforesaid Fund to mitigate the lack of decent housing posed to the people of South Africa;

### **"Establishment of Fund**

1 (i). Any person, natural and juristic, who issues mortgage bond to any South

African or South African resident, natural and juristic, shall establish an internal Property Repossession Risk Fund in order to protect the property owner and the mortgage bond holder in the event the former experiences financial distress that could result in mortgage repayments default.

(ii) All the new mortgage bond finance customers of financial institutions should contribute 1% to Property Repossession Risk Fund (PRRF) and the 1% contributions should be held under a registered trust within the relevant financial institution. When the monthly bond repayments are made 1% of the total monthly bond repayments will be transferred into the PRRF. This will give the client a breather until financial recovery. The mortgage bond client has a discretion to decide what should happen to the funds held in trust on his or her behalf after the final and full repayment of the mortgage bond.

(iii). Any company President or Managing Director or Chairperson or CEO or Owner(s) who contravene, neglect, refuse or fail to comply with section 1(i) *supra* are guilty of an offence and liable to a fine of not less than R100 000 or imprisonment or both such fine and imprisonment of not less than 1 year.”

**2. Powers and functions of the Fund.**—(1) The powers and functions of the Fund shall include—

(a)  
the management and utilisation of the money of the Fund for purposes connected with or resulting from the exercise of its powers or the performance of its duties;

(b)  
the payment of the mortgage bond arrears of the mortgage bond client in the event the client is in financial distress and irreparably unable to repay the mortgage bond repayments;

(c)  
When the house finance client is under financial stress that could lead to the repossession of the house, then the PRRF will come to the rescue to

an extent that the funds credited in favour of the defaulting property client permit.

(d)

If the house is fully paid up then the money can be deposited into the account of the client or it can be used to finance another house or it can be used to finance a car or it can be used for a business or it can be saved or the client can continue to deposit 1% of the monthly repayments. All these is at a sole discretion of the client in the event the mortgage bond is fully paid up.

(e)

The mortgage bond client has a discretion to decide what should happen to the funds held in trust on his or her behalf after the final and full repayment of the mortgage bond.

(f)

procuring re-insurance for any risk undertaken by the Fund under this Act, if there is exceptional need.

(2) In order to achieve its object. the Fund may—

(a)

purchase or otherwise acquire goods, equipment, land, buildings, shares, debentures, stock, securities and all other kinds of movable and immovable property;

(b)

sell, lease, mortgage, encumber, dispose of, exchange, cultivate, develop, build upon, improve or in any other way deal with its property;

(c)

invest any money not immediately required for the conduct of its business and realise, alter or re-invest such investments or otherwise deal with such money or investments;

(d)

borrow money and secure the payment thereof in such manner as it may deem fit;

(e)

draw, draft, accept, endorse, discount, sign and issue promissory notes, bills and other negotiable or transferable instruments, excluding share certificates;

(f)

take any other action or steps which are incidental or conducive to the exercise of its powers or the performance of its functions;

(g) conclude any agreement with any person for the performance of any particular act or particular work or the rendering of particular services contemplated in this Act.

(3) In the exercising of the powers conferred on it by this Act, the Fund may deal with any person, partnership, association, company, corporation or other juristic person wherever seated.

**3. Financing of Fund.—**(1) The Fund shall procure the funds it requires to perform its functions—

(a) by way of 1% of monthly mortgage bond repayments as well as

(b) by any other lawful, reasonable and plausible *modus operandi*.

**4. Financial year of and budgeting for Fund.—**(1) The financial year of the Fund shall be determined by the mortgage bond holder.

(2) The Trustee shall annually prepare a budget for the Fund for consideration by the mortgage bond holder, and the mortgage bond holder shall submit the budget to the Minister for approval.

**5. Use of resources and facilities of Fund.—**The resources and facilities of the Fund shall be used exclusively to achieve, exercise and perform the object, powers and functions of the Fund, respectively.

**6. Appointment of members of staff for Fund.—**(1) The Trustee may appoint members of staff of the Fund, who shall have the power to:—

(a) manage the day to day affairs of the Fund.

(b)

to commence, conduct, defend or abandon legal proceedings in connection with the affairs of the Fund.

(2) The Fund shall guarantee or insure the obligations of staff arising from the application of this Act, in the event the funds permit.

7. Trustee of Fund.—(1) There shall be Trustee of the Fund, appointed by the mortgage bond holder who shall command extensive experience in one or more of the fields of insurance, finance, mortgage bond, property law, trust law, accounting and actuarial science, or in matters relating to property consumers' interests.

(2) Subject to this section, a trustee shall—

(a) avoid conflict of interest relating to the functions, duties and obligations of the Fund or its agents in terms of this Act, and such a Trustee shall act *bona fide* at all times;

(b) at all times act in the best interest of the Fund;

(c) hold office for a period of three years as from the date of appointment of such a Trustee and may be reappointed for further terms of office not exceeding three years at a time, provided that such a Trustee may not serve for more than three consecutive terms of office. (3) The mortgage bond holder may remove a Trustee referred to in subsection (1) (b) from office if there is sufficient reason to do so.

(4) The Trustee and staff of the Fund shall discharge their duties and skills to their optimum best for the benefit of the Fund.

(5) Whenever it is necessary to appoint a Trustee the mortgage bond holder shall—

(a) by notice in the national news media, invite persons or bodies who have an interest in the operations of the Fund to nominate persons who have the requisite experience;

(b) so publish a list of nominees received in response to such invitation, which list shall include the names of the relevant nominators.

(6) Whenever a position on the Fund becomes vacant before the expiry of

the term of office referred to in subsection (2) (c), the mortgage bond holder may appoint any other competent person to serve for the unexpired portion of the term of office of the previous Trustee irrespective of when the vacancy occurs.

7. Powers and functions of the mortgage bond holder, and procedure.—

(1) The Mortgage bond holder shall exercise overall authority and control over the financial position, operation and management of the Fund, and may inter alia—

(a)  
make recommendations to the Minister in respect of—

the annual budget of the Fund;

any amendment of this Act;

the entering into an agreement with any institution;

any regulation to be made under this Act;

(b)  
terminate the appointment of any member of staff and determine the conditions on which such appointment is effected or terminated;

(c)  
approve the appointment, determination of conditions of employment and dismissal by the Trustee of staff of the Fund on management level;

(d)  
approve internal rules and directions in respect of the management of the Fund;

(e)  
determine guidelines in relation to the investment of the money of the Fund; and

(f)  
delegate or assign to the Trustee and any member of the staff of the Fund any power or duty of the mortgage bond holder as it may deem fit, but shall not be divested of any power or duty so delegated or assigned, and may amend or withdraw any decision made by virtue of such delegation or assignment.

(2) The Mortgage Bond Holder may as often as it deems necessary, but shall at least once during a financial year, or when requested by the Minister to do so, report to the Minister regarding matters dealt with during that year

or as requested by the Minister.

(3) (a) The Trustee shall be remunerated by the Fund for services rendered and reimbursed for all reasonable expenses incurred in attending matters of the Fund.

**8. Trustee and staff.—**(1) (a) The mortgage bond holder shall appoint the Trustee of the Fund on such terms and conditions of employment as the mortgage bond holder may determine.

(b) The Trustee shall be a person who is suitably qualified and experienced to manage the day to day affairs of the Fund.

(2) Subject to the directions of the mortgage bond holder, the Trustee shall conduct the current business of the Fund, and he or she may—

(a) exercise the powers and shall perform the functions of the Fund mentioned in section (2);

(b) appoint, determine the conditions of employment of and dismiss the staff of the Fund, excluding members of staff on management level;

(c) draft internal rules and directions in respect of the management of the Fund and make recommendations in respect thereof to the mortgage bond holder;

(d) enter into an agreement with any person for the rendering of a particular service related to the management of the Fund or its functions;

(e) issue guidelines to staff regarding the manner in which the Fund should be run by them on behalf of the mortgage bond holder; and

(f) exercise such powers and shall perform such duties as may be delegated and assigned to him or her by the mortgage bond holder.

**9. Annual report.—**(1) The Fund shall publish an annual report containing—

- (a) the audited balance sheet of the Fund together with a report by the independent auditor in respect of such audit; and
- (b) a report on the activities of the Fund during the year to which the audit relates.

**10. Financial control.**—(1) The Fund shall keep proper records of all its financial transactions and its assets and liabilities.

(2) (a) The accounts of the Fund shall be audited annually by an independent auditor.

**11. Legal status of and proceedings by Fund, and limitation of certain liability.**—  
(1) The Fund may—

- (a) institute or defend legal proceedings; and
- (b) commence, conduct, defend or abandon legal proceedings.

(2) An action to enforce a claim against the Fund or staff may be brought in any competent court within whose area of jurisdiction the cause of action arose.

(3) No Trustee or officer or employee of the Fund, or other person performing work for the Fund, shall be liable for anything done in good faith in the exercise of his or her powers or the performance of his or her functions or duties under or in terms of this Act.

**12. Administration fee**

The mortgage bond holder will charge 5% administration fee in respect of the aforesaid Fund in order to finance the running of the Fund, including but not limited to payment of salaries, disbursements and so forth.

**13. Short title and commencement.**—This Act shall be called the Property Practitioners Act, 2018 and shall come into operation on a date fixed by the President by proclamation in the Gazette.

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