



NEGOTIATING MANDATE

TO: The Chairperson of the Select Committee on Social Services

Hon. L C Dlamini

NAME OF BILL: Property Practitioners Bill

NUMBER OF BILL: [B21B-2018]

DATE OF DELIBERATION: 07 March 2019

VOTE OF THE LEGISLATURE: The Gauteng Provincial Legislature votes in favour of the Bill, with proposed amendments and mandates the Permanent Delegate to the NCOP to negotiate in favour of the Bill.

The proposed amendments are as follows:

1. **Clause 1: Definition of Property Practitioner - Page 7 Line 3; Page 8 Line 2; Page 8 Line 14**

Delete reference to Attorneys Act, 1979 and substitute it with the Legal Practice Act 28 of 2014.

2. **Clause 1: Definition - Business Property Practitioner - Page 6 Line 25**

A definition of "business property practitioner" must be inserted after Line 25 .

3. Clause 1: Developers - Page 7 Lines 1 to 62 and Page 8 Lines 1 to 21

The definition of “property practitioner” must include property developers within its ambit.

4. Clause 1: Page 7 Lines 32 to 33

Clause (v) (cc) must be deleted

5. Clause 4 Page 9 Lines 10 to 61 and page 10 Lines 1 to 2

This provision must be made to group exemptions that could apply to a specified class of persons. This will lessen the burden placed on the Authority to consider multiple applications from the same industry players who are facing the same issues.

6. Clause 9: Page 12 Lines 4 to 22

The Board’s duties should include a duty to ensure that regulation specifically protects the interactions of the marginalised and vulnerable within the property system. This could be done by adding another subsection – (j) to this effect after line 22.

7. Clause 20 (1): Page 15 Line 1

Delete the word Code.

“(1) The Property Sector Transformation Charter **[Code]** as amended from time to time applies to all property practitioners.”

8. Clause 22 Property Sector Research Centre – Page16 Lines 5 to 37

The Property Sector Research Centre should also be a direct function of the sector authority with a specific aim of ensuring that the authority is capacitated to deliver regulation of the sector that will be in line with the changing demographics and norms of society. Those changing demographics and norms extend beyond rural-urban dynamics.

9. **Clause 47 (3) - Page 26 Line 7**

The period of validity for Fidelity Fund Certificate should be changed from one (1) to 3 (three) years.

“(3) Subject to sections 43 and 52, the Authority must, upon receipt of an application contemplated in subsection (1) or (2) and the relevant fees, if the applicant concerned—

(a) meets or has met all requirements provided for in or under this Act; and

(b) is not disqualified in terms of section 48 from being issued with a Fidelity Fund certificate,

issue to the applicant concerned a Fidelity Fund certificate in the prescribed form, which is valid **[until 31 December of the year to which such application relates]** three years.”

10. **Clause 48 - Page 26 Lines 20 to 47**

The clause should be amended to read that the business can continue functioning and the business and its estate agents can remain registered, provided there is at least one qualified and properly registered principal/director in the business.

11. **Clause 49(3) Page 26 Line 57 to 59**

This clause makes provision for the deemed approval of an application for a fidelity fund certificate. Notwithstanding the fact that the Authority is supposedly compelled to issue the fidelity fund certificate to the applicant concerned under the circumstances contemplated in (3), the Authority may nonetheless fail to do so. Therefore, for so long as the application is deemed to have been approved in terms of subsection (3), the property practitioner concerned should be deemed to be in possession of a fidelity fund certificate for the purposes of this Act until such time as the Authority actually issues the certificate in terms of subsection (3).

12. **Clause 50 (a) (vii) Page 27 Line 18**

Delete clause 50(a)(vii).

This disqualification may prevent a property practitioner from earning a living especially in circumstances there may have a valid dispute with SARS.

13. Clause 51: Page 31 After Line 50

Insert a new subclause (5) information pertaining to the sale of immovable assets belonging to deceased estates which must be kept for a period longer than 5 years. Many South Africans are not well placed to access legal services in instances when transactions acted upon by property practitioners are done using fraudulent information submitted to either the Master's Office or Deeds Office or through the property practitioners themselves.

14. Clause 56 (1) Page 31 Lines 2 to 55

Section 56 (1) negates entitlement to commission in the absence of "possession" of a fidelity fund certificate. Certificates often don't get to practitioners timeously, if at all.

Clause must be reviewed.

15. Clause 56(5) Page 32 Lines 20-24

This clause provides that property practitioners are not entitled to remuneration in certain circumstances —

"(5) A conveyancer may not pay any remuneration or other monies to a property practitioner unless that property practitioner has provided the conveyancer with a certified copy of his, her or its Fidelity Fund certificate valid during the period or on the date of the transaction to which such payment relates, and on the date of such payment: Provided that where all relevant conditions have been met, the conveyancer must pay the remuneration and other monies."

It has been submitted that the phrase "and on the date of such payment" the date of assessment for whether a property practitioner has a valid Fidelity Fund certificate should be the date the transaction is concluded.

This could lead to unfair prejudice in circumstances where agents are involved in the sale of units in a development in terms of which there may be a period of years between conclusion of agreement and date of registration.

16. Clause 61: Page 33 Lines 40-1

Delete the words "on request from a consumer".

"(3) A property practitioner must **[on request from a consumer]** provide him or her with a copy of the code of conduct."

It will be good practice for the property practitioner to provide the code of conduct without being requested. The document should be provided to the client at the start of engaging the property practitioner to ensure accountability throughout the entire transaction.

17. Clause 64: Page 35 after Line 25

Insert provisions in the Bill outlining who qualifies as a candidate property practitioner, the duration of candidacy, which principals qualify for candidacy, the transformation imperatives in respect of opportunity, registration and/or the process of qualifying as a property practitioner and the body responsible for such oversight and regulation. This could be another area of function of the authority.

18. Clause 64(3): Page 35 - Lines 19 to 21

Delete clause 64 (3).

It is unfair to hold a principal responsible for acts or omissions of the candidate property practitioner even if the principal is unaware of same.

19. Clause 68(1): Page 36 Lines 18 to 20

Delete the word "or" in line 18, insert comma and insert the words "or property practitioner" after the word "seller".

“Agreements

68.(1) An agreement to sell and purchase or to let and hire property, or the mandatory disclosure form contemplated in section 67, must be drafted by the developer **[or]**, seller or property practitioner, as the case may be, for his, her or its own account.”


A handwritten signature in blue ink, consisting of a large loop and several vertical strokes, positioned above a horizontal line.

HON. M TSEKI

Date: 07/03/2019

**CHAIRPERSON: COGTA AND HUMAN SETTLEMENTS PORTFOLIO COMMITTEE
GAUTENG PROVINCIAL LEGISLATURE**



**CoGTA AND HUMAN SETTLEMENTS PORTFOLIO COMMITTEE
NEGOTIATING MANDATE
ON THE:**

PROPERTY PRACTITIONERS BILL [B21B -2018]

07 March 2019

1. INTRODUCTION

The Chairperson of the CoGTA and Human Settlements Portfolio Committee, Honourable Mohatla Tseki, tables the Committee's Negotiating Mandate on the Property Practitioners Bill [B21B - 2018].

2. PROCESS FOLLOWED

- The Speaker, on 01 February 2019, formally referred the Bill to the Portfolio Committee on CoGTA and Human Settlements ("the Committee"), for formal consideration in terms of Rule 245 (1)(a) read with Rules 246(1), 247 and 248.
- On 12 February 2019, the Permanent Delegate of the National Council of Provinces (NCOP), Honourable Ngwenya did not attend due to political work and the National and Provincial Departments of Human Settlements, briefed the Committee on the intentions of the Bill.
- On the same day, 12 February 2019, the Legal Unit of the Gauteng Provincial Legislature presented the legal opinion and the Portfolio Committee Research presented an analysis of the Property Practitioners Bill [B21B-2018].

In fulfilling constitutional mandate, the Committee published adverts in the following newspapers:

- The dates of advertisements on Radios and newspapers are as follows:
 - 13th – 17th February 2019 on Tembisan News
 - 13th – 17th February 2019 on Alex News

- 13th – 17th February 2019 on Southern Courier
 - 13th – 17th February 2019 on Pimville Urban News
 - 15th February 2019 on Mail & Guardian Newspaper
 - 15th February 2019 on Caxton Community Newspaper
- One Pre-education workshop was conducted and people were bused from all the six (6) regions on the
 - 15th February 2019 in Boksburg Community Hall, Ekurhuleni
 - One the 16th February 2019, the Portfolio Committee held a public hearing at Germiston City Hall, Ekurhuleni
 - On 19th February 2019, the Portfolio Committee held Public Hearing at the Johannesburg City Hall
 - On 23rd February 2019, the Portfolio Committee held Public Hearing at Centurion Council Chambers, Tshwane.
 - On 01st March 2019, the Portfolio Committee deliberated and adopted the Negotiating Mandate Report on the Property Practitioners Bill [B21B-2018] Section 76.
 - The Committee took into consideration the oral and written submissions made at the public hearings as well as those submissions that were emailed directly to the Committee in developing its position in the Negotiating Mandate.

3. PRINCIPLES AND DETAILS OF THE BILL

The Bill seeks to repeal the Estate Agents Affairs Act 112 of 1976 which currently regulates the estate agency sector by inter alia providing for the Estate Agency Affairs Board, Estate Agency Fidelity Fund and further for control of certain activities of estate agents in the public interest.¹ The Act was promulgated in 1976 prior to our constitutional dispensation, and this Bill seeks to align the real estate agency/ property market which includes the buying, selling and renting of immovable property with the Constitution and other relevant legislation that were promulgated after 1994.

In terms of clause 2 this Bill will apply 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. Its application evidently is quite broad.

¹ Memorandum on the Objects of the Bill.

The principal Act regulates the business of only estate agents and agencies, the proposed Property Practitioners Bill extends regulations to all property practitioners, including estate agents, business (property) brokers and providers of bridging finance, as well as bond brokers and marketers etc.

4. OBJECTIVES OF THE BILL

The objects of the Bill are as follows:

- To provide for the regulation of property practitioners;
- To provide for the continuation of the Estate Agency Affairs Board as the Property Practitioners Regulatory Authority;
- To provide for the appointment of the members of the Board and matters incidental thereto;
- To provide for the appointment of the Chief Executive Officer and other staff members of the Authority;
- To provide for transformation of the property practitioners sector;
- To provide for the establishment of the transformation fund and establishment of the research centre on transformation;
- To provide for compliance with and enforcement of the provisions of the Act; to provide for the continuation of the Estate Agents Fidelity Fund as the Property Practitioners Fidelity Fund;
- To provide for consumer protection; to provide for the repeal of the Estate Agency Affairs Act, 1976; and
- To provide for matters connected therewith."

5. OVERVIEW OF THE PUBLIC HEARING

The Public hearings were attended by stakeholders who engaged on all matters related to the Bill. Various sentiments were echoed and the Bill was supported.

6. SUMMARY OF STAKEHOLDERS SUBMISSIONS MADE DURING THE PUBLIC HEARING

The Portfolio Committee received numerous oral and written submissions from individuals and organisations such: ProBono.Org, Real Estate Business Owners of South Africa, Marto Lafitte & Associates Inc, South African Property Association to name but a few. The following are the summary of submissions from different Communities and Organizations:

GENERAL OBSERVATIONS

There were a number of submissions made during the hearings that did not relate to the contents of the Bill and we have omitted those in this document. Generally, most stakeholders expressed support for the Bill's transformation agenda but however made several proposed amendments. That the Portfolio Committee reported that in section that follows (i.e. Part III).

III. PROPOSED AMENDMENTS

Clause1: Definitions Section

Definition of Property Practitioner

Reference to the Attorneys Act, 1979 must be deleted and substituted with the Legal Practice Act 28 of 2014 on Page 7 line 33; Page 8 line 2; and Page 8 line 14

Definition: Business Property Practitioner

It has been submitted that is important to define a "business property practitioner" because only business practitioners for example must/could have trust accounts. Should this not be corrected it would for example imply that each individual must have a trust account/ BEE certificate.

Definition: Developers

The current definition excludes developers because they are selling their own properties. Developers however sell those properties to consumers (deal with consumers) and employ individuals to do so. Currently neither the developers nor the individuals they employ have to comply with the Act and do not have the necessary training. In terms of the Bill they are also therefore not covered by the Fidelity Fund.

It was submitted that the definition of "property practitioner" has to include property developers within its ambit.

Definition: Attorneys and Candidate Attorneys

The exclusion of attorneys and candidate attorneys is not justified. There is no motivation for this and attorneys are, like developers, employing more and more sales associates without the necessary training (albeit they are covered by the attorneys Fidelity Fund). Because attorneys are primarily interested in obtaining conveyancing work, they unfairly compete with estate agents as far as commission, etc. is concerned. The study curriculum for agents involves much more than just law. Attorneys should at best be exempted from NQF 4 & 5 but should comply with everything else in terms of the Act. The EAAB has admitted not being able to control attorney operating illegally at present therefore this is of extreme importance.

Clause 4 - Exemption from Act

This clause makes provision for any person to apply to be exempted from compliance with any specific provision of this Act. Whilst the inclusion of the section is commendable, it is recommended that provision be made to group exemptions that could apply to a specified class of persons. This will lessen the burden placed on the Authority to consider multiple applications from the same industry players who are facing the same issues.

Clause 7 - Composition and appointment of Board

It has been submitted that due to the role of the Board in establishing and reviewing codes of practice it should always explicitly include at least one member with research-based expertise on the perspectives of marginalised and vulnerable groups. This extends beyond rural and land reform, to encompass the complexities of urban property tenure, in law and in popular practice. To that end, the Board should always include appropriate representation from the Property Sector Research Centre.²

Clause 9 - Powers and duties of Board

It has been submitted that the Board's duties should include a duty to ensure that regulation specifically protects the interactions of the marginalised and vulnerable within the property system. This could be done by adding another subsection – (j) to this effect.

Clause 20

This clause makes provision for the Property Sector Transformation Charter Code. It states that—

² Clause 7 (2) provides that the total number of the Board members contemplated in subsection (1)(a) must consist of—

- “(a) a combination of the following skills and competencies:
 - (i) Sufficient financial expertise;
 - (ii) relevant legal experience;
 - (iii) sufficient experience as property practitioners;
 - (iv) sufficient experience in rural and land reform;
 - (v) sufficient experience in the promotion and protection of the consumer interests; and
- (b) at least—
 - (i) one member nominated by the Minister of Trade and Industry, in consultation with the Minister; and
 - (ii) one member nominated by the Minister of Public Works, in consultation with the Minister.”

“(1) The Property Sector Transformation Charter Code as amended from time to time applies to all property practitioners.”

Firstly, it has been submitted that the use of words charter and code is confusing. Perhaps the use of the word Code can be deleted there the clause would read:

“(1) The Property Sector Transformation Charter **[Code]** as amended from time to time applies to all property practitioners.”

Further, that this section should provide for the enactment of regulations which will set out what the charter/code's imperatives are and provide for timelines for its application. This is because the fund referred to in the section will seek to make financial resources available for these imperatives. This may partly be a matter of clarifying how the various mentions of codes of practice in the Bill relate to one another.

Clause 22 Property Sector Research Centre

The Property Sector Research Centre should also be a direct function of the sector authority with a specific aim of ensuring that the authority is capacitated to deliver regulation of the sector that will be in line with the changing demographics and norms of society. Those changing demographics and norms extend beyond rural-urban dynamics.

Clause 47 - Application for Fidelity Fund Certificate

This clause allows property practitioners to register every three years for a Fidelity Fund Certificate, which it has been submitted, is a step in the right direction, however, it remains unnecessary to re-register at all. Property Practitioners should be allowed to register once and then be compelled (as they are), to keep their data up to date at the Authority. Property Practitioners can, under such circumstances, be invoiced annually for their annual fees. This practice is currently in place when agents are invoiced for Continuing Professional Development courses. Given that the system is in place it will further alleviate bottle necks and administration at the authority.

Clause 47 (3)

It has been submitted that there is no objection in principle in respect of the payment of registration and renewal fees as funding of the regulatory framework must be supported. It has been

recommended that the period of validity for Fidelity Fund Certificate should be changed from one (1) to 3 (three) years. In as much as this provision has been amended to provide for a Fidelity Fund Certificate to be renewed every three years. However, this is in contradiction with other clauses that require a property practitioner to apply every year for a Fidelity Fund Certificate and to pay the fee yearly.

Clause 47 (4)

This clause provides that—

“(4) A property practitioner who applies to the Authority for a Fidelity Fund certificate or a registration certificate, after the prescribed period referred to in subsection (1) or (2), or whose application is not accompanied by the fees referred to in section 34, must in addition to the applicable fee pay a prescribed penalty to the Authority and the Authority may not issue a Fidelity Fund certificate to the property practitioner concerned until the penalty has been paid.”

It has been submitted that it is unclear whether the right of a relevant party to demand repayment of any amount received, in respect of or as a result of, a property transaction has a time limit within to do so. It is assumed that prescription still applies in these instances

There should further be limitation on “any amount received”. It should be only in respect of amounts received as compensation for property practitioners’ services, generally in the form of commission. Property practitioners may receive amounts, for example deposits, rental, which a party which fits into this description under (4) should not be entitled to receive.

Clause 48 (Prohibition on rendering services without Fidelity Fund Certificate)

In terms of this section an entire business and all the agents employed in the business can be de-registered because of an omission/act of one of the directors of the business. The equivalent of this is the Authority not being able to function if one board member commits fraud. The clause should be amended to read that the business can continue functioning and the business and its estate agents can remain registered, provided there is at least one qualified and properly registered principal/director in the business.

Clause 49(3)

This clause makes provision for the deemed approval of an application for a fidelity fund certificate. Notwithstanding the fact that the Authority is supposedly compelled to issue the fidelity fund

certificate to the applicant concerned under the circumstances contemplated in (3), the Authority may nonetheless fail to do so. It has been submitted that are of the view that for so long as the application is deemed to have been approved in terms of subsection (3), the property practitioner concerned should be deemed to be in possession of a fidelity fund certificate for the purposes of this Act until such time as the Authority actually issues the certificate in terms of subsection (3).

Clause 47, 48 and 56

Sections 47 and 48 address the "issuing" of fidelity fund certificates under certain circumstances. Section 56 (1) however negates entitlement to commission in the absence of "possession" of a fidelity fund certificate. Certificates often don't get to practitioners timeously, if at all.

Clause 50 (a) (vii) *Disqualification from issue of Fidelity Fund Certificate*

This clause provides as follows:

"50. The Authority may not issue a Fidelity Fund certificate to—

(a) Any person who—

. . .

(vii) is not in possession of a valid tax clearance certificate;"

This disqualification may prevent a property practitioner from earning a living especially in circumstances there may have a valid dispute with SARS. It has been submitted that this requirement is not generally required in respect of any other profession.

Section 55

Clause 55 (1) makes provision for duty of property practitioner to keep accounting records and other documents.

It has been submitted that information pertaining to the sale of immovable assets belonging to deceased estates should be kept for a period longer than 5 years. Many South Africans are not well placed to access legal services in instances when transactions acted upon by property practitioners are done using fraudulent information submitted to either the Master's Office or Deeds Office or through the property practitioners themselves. This submission has been based on the many matters that require reversal of transfer, through litigation that is evidence - and document-intensive.

Clause 56(5) Page 32 Lines 20-24

This clause provides that property practitioners are not entitled to remuneration in certain circumstances —

“(5) A conveyancer may not pay any remuneration or other monies to a property practitioner unless that property practitioner has provided the conveyancer with a certified copy of his, her or its Fidelity Fund certificate valid during the period or on the date of the transaction to which such payment relates, and on the date of such payment. Provided that where all relevant conditions have been met, the conveyancer must pay the remuneration and other monies.”

It has been submitted that the phrase “and on the date of such payment” the date of assessment for whether a property practitioner has a valid Fidelity Fund certificate should be the date the transaction is concluded. It is supported by section 56(2) which—

“(2) A person referred to in paragraph (f) of the definition of “property practitioner” in section 1, and a property practitioner who employs such person, is not entitled to any remuneration or other payment in respect of **or arising from the performance by that person of any act referred to in that paragraph**, unless at the time of the performance of the act that person is in possession of a registration certificate.”

(Emphasis added.)

This could lead to unfair prejudice in circumstances where agents are involved in the sale of units in a development in terms of which there may be a period of years between conclusion of agreement and date of registration.

Clause 61

This clause make provision for a Code of conduct for property practitioners and *inter alia* states:

“(3) A property practitioner **must on request from a consumer** provide him or her with a copy of the code of conduct.” (Emphasis added)

It will be good practice for the property practitioner to provide the code of conduct without being requested. The document should be provided to the client at the start of engaging the property practitioner to ensure accountability throughout the entire transaction.

Clause 64

This clause makes provision for the supervision of candidate property practitioners.

64. (1) A candidate property practitioner may not draft or complete any document or clause in a document—

- (a) conferring any mandate on 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 or lease of property.
- (2) A person who contravenes subsection (1) and a property practitioner who allows an act contemplated in subsection (1) is not entitled to any payment, remuneration, consideration or damages in respect of or by reason of any document contemplated in that subsection or for bringing about the transaction or agreement embodied in that document.
- (3) In any proceedings in respect of sanctionable conduct, it is no defence that the principal property practitioner was not aware of the acts or omissions of the property practitioner or the candidate property practitioner.”

It has been submitted that there must be provisions in the Bill outlining who qualifies as a candidate property practitioner, the duration of candidacy, which principals qualify for candidacy, the transformation imperatives in respect of opportunity, registration and/or the process of qualifying as a property practitioner and the body responsible for such oversight and regulation. This could be another area of function of the authority.

Section 64 (3) (Supervision of candidate Property Practitioner)

Supervision of candidate property practitioners: It is unfair to hold a principal responsible for acts or omissions of the candidate property practitioner even if the principal is unaware of same.

It has been submitted by REBOSA that the employment of 22,000 candidates are threatened by this.

Clause 68(1) – Agreements

This clause states that—

“Agreements

68.(1) An agreement to sell and purchase or to let and hire property, or the mandatory disclosure form contemplated in section 67, must be drafted by the developer or seller, as the case may be, for his, her or its own account.”

It is unnecessary for the agreement to sell or let property be drafted by the developer or seller. In practiced most transactions are concluded by standard agreements prepared by property practitioners.

Clause 69(2) - Consumer education and information

“Consumer education and information

69. (1) The Authority must from time to time conduct campaigns to educate and inform the general public of their rights in respect 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.”

This provision should place an obligation on the property practitioner for duty of care.

7. POSITION BY THE GAUTENG DEPARTMENT OF HUMAN SETTLEMENTS

In line with the GPL Rule 248 (1) (b) the Committee sought the views of the relevant Member of the Executive on the Bill. The Gauteng Department of Human Settlements supports the Property Practitioners Bill [B21B-2018] (s76).

The following are the comments made by the Department of Human Settlements:

- New piece of legislation seeks to

Be in-sync with post-apartheid dispensation

Respond to the changing market conditions and dynamics in the property market sector

- Advocates for a functional property market
(restoration of dignity, stimulates economic growth & development, redresses historically skewed property ownership)

- Provides for

The continuation of the Estate Agency Affairs Board (EAAB) as the Property Practitioners Regulatory Authority (PPRA)

Establishment of the Property Practitioner's Ombud Office for dispute resolution

Continuation of Estate Agents Fidelity Fund as the Property Practitioners Fidelity Fund

Contracts should be signed in the language understandable to the buyer

- Regulate the conduct of property practitioners;
- Protection and promotion of consumer interests;
- Transformation of the property market;
 - *Office of the Ombud brings to par the sector with other service industries like insurance and banking sectors*
 - *Like the financial service sector, it vests responsibility for consumer complaints in an independent body*

- Authority of mediation and an adjudication procedure

8. SOCIO-ECONOMIC FINANCIAL IMPLICATIONS

The Financial Implications of the Bill is to look at the Budget Appropriation of the Department of Human Settlements and will have to increase to cater for the establishment of the office of the Ombud, the CEO and staff of Authority, the Property Sector Transformation Fund and Property Sector Research Centre. All these institutions will have staff that will be employed and will there require monthly salaries.

9. COMMITTEE'S RECOMMENDATIONS

That the Bill be supported with proposed amendments.

10. NEGOTIATING POSITION ADOPTED BY THE COMMITTEE

The Portfolio Committee on CoGTA and Human Settlements supports the principle and detail of the Property Practitioners *Bill [B21B-2018]* with the amendments proposed in part 5 above.