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Managing Agents under the Property Practitioners Act: What you need to know

The Property Practitioners Act ("the PPA") and the Property Practitioners Regulations ("the PPA Regulations") officially came into operation on the 1st of February 2022.

The much anticipated PPA Regulations, which consist of 88 pages, were published on 14 January 2022 and are primarily aimed at addressing the shortcomings of the PPA. Surprisingly, the industry was only given 10 days to study these regulations before the PPA came into operation on 1 February 2022. Therefore, neither property practitioners nor the Property Practitioners Regulatory Authority have had reasonable time to adequately prepare for this new dispensation.

Although there are a number of useful articles and resources available online detailing the effect that the PPA and its Regulations has on traditional estate agents, very little focus has been given to the newly introduced roles and responsibilities which have been placed on managing agents of community schemes.

This is particularly disconcerting given that the PPA is arguably the most important piece of legislation that has ever come into operation concerning managing agents, because for the first time in our history, traditional managing agents are formally and undoubtedly regulated by a controlling Authority.

Therefore, it is essential for every managing agent to understand the effects of the PPA and the PPA Regulations and how to comply with this important legislation. As a former managing agent myself, I know that the demanding nature of the property management industry doesn't offer most managing agents the time required to study the entire PPA and its Regulations. Therefore, I have compiled the following summary specifically focusing on the most important legal ramifications of the PPA and its Regulations concerning managing agents:

TRANSITIONAL PROVISIONS

1. The Estate Agents Affairs Act, 1976 has been repealed and replaced by the PPA;

2. The Estate Agency Affairs Board (the EAAB) has been disestablished and replaced by the Property Practitioners Regulatory Authority ("the Authority");

3. The Estate Agents Fidelity Fund continues to operate under the name Property Practitioners Fidelity Fund ("the Fidelity Fund") and all funds of the Estate Agents Fidelity Fund immediately before the commencement of the PPA shall be transferred to the Fidelity Fund.

4. Managing agents (which includes any person who for remuneration manages a property on behalf of another) are now officially classified and referred to as "property practitioners" and are now regulated in terms of the PPA and its Regulations. However, as this article focuses exclusively on managing agents, I shall continue to refer to them as such;

5. Managing agents are now subject to the Property Sector Transformation Charter Code. In a nutshell, this means that managing agents are required to fully comply with BEE legislation and policies should they wish to provide services to any organ of state (refer to section 20(2) of the PPA);

6. Any person who feels aggrieved by any act or omission of a managing agent may lodge a complaint with the Authority, which shall be dealt with in accordance with the dispute resolution process set out in Chapter 5 of the PPA, read with Chapter 3 of the PPA Regulations.

FIDELITY FUND CERTIFICATES

7. **The following important requirements are now applicable to managing agents in respect of Fidelity Fund certificates:**

   a. Every managing agent is required to apply to the Authority for a Fidelity Fund certificate, which certificate shall remain valid for a period of three years (refer to section 47(1) of the PPA);

   b. Managing agents who have not been issued Fidelity Fund certificates under the repealed Estate Agents Affairs Act must urgently apply to the Authority for a Fidelity Fund certificate;

   c. Managing agents to whom a Fidelity Fund certificate has already been issued in respect of the 2022 calendar year under the now repealed Estate Agents Affairs Act, must by no later than 31 October 2022, apply to the Authority for the issue to him or her of a Fidelity Fund certificate, unless he or she has ceased or will cease to operate as a property practitioner by the end of this year and has advised the Authority of such fact in writing (refer to PPA Regulation 15.4);

   d. All managing agents must lodge an application to renew his or her Fidelity Fund certificate before 31 October of the calendar year in which the current certificate will expire (refer to PPA Regulation 21.1);

   e. Managing agents who fail to apply for a Fidelity Fund certificate shall be required to pay a penalty of R125.00 per month until he or she applies for the certificate (refer to PPA Regulation 23.1) and may be liable for a fine of up to R15,000.00 (refer to PPA Regulation 38);

   f. The Authority may not issue a Fidelity Fund certificate to any person who (refer to section 50 of the PPA) -

      i. is not a South African citizen and does not lawfully reside in the Republic;
      ii. is not in possession of a valid tax clearance certificate;
      iii. is not in possession of a valid BEE certificate;
      iv. does not comply with the prescribed standard of training;
      v. does not have the practical experience determined by the Authority;

   g. A holder of a Fidelity Fund certificate must -

      i. prominently display their Fidelity Fund certificate in every place of business to enable consumers to easily inspect it (refer to section 53(1)(a) of the PPA);
      ii. ensure that the following wording appears on all letterheads or marketing material pertaining to the property practitioner "Registered with the PPRA" (refer to section 53(1)(b) of the PPA, read with PPA Regulation 37.1);
      iii. ensure that every managing agreement contains a clause in the following terms "{Insert name of property practitioner as defined in the agreement} hereby warrants the validity of his / her / its Fidelity Fund certificate as at the date of signature of the Agreement." (refer to section 53(1)(c) of the PPA, read with PPA Regulation 37.2);

   h. It is important to note that support and administrative staff to a managing agent are not required to register with the Authority or hold a Fidelity Fund certificate, regardless of the fact that such person may be employed by or in any way be engaged with any property practitioner (refer to PPA Regulation 25.2);

TRUST ACCOUNTS

8 **The following important requirements are now applicable to managing agents in respect of Trust Accounts:**

a. Every managing agent must open and keep one or more separate trust accounts and immediately deposit all trust money held or received by or on behalf of that managing agent in the relevant trust account (refer to section 54(1)(a) of the PPA).

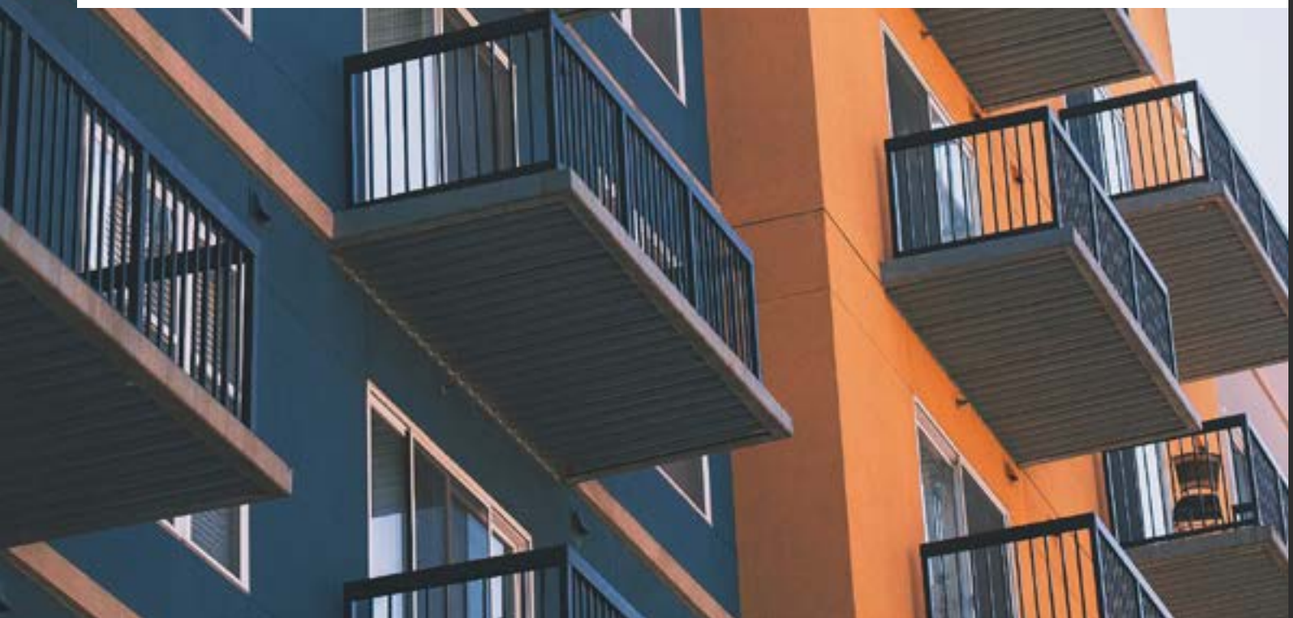
b. Every managing agent must cause his or her accounting records to be audited within six months after the final date of the financial year of the managing agent concerned and must, forthwith after receipt of the audit report submit that report to the Authority (refer to section 54(5)(b) of the PPA).

c. The above requirements are subject to the following exemptions:

   i. A managing agent shall be exempted from keeping a trust account if he or she has never received any trust monies or no longer receives any trust monies (refer to PPA Regulation 2.1.1.1 and 2.1.1.2);

   ii. A managing agent shall not be required to operate a trust account in respect of a body corporate where the funds of that body corporate are held in a bank account opened in the name of the body corporate concerned (refer to PPA Regulation 2.6);

   iii. A managing agent whose turnover is below R2,5 million is not required to audit his or her accounting records, however he or she is required to subject his or her accounting records to an independent review by a registered accountant (refer to section 23(1) of the PPA).



FEES PAYABLE TO THE FIDELITY FUND

9 **The following important requirements are now applicable to fees payable by managing agents to the Fidelity Fund:**

a. Every managing agent shall pay to the Fidelity Fund a levy of R2,340.00 every three years or R780.00 per annum (refer to PPA Regulation 15.1);

b. A candidate managing agent (which means a person who has not yet met all the qualification or experience required as prescribed, to practise as a property practitioner and who is undergoing training) shall pay R380.00 per annum to the Fidelity Fund for the first two years of his/her candidacy period, whereafter he/she shall pay the same levy applicable to managing agents (refer to PPA Regulation 15.2);

c. Every managing agent shall, upon first becoming registered as a property practitioner pay to the Fidelity Fund a contribution of R400.00 (refer to PPA Regulation 15.3);

MANDATORY RETENTION OF RECORDS

10 **Every managing agent must for a period of five years retain the following records (refer to section 55(1) of the PPA):**

a. all documents exchanged with the Authority;

b. if applicable, correspondence with his, her or its employer or franchisor;

c. any agreement incidental to his, her or its carrying on the business of a managing agent;

d. any agreement, mandate, mandatory disclosure form or other document relating to the financing, sale, purchase or lease of a property;

e. any advertising or marketing material related to his, her or its carrying on the business of a managing agent; and

f. any other document prescribed by the Minister.

PROHIBITED BUSINESS PRACTISES

11 **A managing agent may not (refer to section 58(1) of the PPA) -**

a. practise in association with any person who is legally prohibited from practising as a property practitioner;

b. enter into any arrangement, formally or informally, whereby a consumer is obliged or encouraged to use a particular service provider to render any service or ancillary services in respect of any transaction of which that managing agent was the effective cause.

12 **The following undesirable business practises are prohibited (refer to PPA Regulation 35.1)-**

a. any arrangement in terms of which any party or person that directly or indirectly controls or manages any residential property development, including any body corporate or homeowners' association (the "managing organisation") -

   i. receives money or any other reward in exchange for a benefit, advantage or other form of preferential treatment in respect of the marketing of properties in such property development;

   ii. requires that any property in such property development may only be disposed of through the agency of the managing organisation or a property practitioner designated by the managing organisation or which imposes any form of penalty in respect of a failure to do so;

   iii. requires that any property in such property development may only be disposed of to the managing organisation or a person or entity designated by the managing organisation;

   iv. effectively provides an advantage to any one property practitioner or group of property practitioners over and above any other property practitioners, in providing services in relation to properties in such property development

   v. effectively excludes or disadvantages any property practitioner or group of property practitioners from being able to provide services in relation to properties in such property development.

MANDATORY TRAINING AND QUALIFICATION REQUIREMENTS

13 **The following important provisions are applicable to the standard of training required by managing agents:**

a. No person shall be entitled to practice as a managing agent unless such person has first completed a practical training course in respect of non-principal property practitioners relevant to the industry in which such person has sat their professional designation examination as established by the Authority, which practical training course will constitute a minimum of six modules to be completed over a maximum period of six months (refer to PPA Regulation 33.2.3);

b. The Authority shall make arrangements so that the professional designation examinations will be capable of being written at least four times per annum at such intervals as are determined by the Authority refer to PPA Regulation 33.2.4);

c. No person may be issued with a Fidelity Fund certificate by the Authority unless such person has complied with the qualification requirements set out in PPA Regulation 33.1 (refer to PPA Regulation 33.2.7);

d. A person who, on the effective date of the PPA, is already registered as either a non-principal or principal property practitioner, will be exempted from the qualification requirements set out in PPA Regulation 33.1;

e. In addition to the educational qualifications referred to in PPA Regulation 33.1, the Authority may, at any time, prescribe any reasonable continuing professional development requirements for property practitioners (refer to PPA Regulation 33.5.1)

CODE OF CONDUCT AND DUTIES OF MANAGING AGENTS

14 The following important duties are now applicable to managing agents (refer to PPA Regulation 34.2):

a. In terms of a property practitioner's general duty to members of the public and other persons or bodies, a managing agent -

i. shall not in or pursuant to the conduct of his or her business do or omit to do any act which is or may be contrary to the integrity of property practitioners in general;

ii. shall protect the interests of his or her client at all times to the best of his or her ability, with due regard to the interests of all other parties concerned;

iii. shall not accept a mandate if the performance of the mandate requires specialised skill or knowledge falling outside his or her field of competence, or he or she has not completed the required qualifications, unless he or she will in the performance of the mandate be assisted by a person who has the required skill or knowledge and this fact is disclosed in writing to the client;

iv. shall not in his or her capacity as a property practitioner willfully or negligently fail to perform any work or duties with such degree of care and skill as might reasonably be expected of a property practitioner;

v. shall comply with both the PPA and the PPA Regulations and all applicable bylaws; and

vi. shall not through the medium of a company, close corporation or third party, or by using such company, close corporation or third party, or by using such company, close corporation or third party as a front or nominee do anything which would not be permissible for him to do if he were operating as a property practitioner.

b. No managing agent shall, without just cause, divulge to any third party any confidential information obtained by him or her concerning the business affairs, trade secrets or technical methods or processes of a client or any party to a transaction in respect of which he acted as a managing agent.

FINAL THOUGHTS

Notwithstanding the aforementioned requirements, it is worth noting that any person may apply in writing to the Authority to be exempted from compliance with any specific provisions of the PPA and the PPA Regulations (refer to section 4 of the PPA, read with PPA Regulation 41.1 to 41.21).

While all of this change may be exciting and at times overwhelming, it is important to remember that historically the effective management of the EAAB has been poor to say the least, and I am afraid that simply giving the EAAB a new name will not miraculously repair the deep rooted problems that have plagued the EAAB for years. We will have to wait and see whether the Property Practitioners Regulatory Authority is capable of providing for the proper regulation of property practitioners.

Specialist Community Scheme Attorney (LLB, LLM), Auren Freitas dos Santos, is a Director of The Advisory, a boutique consultancy specialising exclusively in community schemes law. Contact him at info@theadvisory.co.za if you have any questions relating to the Property Practitioners Act and its Regulations.