HOMEOWNERS' ASSOCIATIONS CHARGING AGENTS ACCREDITATION FEES REMAINS IN THE LIMELIGHT

PPRA's latest Guidance Note on Undesirable Business Practices, September 2023

The Regulations to the Property Practitioners Act prohibit various undesirable business practices. This and various industry communications despite, the Property Practitioners Regulatory Authority reports that the practice continues. It has also indicated that it strongly disapproves of developments where the such practices are forced estate agents. It has referred the issue to both the Competition Commission and the Community Schemes Ombud. In our discussion below, we highlight the stakeholders' points of departure in the context of the legislative prohibition.

INTRODUCTION

In February this year, this publication highlighted the concerns raised by role players in the real estate industry regarding estate agents making themselves guilty of undesirable business practices. This followed on the news that the Property Practitioners Regulatory Authority ('the PPRA') has, in the past months, fined more than 150 estate agents for making themselves guilty of taking part in these prohibited practices. In the main, the prohibited business practices relate to any arrangement in terms of which any party or person that directly or indirectly controls or manages any residential property development (a body corporate or homeowners' association, for example) gives some preference to estate agents to market and render services to owners and buyers within the development.

The other side of this coin is equally concerning. Ms Ramaili, CEO of the Property Practitioners Regulatory Authority ('PPRA') commented in the online publication *Property Professional* (27 November 2023) that "… it has recently come to light that, in addition to the so-called 'accreditation fees' many HOAs are "forcing" agents to contravene the Property Practitioner's Act, and also penalising sellers by refusing to release clearance certificates if the agent refuses to pay either their 'fee', or a fine for not being registered with the estate."

It is a fact that certain homeowners' associations ('Association(s)') have rules or policies which have the effect of obliging estate agents who want to practice within the scheme, to "register" or "accredit" with them before being allowed to do so.

In some instances, the motive for the accreditation requirement is or appears to be reasonable and, so they argue, cannot be faulted. For example, where, in a retirement scheme, there are rules regarding access to the scheme for estate agents so as to maintain the peaceful and quiet atmosphere of the scheme in the interests of the inhabitants, and to support security measures within the scheme. But more often than not, this is not the real or main reason for the requirement and is rather a source of additional funding for the Association.

Attempts to obscure the fact that accreditation is required to render services within an estate, are often hidden by using creative terminology, such as referring to "administrative fees" or "third party engagement fees" and the like. But in our law, a "substance over form" mindset will apply in cases where there is a legal rule that must be adhered to, such as the prohibition of "undesirable practices" in the regulations to the Act under discussion. Therefore, whatever the description given to a practice rule or arrangement which allows a form of exclusivity to market within the estate, or gives different privileges to certain agents, pose the real risk for the estate agent of making himself or herself guilty of undesirable and prohibited conduct under regulation 35 of the Act. The intention of the Association is not the decisive enquiry in this instance–the outcome of the accreditation is.

DEFINING UNDESIRABLE BUSINESS PRACTICES

To understand what the legislature prohibits, the exact wording of the regulation should be studied. The relevant parts (for this article) are recorded in regulation 35 and read as follows:

"35.1 Pursuant to the provisions of section 63 (1) of the Act, the following business practices are prohibited –

35.1.1.1 …

35.1.1.2 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") –

35.1.1.3 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;

35.1.1.4 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;

35.1.1.5 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;

35.1.1.6 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; or

35.1.1.7 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."

It is not necessary to dissect the specific proscriptions to appreciate that the legislature seeks to root out practices that create preference and unfair advantage to some, and which undermines a level playing field where agents can compete on equal footing.

In the words of the September 2023 PPRA **Guidance Note on undesirable practices**-

> "2.1…all property practitioners and their firms are hereby discouraged from entering into arrangements with any body corporate or homeowners' association in terms of which money is exchanged for a benefit, advantage or other form of preferential treatment in respect of the marketing of properties in such property developments.
>
> 2.2. Any such arrangement which effectively provides an advantage to any one property practitioner or group of property practitioners over any other property practitioners, or 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 developments is prohibited."

WHAT 'PRIVILEGES DO ASSOCIATIONS CONFER?

The privileges that agents receive from being accredited, come in many forms. It may be in the form of some exclusivity regarding permission to market within the estate; to have automatic access to the estate for certain hours of a day; to use certain public display boards in the estate for advertising; to co-brand material used in the estate; to enjoy opportunities to engage with residents and potential sellers, and more.

Often these privileges are paid for, or part of 'a parcel' requiring the estate agent to "educate" potential purchasers on the rules of the scheme. Although there are obvious benefits to the latter, it is considered by the Property Practitioners Authority to be a method used to disguise the fact that (i) the essence of the agreement is simply one where accreditation is required for the privilege to market and render estate agent services within the development; (ii) the effect of the arrangement is to give priority to some agents over others; (iii) there is financial or other gain for the Association; and (iv) also ignores the fact that estate agents should in any event inform prospective purchasers of salient details of the property, which would include the rules of an Association where this is applicable.

CONSEQUENCES FOR THE ASSOCIATION

1. The PPRA takes a hard line on estate agents in this context: Whatever an Association's real or alleged aims are with its accreditation requirements, an estate agent who falls into step therewith, risks being found guilty of sanctionable misconduct (section 62, PPA). The estate agent may be fined and risks losing his or her Fidelity Funds Certificate.
   This is clearly detrimental to the good standing of a particular estate within its community because it would be frowned upon to accredit with sanctioned estate agents, i.e. with agents who are guilty of undesirable business practices.

2. In addition, insisting on accreditation means that the <u>Association seeks to allow only those estate agents who are willing to turn a blind eye to the law that applies to them</u>. It cannot be in the interests of owners to work with such agents.
   In this way, the Association's executives are not complying with the fiduciary duties imposed on them by virtue of the Community Schemes Ombud Services Act, and may be held liable under that Act (and in certain instances, also under the Companies Act) for damage that may arise from the dereliction of this duty.

3. According to the South African Accounting Academy's website, in a note to its members titled *Relevance to Auditors, Independent Reviewers & Accountants,* it is further warned that the PPA –

> "…is yet another piece of legislation that your clients must comply with, and which you must assess compliance with. If they don't comply with the relevant laws and regulations, you have certain reporting obligations regarding NOCLAR (Non-Compliance with Laws And Regulations) – <u>this could include reporting to management, qualifying your audit opinion, reporting a Reportable Irregularity, etc.</u>
> <u>As an auditor and independent reviewer, you need to consider and assess compliance with the PPA and Guidelines issued by the PPRA.</u>
> <u>As an accountant, you may need to advise your clients who are property practitioners on compliance with the PPA and adherence to the latest guidelines issued by the PPRA.</u>
> Relevance to Your Clients:
> A property practitioner has a duty to comply with the Property Practitioners Act.
> Your clients who are property practitioners, must not only comply with the PPA, but they also have to adhere to the latest guidelines issued by the PPRA." (Our underlining)

VIEWS OF THE PPRA AND CSOS

The Property Practitioners Regulatory Authority has referred the matter to the Competition Commission and the Community Schemes Ombud Services ('CSOS') for consideration. Input and action from these role-players are expected soon.

It is notable that in a CSOS Circular (No 1 of 2021) that deals with rules and amendment thereof by schemes for which application for approval must be made to the Ombud, it is stated in Annexure A thereto, under the list of "*previously Identified Rules that must be removed … and are regarded as non compliant*", the following appears:

> "15 Estate Agents
> Only a certain agent may let or sell a unit, this is discriminatory , unreasonable and prejudicial to unit owners. This rule Imposes an unreasonable limitation on the rights of an owner in the scheme to

> market, sell and let his or her unit through an estate agent of his or her choice and the CSOS will not register a rule of this nature."

This is a clear indication of the view that the Ombud is likely to take of Associations engaging in undesirable business practices.

THEREFORE, NO ACCREDITATION WHATSOEVER?

There may definitely be instances where some arrangement may be warranted in light of specific interests of persons residing in a scheme. For example, in a retirement village, measures dealing with the number of agents that may enter a scheme on a given day, as well as the hours, may be warranted to preserve the calm and peaceful living conditions that the development offers to its retirees (and which prompted them to invest therein), to name one. But any such rule must be investigated from all sides to ensure it does not transgress the law.

Contact **STBB** should you require assistance in drafting appropriate measures, where warranted, or dealing with transgressions.

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