

‘ACCREDITATION FEES’: AGENTS’ UNDESIRABLE PRACTICES INCREASINGLY 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’ under threat of penalty. Notwithstanding this, the Property Practitioners’ Regulatory Authority has, as at February this year, fined more than 150 agents over the past few months for contravening these prohibitions. In our discussion below, we look at the various stakeholders’ points of departure in the context of the legislative requirements.

The Summary can be viewed [here](#)

INTRODUCTION

In the regulations to the Property Practitioners Act 22 of 2019 (‘the Act’), a list of “undesirable practices” are recorded and section 62 of the Act states that a transgression will render the property practitioner guilty of sanctionable misconduct. Maximum and minimum fines are listed in regulation 38 for such contraventions.

In the main, the undesirable 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, including any body corporate or homeowners’ association (the “managing organisation”)” gives some preference to estate agents to market and render services to owners and buyers within the development.

The fines are not idle threats. According to the Property Practitioners Regulatory Authority (the ‘PPRA’) they have in the short period since the coming into operation of the Act in February 2022, fined more than 150 agents for making themselves guilty of contravening these regulations.

This despite, in recent media comments made by Ms Thato Ramaili, the acting CEO of the PPRA, the transgressions remain rife as agents are “forced” to pay accreditation fees (or styled as “administrative fees” or otherwise) for access to the estates to market their services therein.

The privileges that agents receive from being accredited, come in many forms and shapes. 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 paid-for privileges are 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 to some extent, it is often just a method used to disguise the fact that 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.

The discussion herein relates to the prohibitions in the Act that are applicable to estate agents. We therefore do not elaborate on the associated challenge that such scheme management bodies (homeowners’ associations, body corporates and the like) face in terms of laws that regulate them in turn. We will address this in a next **STBB Property Law Update**. But to note briefly, there are good grounds to argue that such conduct also constitutes transgressions of the Community Schemes Ombud Services Act’s provisions regarding conduct of scheme executives, and aspects of the Sectional Titles Schemes Management Act (in the case of a sectional title body corporate). In addition, the ideals

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of transformation and inclusivity feature extensively in the Property Practitioners Act and several clauses clarify the requirement for estate management and homeowners to be, at least, aware of the legal requirements.

WHEN IS AN ESTATE AGENT'S CONDUCT AN "UNDESIRABLE PRACTICE"?

To answer the question, it is best to have a look at the exact wording of the regulation. The relevant parts (for this article) in regulation 35 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."

Upon reading these provisions, 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, *"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."

NON-ADHERENCE AND SUBSTANCE OVER FORM

It appears from the news and regular statements made by Ms Ramaili, that there continues to exist many instances where homeowners' associations ('HOAs'), body corporates (on their own or via a managing agent) and other similar managing bodies continue to impose fees (however disguised) on estate agents to gain entry to and/or to market their services in a development.

Attempts to obscure the fact that accreditation is required to render services within an estate, is often hidden by using creative terminology, such as referring to "administrative fees" or "third party engagement fees" and the like. But in our

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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 or gives different privileges to certain agents, it poses 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 CONSIDERATIONS IN FAVOUR OF ACCREDITATION

The Association of Residential Communities (ARC) was established in 2008 to proactively support the volunteers and members of HOAs and bodies corporate, and their management teams to establish, maintain and enhance the value of properties in such communities and the lifestyles of their residents. Interestingly, according to statistics on their website (accessed 08/02/2024) there are presently some 3,000 HOAs and 56 000 sectional title schemes in South Africa (which means that accreditation practices in these developments will impact many potential property transactions).

In a June 2023 article in the Property Professional titled “Why are agents still paying HOA fees?”, it is recorded that HOAs have specified several reasons as to why such fees and/or practices are deemed necessary, from security to education. They argue that there might be fees payable, but that it is not in respect of accreditation. Rather, the “fees are necessary for security reasons (paying for extra security staff on show days), training an estate agent on the rules and guidelines of the community, enabling agents to place adverts on the HOA website, etc. It is said that: “Estate agents are required to educate a buyer on the rules of the HOA because they are buying into a scheme. It makes no sense to require the same knowledge of say a builder, electrician, or landscaper.”

The argument goes further to state that payment of the fee provides no benefit or advantage to the agent and that the number of agents who may operate within an estate is in most instances uncapped.

The ARC has been in meetings with the PPRA, but from news reports it appears that no middle ground was found.

DO THESE ARGUMENT HOLD WATER?

Not adequately, if the effect thereof is considered, which essentially is that agents are either “inside a club” or outside of it. If you do not accredit, then you are excluded from or enjoy less opportunity to market and be active in the development, than those who are accredited and “part of the club”.

Whether or not the accreditation requirement has a laudable aim (i.e. security measures rather than just a way of creating an additional flow of funds for the development), the “substance over form” approach and the letter of the law needs to prevail. In short, where the practice requires accreditation of sorts that result in exclusion or different treatment, it is an undesirable practice. For example, some might be excluded because they are not able to afford the accreditation fees or might as a matter of principle refuse to pay it because it constitutes an illegal infringement on that agent’s right to operate as an estate agent.

In any event, there are holes in the arguments presented in support of the lawfulness of such practices. If compliance with rules of the scheme is so central, then surely builders and landscapers should undergo some lesser form of training as well, to ensure compliance from their end; and in the case of private sales without the involvement of an estate agent, there should then also exist a requirement that the new owner must undergo or receive training regarding the rules of the development.

And, it should not be overlooked that the sale agreement and the title deeds to such properties refer to the rules that apply to the development and make it clear that a new owner is bound thereto. Prior ‘education’ on the form of these

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rules is a nicety perhaps, but not a legal requisite. *Caveat emptor*, buyer beware means that the buyer needs to acquaint himself with many crucial aspects of his investment in the development, the rules being a small part only in the context of other facets, such as defects, building plan compliance, levy and rates liabilities, and the like.

As regards the argument that additional security is required on “show days”, that may be a luxury that the estate can afford. However, surely then similar security must be in place where someone hosts a private function with 10 or more guests, or where a building project is underway with the coming and going of artisans, or where the property is rented for holiday accommodation to persons not known to the scheme management, and the like.

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 Act.

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