



Alan Levy Attorneys Notaries & Conveyancers

MANAGING AGENTS AND THE PROPERTY PRACTITIONERS ACT, 2019

Ground Floor, 21 Scott Street
Waverley, Johannesburg

010 001 8209

enquiries@alattorneys.co1za

MANAGING AGENTS AND THE PROPERTY PRACTITIONERS ACT, 22 OF 2019

Acronyms

ACRONYM	MEANING
PPA	Property Practitioners Act
PPRA	Property Practitioners Regulatory Authority
EA	Estate Agent
MA	Managing Agent
EAAA	Estate Agency Affairs Act
FFC	Fidelity Fund Certificate
PP	Property Practitioner

What we will be examining:

- What Managing Agents (MA's) who are registered as Estate Agents (EA's) need to look out for in the new Property Practitioners Act, 2019 (PPA)
- What MA's who are not registered as EA's need to do in terms of the PPA
- Exactly who at a Managing Agent's office needs to hold a Fidelity Fund Certificate (FFC) and be a Property Practitioner (PP)
- Some key differences between the Estate Agency Affairs Act, 1976 (EAAA) and the PPA

The new dispensation of the PPA

- The PPA will replace the EAAA, 1976 in its entirety.
- Section 76 of the PPA states that the EAAA is repealed.
- Section 75(6) of the PPA states that all regulations made in terms of the EAAA remain in full force and effect as if they have been made in terms of the PPA.
- The PPA was published on 3 October 2019 and will come into operation on a day to be proclaimed by the President.
- The draft PPA regulations were published for public comment in March 2020.

What do MA's have to watch out for in the new PPA

- **Definitions** - Section 1(a)(i) and (c) of the PPA no longer speak of an Estate Agent (EA) but rather of a Property Practitioner (PP). The definition of a Property Practitioner has been amended to include a natural/juristic person who for the acquisition of gain on the instructions of another person, manages property.
- **Application of the PPA** - Section 2 of the PPA states that the PPA applies to the managing of immovable property and to any rights, obligations, interests, duties or powers associated with or relevant to such property.
- **Objects of the PPA** – Section 3(h) provides that an object of the PPA is to provide for a just and equitable legal framework for the managing of property.
- **Exemptions from the PPA** – Section 4(1)(2) provides that any person may, subject to this Section, be exempted from compliance with any specific provision of the PPA. The Applicant must in the prescribed manner and form submit the application for exemption to the Property Practitioners Regulatory Authority (PPRA).

What do MA's have to watch out for in the new PPA

- **Establishment of the Property Practitioners Regulatory Authority (PPRA)** – Section 5(4) provides that the PPRA must provide regulatory mechanisms in respect of the managing of property.
- **Functions of the PPRA** – Section 6(b) provides that it is a function of the PPRA to regulate the conduct of PP's in so far as managing property is concerned.
- **Exemption in respect of trust accounts** - Section 23(2)(a) states that the Minister may, by notice in the Gazette, determine circumstances under which Property Practitioners (PP's) may be exempted from keeping trust accounts.
- **Powers of Inspectors** – Section 25(1)(4) provides that Inspectors may at reasonable times and without prior notice, conduct inspections on PP's to determine whether the provisions of the PPA are being complied with and may without a search warrant enter and inspect business premises of PP's. If the PP conducts his business at a private residence, the Inspector will require a search warrant, issued by a Judge or Magistrate. The Inspectors may require the PP to produce their FFC.



What do MA's have to watch out for in the new PPA

- **Compliance Notices** - Section 26(1)(5) provide that the Minister may determine fines to be paid for contraventions of the PPA.
- **Lodging of Complaints** – Section 28 provides that any person may in the prescribed form lodge a complaint with the PPRA against a PP in respect of the management of property.
- **Fees payable by PP's** – Section 41 provides that a PP must annually pay to the PPRA a prescribed application fee for an FFC in accordance with Section 47 of the PPA.
- **Application for an FFC** – Section 47 provides that every PP must every 3 years apply to the PPRA for an FFC. The PPRA on receipt of the application, if the Applicant meets the requirements of the PPA, will issue to the Applicant a FFC valid until 31 December of the year to which such application relates.

What do MA's have to watch out for in the new PPA

- **Prohibition of rendering services without a FFC** – Section 48(1) states that no person may act as a PP unless he has been issued with an FFC and if the PP employs any other person as a PP, such person has also been issued with an FFC. Section 48(2) states that if PP is a Company/Corporation, every Director/Member of such Company/Corporation must be issued with an FFC. Section 48(3) states that any person who contravenes the above is guilty of an offence and must also immediately upon receipt of a request from any relevant party in writing, repay any amount received in respect of or as a result of any property transaction during such contravention.
- **Disqualification from the issue of an FFC** – Section 50 provides that the PPRA may not issue an FFC to any person who is not in possession of a valid tax clearance certificate or valid BEE certificate (no minimum BEE level is currently prescribed). Section 50(b)(ii) and (iii) states that the PPRA may not issue an FFC to any PP who does not comply with the prescribed standard of training and/or does not have the practical experience determined by the PPRA.

What do MA's have to watch out for in the new PPA

- **Mandatory display of FFC** – Section 53 provides that a holder of an FFC must prominently display the FFC in every place of their business and ensure that the prescribed sentence regarding their FFC is reproduced on their letterheads and marketing material as well as in any agreements relating to property transactions entered into by the PP and that failure to comply with such provisions is an offence. Regulation 37 to the PPA states that the following wording must appear on all letterheads and marketing material pertaining to a PP “Holds a Fidelity Fund certificate issued by the Property Practitioners Regulatory Authority”. The Regulation further states that in any agreement in connection with a property transaction to which the PP is a party, the agreement must contain the following clause “XXX (Insert name) hereby warrants the validity of his Fidelity Fund certificate as at the date of the signature of this agreement.”

What do MA's have to watch out for in the new PPA

- **Trust Accounts** – Section 54(1) states that every PP must open and keep one or more separate Trust accounts which must contain a reference to this Section. Regulation 4 (exemption from Trust accounts) states that a PP is exempted from keeping a Trust account if that PP has never received any trust monies or no longer receives any trust monies and that PP submits to the PPRA an affidavit in which they undertake that they will not receive any trust monies.
- **PP's not entitled to remuneration in certain circumstances** – Section 56(1) states that a PP is under no circumstances entitled to any remuneration in respect of or arising from the performance of any act referred to in the definition of PP's in sub paragraph (i), (ii), (iii) or (iv) of paragraph (a) in Section 1 of the PPA, unless at the time of performance of the act, the PP was in possession of an FFC.
- **Limitation on relationships with other property market service providers** – Section 58(a) and (b) states that a PP may not enter into any arrangement, formally or informally, whereby a consumer is obliged or encouraged to use a particular service provider, including an Attorney to render any service or ancillary service in respect of any transaction of which that PP was the effective cause.

The following conclusions are drawn for MA's

- A Managing Agent is a **PP** and must hold an **FFC**
- The **Directors** of the Managing Agency must also be the holders of an FFC.
- The employees of the Managing Agency who manage property must also be the holders of an FFC.
- A Managing Agent **may apply to be exempted** from compliance with any specific provision of the PPA.
- The PPRA may regulate the management of property and Managing Agents.
- Inspectors may arrive at Managing Agents' offices and request the Managing Agent's FFC.
- Consumers may lodge a complaint against a Managing Agent at the PPRA.
- FFC applications must take place every 3 years.
- A Managing Agent may not act as a PP without an FFC and doing so is an offence. Remuneration received must be re-paid.
- A Managing Agent to obtain an FFC, would **need to comply with the prescribed standard of training** and the **prescribed practical experience** (which will need to be clarified by the PPA) to obtain an FFC.

The following conclusions are drawn for MA's

- The Managing Agency will need to **be in possession of a valid BEE certificate** to obtain an FFC. The PPA does not prescribe any BEE level.
- The FFC must be displayed and mandatory sentences included on letterheads, agreements, etc.
- The Managing Agency will need to open and keep **at least 1 Trust account**. Application for an exemption to hold a Trust account may be made to the PPRA.
- A Managing Agency **may not enter into an agreement** with a service provider, i.e., Attorney, where the consumer is obliged or encouraged to use the particular service provider to provide his services in respect of the transaction, where the PP was the effective cause.

What do MA's who are not registered as EA's need to do in terms of the PPA?

With the advent of the PPA, Managing Agents who are not registered as **Estate Agents** have some **important questions to ask themselves.**

Certain of these Managing Agents are of the view that they are **not** classified as Estate Agents in terms of the EAAA and **neither as PP's** in terms of the PPA and that they therefore need not hold a FFC to carry out their services as a Managing Agent.



What do MA's who are not registered as EA's need to do in terms of the PPA?

What these Managing Agents have been unable to answer is that the legislature, already in 1981, by Regulation expanded on the definition of an Estate Agent and included a provision detailing that a Managing Agent who collects or receives money payable by any person on behalf of a Body Corporate in respect of a Sectional Title unit, is classified as an Estate Agent. This 1981 amendment to the EAAA, referred to above will now also currently apply to the PPA, in terms of S75(6) of the PPA. In the Fairbrass case, the full bench of the then Witwatersrand Local Division in 1999 ruled that a Managing Agent acting for a Body Corporate in instituting legal proceedings for monies due to the Body Corporate is subject to the jurisdiction of the EAAA. However, these Managing Agents who allege that they are not Estate Agents nor PP's make the argument that they do not collect or receive monies on behalf of Bodies Corporate.

What do MA's who are not registered as EA's need to do in terms of the PPA?

Another argument made by Managing Agents in regard to the PPA is that they do not manage property as envisaged by the PPA but rather what they do is to perform specified financial, secretarial, administrative and other management services to a Body Corporate (or a Homeowners Association), as provided for in Prescribed Management Rule 28(5) to the Sectional Titles Schemes Management Act, 2011, where the services of a Managing Agent are set out. These Managing Agents again believe that they are not classified as PP's in terms of the PPA.

Whether you are a Managing Agent sitting on either side of the fence, many Managing Agents wanted the PPA to have gone further and for the first time, to have properly governed Managing Agents of Community Schemes as a separate profession to sales and letting agents. Unfortunately, the PPA has again attempted to lump Managing Agents with a piece of legislation designed for sales and letting agents, which says very little if not nothing about the managing of Community Schemes.

If the PPA really intended to make clear it's inclusion of Managing Agents of Community Schemes as PP's, the PPA could have merely included in the definition of a PP, a Managing Agent as defined in the Community Schemes Ombud Service Act, 2011 (**CSOSA**). The CSOSA defines a Managing Agent as any person who provides management services to a Community Scheme for reward. Noteworthy in this definition in the CSOSA is that no mention is made of managing a property (which is the PPA's definition when purportedly including a Managing Agent as a PP)



What do MA's who are not registered as EA's need to do in terms of the PPA?

A final consideration is that Managing Agents of Community Schemes do not need to hold a trust account to operate their businesses. We know already that the STSMA allows Body Corporates to hold a bank account in the Body Corporates name. It is somewhat contradictory that the PPA compels every PP, which now includes managing agents to hold a trust account, unless exemption is received from the PPRA.

It will remain to be seen, if challenged, how the Courts will interpret whether a Managing Agent of a Community Scheme is indeed a PP or not. All leanings are that the legislature intended to include Managing Agents but failed to make this clear enough and expand on this efficiently in the PPA. Until then, Managing Agents who are not registered as PP's have a dilemma on their shoulders. Preferably, such Managing Agents should begin the process of regulating themselves as PP's but there is still an argument to be made by such Managing Agents that they are not PP's and need not hold an FFC.



Who at a MA's office needs to hold a FFC and be a PP?

- The juristic person under which the Managing Agency carries on business must be the holder of an FFC.
- The Directors or members of the juristic person of the Managing Agency also need to be the holders of an FFC (Section 48(2) PPA).
- Any other person who is employed by a PP and performs on such PP's behalf any act referred to in the definition of a PP in terms of Section 1(a)(i), (ii), (iii) and (iv), which includes managing a property.

Some key differences between the EAAA and the PPA

- »» The PPA includes in the definition of a PP, while the EAAA doesn't in the definition of an Estate Agent, a person who, for remuneration, manages a property on behalf of another.
- »» The PPA introduces the requirement for a valid BEE Certificate before issuing of a FFC whereas the EAAA did not refer to such requirement.
- »» The PPA refers to mandatory requirements for a PP to display its FFC at its offices and on any letterheads and marketing material as well as to have the mandatory sentence appearing in its agreements relating to property transactions, where the EAAA did not contain such requirements.
- »» The PPA in Section 23 allows a PP to apply to the PPRA to be exempted from keeping a Trust account where the EAAA did not contain such a provision.

Disclaimer

This presentation is meant as an introduction only, and does not include the full details and requirements of the PROPERTY PRACTITIONERS ACT. For all the necessary details and requirements, please contact Alan Levy Attorneys.

Alan Levy Attorneys Incorporated, its directors and employees do not accept any liability whatsoever in relation to any damages whatsoever that may be suffered by any person as a result of reliance on the contents of this PROPERTY PRACTITIONERS ACT presentation and the advice herein.



Debt Collection

Community Schemes

Conveyancing

Family Law

Labour Law

Commercial Law

Litigation & Dispute Resolution (Evictions)