

REPUBLIC OF SOUTH AFRICA

ESTATE AGENTS AMENDMENT BILL

*(As amended by the Portfolio Committee on Trade and Industry
(National Assembly))*

(MINISTER OF TRADE AND INDUSTRY)

[B 40B—98]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP EIENDOMSAGENTE

*(Soos goedgekeur deur die Portefeuljekomitee oor Handel en Nywerheid
(Nasionale Vergadering))*

(MINISTER VAN HANDEL EN NYWERHEID)

[W 40B—98]

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Amendment of section 1 of Act 112 of 1976, as amended by section 1 of Act 60 of 1978, section 1 of Act 57 of IWO, section 1 of Act 53 of 1982, section 1 of Act 51 of 1984, section 1 of Act 10 of 1985 and section 1 of Act 49 of 1996

1. Section I of the Estate Agents Act, 1976 (hereinafter referred to as the principal Act), is hereby amended-
- (a) by the substitution for the definition of “board” of the following definition: 5
 “ ‘hoard’ means the Estate [Agents] Agency Affairs Board established under section 2, and includes, for the purposes of [subsections (2) and (3) of section 30, and] section 32(7)(a)(ii) [insofar as it relates to the said subsections], any [disciplinary] committee [of the board acting I () pursuant to and in accordance with the provisions of section 8B] of inquiry;”;
- (b) by the insertion after the definition of “close corporation”, of the following definition: 15
 “ ‘committee of inquiry’ means a committee of inquiry referred to in section 8B(I);”;
- (c) by the insertion, after the definition of “court”, of the following definitions: 20
 “ ‘employ’ includes using the services of an independent contractor; ‘employee’ includes an independent contractor;”;
- (d) by the substitution for subparagraphs (i) and (ii) of paragraph (a) of the definition of “estate agent” of the following subparagraphs, respectively: 20
 “(i) sells or purchases or publicly exhibits for sale immovable property [or any interest in immovable property] or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor; or 25
 (ii) lets or hires or publicly exhibits for hire immovable property [or any interest in immovable property] or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or”;
- (e) by the substitution in paragraph (c) of the definition of “estate agent” for the words preceding subparagraph (i) of the following words: 30
 “(c) for purposes of sections 7, 8, 9, 12, 15, 16, 18, 19, 21, 26, 27, 30 [and], 33 and 34B, includes—”;
- (f) by the substitution for paragraph (e) of the definition of “estate agent” of the following paragraph: 35
 “(e) for purposes of section 30(2), (3), (4), [and] (5), (6), (7) and (8) and of regulations made under section 33(1)(h), includes any person who was an estate agent at the time when he or she was guilty of any act or omission which allegedly constitutes [improper] conduct deserving of sanction referred to in section 30;” 40
- (g) by the substitution for the definition of “fidelity fund certificate” of the following definition: 45
 “ ‘fidelity fund certificate’ means a fidelity fund certificate referred to in section 16, and includes for the purposes of sections [26(a)] 26, 27, 28 and 33(1)(e) and (f), a registration certificate referred to in section 16;”;
- (h) by the addition to the definition of “immovable property” of the following paragraph: 50
 “(i) any housing interest as defined in section 1 of the Housing Development Schemes for Retired Persons Act, 1988 (Act No. 65 of 1988), and any proposed housing interest;”;
- (i) by the substitution for the definition of “Minister” of the following definition: 55
 “ ‘Minister’ means the Minister of [Commerce and Consumer Affairs] Trade and Industry;”;
- (j) by the addition of the following definition: 55
 “ ‘trust money’ means-
- (a) money or other property entrusted to an estate agent in his or her capacity as an estate agent;

- (b) money collected or received by an estate agent and payable in respect of or on account of any act referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of the definition of ‘estate agent’;
- (c) any other moneys, including insurance premiums, collected or received by an estate agent and payable in respect of any immovable property, business undertaking or contract for the building or erection of any improvements on immovable property.”

Substitution of section 2 of Act 112 of 1976

2. The following section is hereby substituted for section 2 of the principal Act:

“Establishment of Estate Agency Affairs Board 10

2. There is hereby established a juristic person to be known as the Estate [Agents] Agency Affairs Board.”

Substitution of section 7 of Act 112 of 1976

3. The following section is hereby substituted for section 7 of the principal Act:

“Objects of board 15

7. [The object] Having due regard to the public interest, the objects of the board shall be to—

- (a) maintain and promote the [integrity] standard of conduct of estate agents; and
- (b) regulate the activities of estate agents.”

Amendment of section 8B of Act 112 of 1976, as inserted by section 5 of Act 51 of 1984

4. Section 8B of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) A [disciplinary] committee of inquiry may exercise or perform any power or function which is granted or entrusted to [the board by subsections (2) and (3) of section 30] it in terms of this Act.”;

(b) by the substitution for subsection 5 of the following subsection:

“(5) If a vacancy occurs on a [disciplinary] committee of inquiry after the committee has commenced with an investigation, the investigation may be proceeded with before at least two members of the committee, but if only two serving members remain, they may take any decision referred to in section 30(3), (7) or (8) only by unanimous vote.”;

(c) by the deletion of subsection (6); and

(d) by the substitution for the words “disciplinary committee” and “disciplinary committees”, wherever they occur, of the words “committee of inquiry” and “committees of inquiry”, respectively.

Insertion of section 8C in Act 112 of 1976

5. The following section is hereby inserted in the principal Act after section 8B:

“Appeal against decisions of committees of inquiry 40

8C. (1) Any person who feels aggrieved by any decision taken by a committee of inquiry in the exercise of its powers and the performance of its functions under section 8B(2), may, subject to subsection (3), within 30 days after the committee of inquiry—

- (a) has informed that person in writing of the decision and upon payment of the prescribed fee request the committee of inquiry in writing to furnish him or her in writing with its reasons for the decision;
- (b) has in accordance with paragraph (a) furnished that person with its reasons for the decision and after notice to the committee of inquiry, appeal to the board against the decision in the prescribed manner. 5
- (2) The board shall hear the appeal against the decision of the committee of inquiry in the prescribed manner and may after considering the appeal—
- (a) confirm, amend or reverse the decision;
- (b) remit the matter for further hearing, with such instructions as regards the taking of further evidence or otherwise as the board may deem necessary; 10
- (c) confirm or suspend any penalty imposed;
- (d) set aside any penalty imposed and impose any other penalty contemplated in section 30(3); 15
- (e) make an order contemplated in section 30(7)(a).
- (3) (a) If a committee of inquiry has found an estate agent not guilty on a charge of conduct deserving of sanction, any person who lodges an appeal against the decision to the board shall pay to the board a deposit, in an amount determined by the board, to cover the costs of the board and the estate agent concerned in respect of the appeal, 20
- (b) The deposit contemplated in paragraph (a) shall be refunded in full if the appeal is successful or partly successful.
- (4) A court may, on application by the board, order that a decision of, or penalty imposed by, a committee of inquiry not be stayed or suspended pending an appeal to the board, if the court considers such an order to be in the public interest.”. 25

Insertion of sections 12A, 12B and 12C in Act 112 of 1976

6. The following sections are hereby inserted in the principal Act after section 12:

“Determination of liabilities of fund and investment of moneys in fund 30

12A. (1) The Board shall after the end of each financial year of the fund determine to what extent, if at all, the total income of the fund during that financial year exceeded the expenditure incurred by or accrued to the fund during that financial year and shall, if the fund’s income exceeded its liabilities, determine how much of the excess may be utilised during the next financial year for the purposes of the grants and other payments contemplated in section 12B. 35

(2) Any moneys in the fund not immediately required for the purposes of the fund, shall be invested in the prescribed manner.

Grants and other payments from fund 40

12B. (1) The board may, from the amount determined by it in terms of section 12A and subject to such terms and conditions as it may deem fit—

- (a) make grants with regard to— 45
- (i) research in fields of activity relevant to the business of estate agents in general;
- (ii) the maintenance and promotion of the standard of conduct of estate agents in general;
- (iii) the maintenance and promotion of the training standards of estate agents in general;

- (b) make grants to any association or society of estate agents for the purposes of enabling that association or society to further the practice of estate agency or to maintain and promote the interests of estate agents in general;
 - (c) pay an honorarium or compensation to any person or institution for services with the object of enhancing the standard of conduct of estate agents in general, rendered at the request of the board; and
 - (d) utilise such amount as it may determine for the purposes of—
 - (i) advertising and promoting the services and facilities offered by estate agents in general; or
 - (ii) promoting public awareness in respect of matters relating to the acquisition and disposal of immovable property.
- (2) The board may at any time revoke any grant contemplated in subsection (1)(a) or (b).

Group insurance schemes 15

12C. (1) The board may in the public interest arrange any group insurance scheme with any insurer registered or deemed to be registered under the Insurance Act, 1943 (Act No. 27 of 1943), for the provision of indemnity insurance to cover estate agents' liability to members of the public on the grounds of malpractice, up to an amount determined by the board.

(2) Any premium payable in respect of the insurance contemplated in subsection (1) shall be paid from the fund.”

Amendment of section 16 of Act 112 of 1976, as amended by section 2 of Act 53 of 1982 and section 3 of Act 40 of 1986 25

7. Section 16 of the principal Act is hereby amended—
- (a) by the substitution for subsection (3) of the following subsection:

“(3) **[If]** Subject to sections 28(1), 28(5) and 30(6), if the board upon receipt of any application referred to in subsection (1) or (2) and the levies and contribution referred to in those subsections, is satisfied that the applicant concerned is not disqualified in terms of section 27 from being issued with a fidelity fund certificate, the board shall in the prescribed form issue to the applicant concerned a fidelity fund certificate or a registration certificate, as the case may be, which shall be valid until 31 December of the year to which such application relates.”; and
 - (b) by the addition of the following subsection:

“(5) An estate agent who applies to the board for a fidelity fund certificate or a registration certificate, as the case may be, after the prescribed period referred to in subsection (1) or (2), or whose application is not accompanied by the levy referred to in section 9(1)(a) or the contribution referred to in section 15, as the case may be, shall pay to the board a prescribed penalty in addition to the levy or contribution and no fidelity fund certificate or registration certificate shall be issued to the estate agent until the penalty has been paid.”

Repeal of section 17 of Act 112 of 1976

- 8. Section 17 of the principal Act is hereby repealed.

Amendment of section 18 of Act 112 of 1976, as amended by section 2 of Act 60 of 1978, section 5 of Act 57 of 1980 and section 7 of Act 51 of 1984

9. Section 18 of the principal Act is hereby amended by the substitution for paragraphs (a) and (b) of subsection (1) of the following paragraphs, respectively:

- “(a) theft of trust money, committed after the commencement of this Act, by an estate agent;
- (b) the failure of an estate agent to comply with section 32(1) or 32(2)(e).”.

Substitution of section 26 of Act 112 of 1976, as substituted by section 5 of Act 40 of 1986

10. The following section is hereby substituted for section 26 of the principal Act: 10

“Prohibition of rendering of services as estate agent in certain circumstances

26. No person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him or her and to every person employed by him or her as an estate agent and, if such person is— 15

- (a) a company, to every director of that company; or
- (b) a close corporation, to every member referred to in paragraph (b) of the definition of ‘estate agent’ of that corporation.”.

Amendment of section 27 of Act 112 of 1976, as amended by section 3 of Act 60 of 1978, section 7 of Act 57 of 1980, section 4 of Act 53 of 1982, section 8 of Act 51 of 1984 and section 4 of Act 10 of 1985 20

11. Section 27 of the principal Act is hereby amended—

(a) by the substitution for subparagraph (iii) of paragraph (a) of the following subparagraph:

“(iii) is an unrehabilitated insolvent in respect of whom the trustee of the insolvent estate has not certified that the insolvent is a fit and proper person to assume a position of trust and to be issued with a fidelity fund certificate;”; 25

(b) by the insertion after paragraph (aA) of the following paragraph:

“(aB) any estate agent referred to in paragraph (a) of the definition of ‘estate agent’ if such estate agent carries or intends to carry on business as an estate agent under a trade name which is identical or confusingly similar to the trade name of an estate agent— 30

- (i) already issued with a fidelity fund certificate; or
- (ii) whose fidelity fund certificate is suspended or has lapsed or been withdrawn in terms of this Act;”; and 35

(c) by the substitution for the proviso to that section of the following proviso:

“Provided that if in respect of any person who is subject to any disqualification referred to in this section, the board is satisfied that, with due regard to all the relevant considerations, the issue of a fidelity fund certificate to such person will be in the interest of justice, the board may issue, on such conditions as the board **[with the concurrence of the Minister]** may determine, a fidelity fund certificate to such person when he or she applies therefor.” 40

Amendment of section 28 of Act 112 of 1976, as amended by section 8 of Act 57 of 1980, section 5 of Act 53 of 1982, section 5 of Act 10 of 1985, and section 6 of Act 40 of 1986

12. Section 28 of the principal Act is hereby amended—
- (a) by the substitution for the heading to section 28 of the following heading: 5
 “Withdrawal **and lapse of fidelity fund certificates**”;
 - (b) by the substitution for subsection (1) of the following subsection:
 - “(1) The board, the executive committee or a committee of inquiry may withdraw a fidelity fund certificate issued to any person—
 - (a) who has been summoned in the prescribed manner to appear before the board or any committee of inquiry if such person without just cause fails to comply with the summons and prior to the date of the appearance stated in the summons, has not been excused in writing by the board or the committee of inquiry, as the case may be, from so appearing; 10
 - (b) if that person is a company or a close corporation, and the fidelity fund certificate of any director of the company or of any member of the corporation has lapsed in terms of subsection (5); 15
 - (c) if such person or, if such person is a company, any director of that company or, if such person is a close corporation, any member referred to in paragraph (h) of the definition of ‘estate agent’, of that corporation, becomes subject to any disqualification referred to in section 27(a)(vi) or (vii), (aA) or (b).”; 20
 - (c) by the substitution for subsection (5) of the following subsection:
 - “(5) A fidelity fund certificate issued to any person shall lapse immediately and be of no force and effect if that person— 25
 - (a) becomes subject to any disqualification referred to in section 27(a)(i) to (v);
 - (b) is a company or a close corporation, and the company or close corporation is being wound up, whether provisionally or otherwise, or is deregistered, as the case may be.”; 30
 - (d) by the substitution for subsection (6) of the following subsection:
 - “(6) Any person who is in possession or control of a fidelity fund certificate which has lapsed in terms of subsection (5) shall forthwith return that certificate to the board.”; and
 - (e) by the addition of the following subsections: 35
 - “(7) No person whose fidelity fund certificate has been withdrawn in terms of subsection (1) or has lapsed in terms of subsection (5), may directly or indirectly participate in the management of any business carried on by an estate agent in his or her capacity as such, or participate in the carrying on of such business, or be employed, directly or indirectly, in any capacity in such business, except with the written consent of the board and subject to such conditions as the board may determine. 40
 - (8) No estate agent shall directly or indirectly in any capacity whatsoever employ a person referred to in subsection (7), or allow or permit such person directly or indirectly to participate in any capacity in the management or the carrying on of his or her business as an estate agent, except with the written consent of the board, and subject to such conditions as the board may impose.”. 45

Amendment of section 30 of Act 112 of 1976, as amended by section 9 of Act 57 of 1980, section 10 of Act 51 of 1984, section 6 of Act 10 of 1985 and section 7 of Act 40 of 1986 50

13. Section 30 of the principal Act is hereby amended—
- (a) by the substitution for paragraph (g) of subsection (1) of the following paragraph:

“(g) fails to comply with any provision of section [16(1), (2) or (4)] **28(8), 29 or 32**, or contravenes any provision of section 26 [or], 32A(2)(a) or (b) or **34B**”;

(b) by the substitution for subsections (2) and (3) of the following subsections, respectively:

“(2) The board or a committee of inquiry may in the prescribed manner bring and investigate any charge of **[improper]** conduct deserving of sanction against any estate agent.

(3) When any estate agent is found guilty of **[improper]** conduct deserving of sanction by the board or a committee of inquiry, the board or committee of inquiry (as the case may be) may—

- (a) withdraw the fidelity fund certificate of such estate agent and—
- (i) if such estate agent is a company, of every director of such company;
 - (ii) if he or she is a director of a company which is an estate agent, of such company;
 - (iii) if he or she in partnership acts as an estate agent, of every partner in such partnership;
 - (iv) if such estate agent is a close corporation, of every member referred to in paragraph (b) of the definition of ‘estate agent’ of that corporation; or
 - (v) if he or she is a member of a close corporation which is an estate agent, of such corporation;

(b) impose on such estate agent a fine not exceeding **[one thousand rand] R25 000** or such higher amount as may be prescribed by the Minister by notice in the *Gazette* in order to counter the effect of inflation, and which is payable to the board;

(c) ~~renrjmand~~ such estate agent:

Provided that a fine or any portion thereof or the withdrawal of any fidelity fund certificate may be suspended for a period not exceeding three years and on such further conditions as the board or committee of inquiry (as the case may be) may determine.”;

(c) by the addition of the following subsections:

“(6) If any fine referred to in subsection (3)(b) is not paid in full to the board within one month after it has been imposed, or arrangements for payment is not made to the satisfaction of the board within that period, the fidelity fund certificate of the person on whom the fine has been imposed shall be suspended immediately and be of no force and effect until the fine has been paid or the arrangements have been made.

(7) (a) The board or, subject to paragraph (d), a committee of inquiry may, whenever a fine has been imposed on an estate agent as contemplated in subsection (3)(b), order that any portion of the fine, but not exceeding 80% of such fine, be applied towards the payment of compensation to any person who suffered a pecuniary loss as a result of the conduct of the estate agent in question.

(b) The board shall, on receipt of the fine imposed on the estate agent in question, make the payment contemplated in paragraph (a): Provided that no such payment shall be made until all appeals in respect of the imposition of the fine have lapsed or been finalised or been abandoned.

(c) This subsection shall not preclude any person from pursuing any civil remedy against the estate agent referred to in paragraph (a): Provided that if an award is made by a court in favour of a person who has received payment from the board as contemplated in paragraph (b), the court shall take the payment into account.

(d) A committee of inquiry may exercise the same powers conferred on the Board under paragraph (a), provided at least one member of such committee is qualified—

- (i) to be admitted as an advocate under the Admission of Advocates Act, 1964 (Act No. 67 of 1964);
 - (ii) to be admitted as an attorney under the Attorneys Act, 1979 (Act No. 53 of 1979); or
 - (iii) to be appointed as a magistrate under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), read with section 10 of the Magistrates Act, 1993 (Act No. 90 of 1993),
and for an uninterrupted period of at least five years practised as an advocate or attorney or occupied the post of magistrate, or for that period was involved in the tuition of law or rendered services as a legal consultant.
- (8) If an estate agent who has been charged with conduct deserving of sanction has been found—
- (a) not guilty by the board or a committee of inquiry;
 - (b) guilty by a committee of inquiry, and the estate agent's appeal to the board in terms of section 8C against the decision or penalty is successful or partly successful,
the board may, on recommendation of the committee of inquiry concerned (if applicable), make a contribution from the fund, in the amount determined by the board, towards the costs incurred by the estate agent in respect of the hearing before the board or the committee of inquiry (as the case may be) and, if applicable, the appeal heard by the board.”; and
 - (d) by the substitution for the words “improper conduct”, wherever they occur, of the words “conduct deserving of sanction”.

Substitution of section 31 of Act 112 of 1976, as amended by section 4 of Act 60 of 1978, section 10 of Act 57 of 1980 and section 11 of Act 51 of 1984

14. The following section is hereby substituted for section 31 of the principal Act:

“Appeal against decisions of board

- 31. (1)** Any person who feels aggrieved by any decision taken by the board in the exercise of its powers under section [8B(6)], 8C, 16, 27.28 or may at any time after he or she became aware of such decision but not later than one month after the board—
- (a) has informed him or her in writing of such decision and upon payment of the prescribed fees, request the board in writing to furnish him or her in writing with its reasons for such decision;
 - (b) has in accordance with paragraph (a) furnished him or her with its reasons for such decision and after notice to the board, appeal to the court against such decision, and the court may thereupon—
 - (i) dismiss the said appeal;
 - (ii) if it is of the opinion that the board has not acted in accordance with the relevant provision of this Act, give an order opposite to the decision of the board or amending the decision of the board;
 - (iii) refer the matter back to the board for further consideration; or
 - (iv) give such other order, including any order as to costs, as it may deem fit.
- (2) A court may, on application by the board, order that a decision of, or penalty imposed by, the board not be stayed or suspended pending an appeal to the court under the provisions of this section, if the court considers such an order to be in the public interest.”.

Amendment of section 32 of Act 112 of 1976, as amended by section 5 of Act 60 of 1978, section 11 of Act 57 of 1980, section 12 of Act 51 of 1984 and section 8 of Act 40 of 1986

15. Section 32 of the principal Act is hereby amended—
(a) by the substitution for subsection (1) of the following subsection:

“(1) Every estate agent shall open and keep one or more separate trust accounts, which shall contain a reference to this section, with a bank [**or building society**] and such estate agent or his or her employee, as the case may be, shall forthwith deposit therein [**the moneys**] all trust money held or received by [him in his capacity as an] or on behalf of such estate agent [**or as an employee of such estate agent, on behalf of any person,**] and the name of such bank [or building society] and the number of each such trust account shall forthwith be notified to the board.”;

(b) by the addition to subsection (2) of the following paragraph: 10

“(e) Trust money in an account invested in terms of paragraph (a) or deposited in terms of subsection (1) shall be retained by the estate agent in question in that account until the estate agent is lawfully entitled to it or instructed to make payment therefrom to any person.”;

(c) by the addition to subsection (3) of the following paragraph: 15

“(c) administer the accounts referred to in subsections (1) and (2)(a) in the prescribed manner.”.

Amendment of section 32A of Act 40 of 1986

16. Section 32A is hereby amended by the substitution for the words “improper conduct”, wherever they occur, of the words “conduct deserving sanction”. 20

Amendment of section 33 of Act 112 of 1976, as amended by section 6 of Act 60 of 1978, section 13 of Act 57 of 1980 and section 9 of Act 40 of 1986

17. Section 33 of the principal Act is hereby amended—

(a) by the insertion in subsection (1) after paragraph (e) of the following paragraph: 25

“(eA) prescribing the penalty payable to the board in terms of section 16(5);”;

(b) by the substitution for paragraph (h) of subsection (1) of the following paragraph:

“(h) prescribing the manner in which a charge of [improper] conduct deserving of sanction against any estate agent shall be brought and investigated and the manner in which a person must be summoned to appear before a committee of inquiry or the board;”;

(c) by the insertion in subsection (1) after paragraph (j) of the following paragraphs: 35

“(jA) prescribing the manner in which any account referred to in section 32(3)(c) shall be administered;

“(jB) prescribing the procedure to be followed in respect of an appeal to the board and the manner in which the appeal must be heard.”

Substitution of section 34A of Act 112 of 1976 40

18. The following section is hereby substituted for section 34A of the principal Act:

“Estate agent not entitled to remuneration in certain circumstances

34A. (1) No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of the definition of ‘estate agent’, unless at the time of the performance of the act a valid fidelity fund certificate has been issued— 45

- (a) to such estate agent; and
- (b) if such estate agent is a company, to every director of such company or, if such estate agent is a close corporation, to every member referred to in paragraph (b) of the definition of ‘estate agent’ of such corporation. 50

(2) No person referred to in paragraph (c)(ii) of the definition of 'estate agent', and no estate agent who employs such person, shall be entitled to any remuneration or other payment in respect of or arising from the performance by such person of any act referred to in that paragraph, unless at the time of the performance of the act a valid fidelity fund certificate has been issued to such person." 5

Insertion of section 34B in Act 112 of 1976

19. The following section is hereby inserted in the principal Act after section 34A:

"Prohibition of completion of documents by certain estate agents

34B. (1) An estate agent who has not complied with the prescribed standard of training may not in his or her capacity as an estate agent draft or complete any document or clause in a document— 10

(a) conferring any mandate on any estate agent to perform any act referred to in paragraph (a) of the definition of 'estate agent'; or

(b) relating to the sale or lease of immovable property. 15

(2) Any estate agent who contravenes subsection (1) shall not be entitled to any payment, remuneration 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." 20

Substitution of section 37 of Act 112 of 1976

20. The following section is hereby substituted for section 37 of the principal Act:

"Short title and commencement

37. This Act shall be called the Estate [Agents] Agency Affairs Act, 1976 [and the provisions thereof shall come into operation on a date fixed by the State President by proclamation in the *Gazette*]." 25

Substitution of long title of Act 112 of 1976

21. The following long title is hereby substituted for the long title of the principal Act:

"TO provide for the establishment of an Estate [Agents] Agency Affairs Board and an Estate Agents Fidelity Fund: for the control of certain activities of estate agents in the public interest; and for incidental matters." 30

Short title and commencement

22. This Act shall be called the Estate Agents Amendment Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE ESTATE AGENTS
AMENDMENT BILL, 1998**

The amendments proposed in the Estate Agents Amendment Bill, 1998, are intended to streamline the provisions of the Estate Agents Act, 1976 (Act No. 112 of 1976), hereinafter referred to as “the Act”, and to enhance the consumer protection measures contained in the Act. Certain *lacunae* and anomalies in the existing legislation are removed and certain expressions are redefined to correspond more closely with the main purpose of the Act, namely to protect consumers in their dealings with estate agents.

The principal amendments introduced by the Bill are the following:

Clause 1

- (a) The proposed new definition of “board” is necessitated by the proposal to amend the short title of the Bill, which will be discussed with regard to clauses 20 and 21.
- (b) Paragraph (b) introduces a definition of “committee of inquiry” — see the discussion on clause 4 below.
- (c) At present there is a *lacuna* in the Act to the effect that an independent contractor rendering services as an estate agent is required to be in possession of a fidelity fund certificate, but is not subject to the remaining provisions of the Act. The proposed definitions of “employ” and “employee” in paragraph (c) are aimed at rectifying this position.
- (d) Currently the Act does not prohibit an estate agent from employing a person who does not hold a fidelity fund certificate to exhibit “show houses” during the absence of the estate agent concerned. Such persons are in reality estate agents since they furnish information and advice relating to the property, albeit informally. The proposed amendments to paragraph (a) of the definition of “estate agent” are intended to remove this anomaly and to bring the aforesaid persons within the ambit of the Act.
- (e) The amendments proposed by paragraphs (e), (f) and (g) are of a technical nature following the amendments introduced by clauses 19, 13 and 10, respectively — see the discussions below.
- (f) In terms of the Act the sale of “housing interests” as defined in section 1 of the Housing Development Schemes for Retired Persons Act, 1988 (Act No. 65 of 1988), is not covered by the provisions of the Act, with the result that members of the public who buy and sell such housing interests through the intervention of an estate agent do not enjoy the protection afforded by the Act. It is in the public interest that those members of the public should enjoy the same protection which the Act affords other sellers and purchasers of immovable property. The amendment proposed by paragraph (h) is intended to introduce such protection.
- (g) The proposal contained in paragraph (i) merely rectifies the reference to the “Minister of Trade and Industry”.
- (h) It is desirable and necessary to define “trust money” in order to simplify and clarify the interpretation and application of various sections of the Act. Furthermore, in terms of the Act the estate agents fidelity fund cannot be held liable to pay compensation to a member of the public if an estate agent has misappropriated a deposit received in respect of a building contract negotiated by him or her. In practice, however, many estate agents are involved in the negotiation of such contracts and members of the public entrust deposits to them in good faith, believing that they are protected by the estate agents fidelity fund should the deposit be misappropriated. The proposed definition of “trust money” makes it clear that the fund would be liable to pay compensation to a member of the public who has suffered a loss by reason of an estate agent’s theft of such deposit.

Clause 2

The proposed substitution of section 2 is of a technical nature, following the proposed substitution of the short title of the Act — see the discussion on clause 21 below.

Clause 3

[It is necessary to restate the object of the Estate Agents Board. The current object, namely “to maintain and promote the integrity of estate agents”, has negative connotations in that it creates the impression that estate agents’ integrity will suffer or decline unless it is maintained and promoted by the Board. Furthermore, the wording of the existing object of the Board does not make it sufficiently clear that the function of the Board is to control the activities of estate agents in the public interest. The proposed amendment of section 7 of the Act is intended to address this issue.

Clause 4

- (a) The Act currently makes provision for the establishment of “disciplinary committees”, The expression “disciplinary committee” does, however, have a negative connotation and the perception may be created that an estate agent who is merely summoned to attend a meeting of a disciplinary committee is already “disciplined”. Obviously, this is not correct because the disciplinary measures only take effect after an estate agent has been found guilty. The proposed amendments of section 8B of the Act are intended to remove this negative perception by substituting the expression “disciplinary committee” with the expression “committee of inquiry”, which is a more apt description.
- (b) The insertion of section 8C in the Act (see below) necessitates the deletion of subsection (6) of section 8B.

Clause 5

- (a) In terms of the Act an estate agent found guilty of improper conduct by a disciplinary committee can appeal to the Estate Agents Board. This right of appeal is maintained in the proposed section 8C(1), but the Board’s powers to deal with the appeal are more closely described in section 8C(2).
- (b) The Act allows any person aggrieved by a decision of a disciplinary committee to appeal to the Board against such decision. Accordingly, if an estate agent has been found not guilty on a charge of improper conduct the complainant may appeal, without incurring any costs, and the Board is obliged to hear the appeal. Many instances occur where these appeals are without substance and are pursued only to harass the estate agent in question. The proposed section 8C(5) is intended to address the situation by requiring the appellant (i.e. the complainant in the case) to lodge a deposit with the Board to cover costs. This deposit will be repaid in full should the appeal succeed, or partly succeed.
- (c) In terms of the proposal contained in section 8C(3) a decision of a committee of inquiry will not be stayed or suspended pending an appeal to the Board if the court so orders.

Clause 6

The strength of the estate agents fidelity fund has reached a level which not only enables it to adequately cover claims lodged against the fund, but could also enable a portion of the fund to be utilised to provide additional services of direct benefit to members of the public in general and the estate agency industry. The proposed sections 12A, 12B and 12C are intended to give effect hereto. The services and facilities that can be funded by the fidelity fund are detailed in clause 12B. Provision is made specifically

for the funding of activities aimed at promoting awareness amongst members of the public of matters relating to the acquisition and disposal of immovable property.

The proposed new section 12C empowers the Board to take out a professional indemnity insurance providing all estate agents with professional indemnity cover up to an amount determined by the Board. This is felt to be desirable since estate agents are exposed to negligence claims on an increasing scale following the acknowledged increased professionalism in the industry brought about by the Act.

Clause 7

- (a) The amendment introduced by paragraph (a) is of a technical nature, the purpose being to make it clear that a fidelity fund certificate remains valid until 31 December of the year in which it was issued, unless it has been withdrawn or suspended or has lapsed before such date.
- (b) In terms of the Act an estate agent must annually by not later than 31 October apply to the Board for a renewal of his or her fidelity fund certificate for the following year. This application must be accompanied by a prescribed levy which is payable to the Board. In terms of section 30(1)(g) any late application or payment constitutes improper conduct, which means that formal disciplinary proceedings must be instituted in such cases. This constitutes an unnecessary administrative burden for the Board and leads to great annoyance and dissatisfaction on the part of estate agents who are charged with improper conduct. There is no reason why a late application or late payment should constitute improper conduct and why the mechanisms of a disciplinary hearing should be invoked to bring those estate agents to task. It is therefore proposed that these acts should no longer constitute improper conduct, but that the Board be empowered to impose an administrative penalty, to be prescribed by the Minister. The amendment contained in paragraph (b) is intended to give effect to this proposal.

Clause 8

The investment of money in the fidelity fund is dealt with in the proposed section 12A. Section 17 of the Act can therefore be deleted.

Clause 9

The proposed amendments introduced by this clause follow upon the proposed insertion of the definition of “trust money” in section 1 of the Act — see the discussion on clause 2 above.

Clause 10

The proposed substitution of section 26 entails a technical amendment to the existing paragraph (a) and the omission of paragraph (b) of that section.

Section 26(b) of the Act currently imposes an obligation on estate agents to take out fidelity insurance in respect of their employees. However, such insurance is very expensive and the obligation so imposed places an undue financial burden on estate agents especially in the current economic conditions. In some cases the insurance is impossible to obtain and it has come to the Board’s attention that certain claims have not been met by insurers on highly technical grounds. The Board strongly feels that the obligation imposed by section 26(b) should be removed and that estate agents should merely be encouraged to take out fidelity insurance as a matter of good business practice. In practice many estate agency firms would consider it unnecessary to take out the insurance, given their own risk exposure.

It must be stressed that the fidelity insurance contemplated in section 26(b) does not provide any protection to members of the public should an estate agent misappropriate money entrusted to him or her. The fidelity insurance in question is purely “in-house”

insurance, aimed at protecting a firm against theft by its own staff. If a member of the public suffers a loss by reason of theft of money by an estate agent, a claim is lodged against the estate agents fidelity fund, not the firm's fidelity insurance.

Clause 11

- (a) At present all unrehabilitated insolvents are disqualified from being issued with fidelity fund certificates. There is no justification for this since in many cases a person's insolvency can be brought about by circumstances beyond his or her control. An insolvent should be disqualified from being issued with a fidelity fund certificate only if it is clear that he or she is not a fit and proper person to assume a position of trust. The amendments proposed by paragraph (a) are intended to give effect hereto.
- (b) The Board currently has no power to refuse the issue of a fidelity fund certificate to an estate agency whose trading name would be confusingly similar to that of an existing estate agency. Members of the public could be confused by this. Furthermore, where the fidelity fund certificate of a firm has been withdrawn by the Board on the grounds of improper conduct, there is nothing stopping any person associated with such firm from starting another estate agency business using exactly the same trading name of that firm. Fidelity fund certificates are withdrawn in serious cases only and the whole purpose thereof is to put an end to the business of an unscrupulous estate agent. If another firm carries on business under the trading name of a firm whose fidelity fund certificate has been withdrawn, members of the public may be misled into believing that nothing has been done by the Board. This is clearly undesirable and the amendments introduced by paragraph (b) are intended to remedy this anomaly.
- (c) The Act currently empowers the Board to issue a fidelity fund certificate to a disqualified person if the Board considers this to be in the interest of justice. However, the Minister's consent must be obtained in every case where conditions are attached to the issue of the certificate. This is a cumbersome process and there is no reason why the Board should not be authorised to deal fully with the issue. Paragraph (c) is intended to remove the requirement that the Minister's consent must be obtained.

Clause 12

Regulations promulgated under the Act provide for a specific procedure to be followed in respect of disciplinary hearings and require, *inter alia*, that the estate agent charged with improper conduct be summoned in a prescribed form to attend the hearing. In practice, however, it often happens that an estate agent, although properly summoned to attend a disciplinary hearing, fails to appear at the hearing without lawful, or any excuse. Inevitably the case in question must then be postponed to a later date, which not only leads to further costs but also causes great inconvenience for the complainant, witnesses and members of the disciplinary committee. Clause 12(b) proposes to amend section 28(1) of the Act by empowering the Board or a disciplinary committee to withdraw a fidelity fund certificate in such circumstances.

In terms of section 28(5) of the Act any person who becomes subject to a disqualification referred to in section 27 of the Act must immediately cease acting as an estate agent and return his or her fidelity fund certificate to the Board. Such person's fidelity fund certificate nevertheless remains valid until it has been formally withdrawn by the Board. The problem, however, is that once a fidelity fund certificate has been issued to an estate agent it is extremely difficult for the Board to obtain information on whether such estate agent has since the date of issue of the certificate become subject to a disqualification. Without obtaining such information the Board is obviously not in a position to act and to withdraw the disqualified estate agent's fidelity fund certificate. Accordingly, it has been found that in practice estate agents who become subject to disqualifications *simply* ignore the provisions of section 28(5) and continue to act as estate agents. To remedy the situation it is proposed in clause 12(c) that a fidelity fund

certificate issued to any person shall automatically lapse and be of no force and effect if such person becomes subject to relevant disqualifications contained in section 27 or, if such person is a company or close corporation, when such company or corporation is being wound up, or is deregistered. If the fidelity fund certificate of a company or a close corporation has lapsed, the Board is empowered to withdraw the fidelity fund certificate of any director of such company or of any member of such corporation.

A person whose fidelity fund certificate has lapsed or whose certificate has been withdrawn by the Board, is no longer in possession of a valid fidelity fund certificate and may, in terms of the Act, not act as an estate agent. It is in the public interest that such persons should play no further role in the carrying on of any estate agency activity. It has been found, however, that in cases where an estate agent's fidelity fund certificate is withdrawn, such person simply continues working as an estate agent by using someone else as a front. The purpose of clause 12(e) is to remedy this deficiency.

Clause 13

- (a) Section 30 of the Act deals with "improper conduct". The expression "improper conduct" does, however, have negative connotations because in many instances an estate agent's conduct is not necessarily "improper" in the true sense of the word. For example, under the code of conduct the expiry date of a sole mandate must be expressed as a calendar date, and in terms of the Act an estate agent would be guilty of "improper" conduct if he or she should, by oversight, accept a sole mandate where the expiry date is not expressed as a calendar date. It could easily be believed that such an estate agent, having been found guilty of "improper conduct", has acted disgracefully which, of course, is not the case. It is therefore proposed that the expression "improper conduct", wherever it occurs in section 30, be replaced by the expression "conduct deserving of sanction", which is an internationally accepted expression in legislation aimed at regulating the conduct of estate agents (see clause 13(d)).
- (b) The amendments proposed by clause 13(a) would have the effect that an estate agent will also be guilty of improper conduct if he or she contravenes the proposed new sections 28(8) (see clause 12(e) of the Bill) or 349 (clause 19 of the Bill).
- (c) One of the penalties imposed on an estate agent found guilty of improper conduct is a fine not exceeding R 1000. The amount has never been increased since the promulgation of the Act and has clearly not kept pace with inflation. Realities must also be faced: An estate agent can earn a large commission on a property transaction and unless a substantial fine can be imposed an unscrupulous estate agent may well decide to pocket an improperly earned commission, pay the fine and terminate his or her business. It is therefore proposed that the maximum fine be increased to R25000 and that the Minister be empowered to increase the maximum fine in order to account for inflation. Furthermore, the Act is currently not clear as to whether any penalty imposed by a disciplinary committee may be suspended for a certain period, subject to

certain conditions. Suspension of a penalty is desirable in certain instances and to avoid any uncertainty in this regard it is proposed that a suitable provision be included in the Act (clause 13(b)).

- (d) The Act currently contains a technical difficulty in that if an estate agent has been found guilty of improper conduct and a fine has been imposed, such fine must be paid within 30 days thereafter. If it is not **timeously** paid, disciplinary proceedings must again be instituted against the estate agent. This is a cumbersome arrangement and a much more expedient procedure would be the immediate suspension of a fidelity fund certificate until the date of payment or **until** an arrangement for payment has been made to the satisfaction of the Board. The proposed new section 30(6) is intended to give effect hereto.
- (e) The Board currently receives some 200 complaints per month from members of the public against estate agents. These complaints are carefully investigated and in cases where it is justified, formal disciplinary proceedings are instituted against the estate agent in question. In some of these cases the estate agent's conduct has caused serious financial loss to the complainant. However, the Act currently contains no provision empowering the Board or a disciplinary committee to compensate the claimant of his or her loss should the estate agent be found guilty of improper conduct. This matter is addressed by the proposed new section 30(7).
- (f) The Act does not empower the Board to make any contribution towards the costs incurred by an estate agent who has been summoned to appear before a disciplinary committee. Such costs could be substantial, and may include traveling and accommodation costs and the costs of employing the services of a legal adviser. The Board is of the opinion that if an estate agent has been found not guilty on a charge of improper conduct, the Board should have a discretion to make a contribution towards the estate agent's costs, in an amount determined by the Board. This matter is addressed by the proposed new subsection (8).

Clause 14

- (a) The proposed amendments to section 31 (1) of the Act are of a technical nature following upon the proposed insertion of section 8C.
- (b) In terms of the proposal contained in section 3 1(2) a decision of the Board will not be stayed or suspended pending an appeal to the court, if the court so orders.

Clause 15

- (a) The proposed amendment of section 32(1) follows upon the insertion of the definition of "trust money" in section 1 of the Act — see the discussion on clause 1 above.
- (b) *The* current wording of section 32 of the Act does not make it clear until what stage an estate agent is obliged to retain trust money in his or her trust account. The proposed amendments introduced by paragraph (b) will rectify this position, by requiring of an estate agent to retain trust money in a trust account until he or she is lawfully entitled to it or instructed to make payment therefrom to any person. The fidelity fund will be liable if a member of the public suffers a loss by reason of the fact that an estate agent has failed to comply with this obligation.
- (c) Although section 32 of the Act requires of every estate agency business to open and keep a trust account, there is no provision prescribing the manner in which that account must be kept in order to prevent a shortfall. The amendment proposed in paragraph (c) is intended to give the Minister the power to make regulations concerning the manner in which an estate agent's trust account must be administered.

Clause 16

This clause is of a technical nature following upon the proposals contained in clause 13.

Clause 17

This clause confers on the Minister the necessary powers to make the regulations following the introduction of the amendments to the Act referred to above.

Clause 18

Clause 18 seeks to amend the Act in order to compel an estate agent to obtain a fidelity fund certificate. The proposed section 34(a) that an estate agent shall not be entitled to any remuneration unless a valid fidelity fund certificate has been issued to him or her.

Clause 19

It is not required of any person to pass any formal examination in order to work as an estate agent. Regulations promulgated under the Act currently provide that a person can obtain "full status" as an estate agent by either working as a candidate estate agent for a period of 12 months or passing the Board examination. However, the Board is of the opinion that a specific educational requirement should be introduced for estate agents who in effect perform paralegal functions by completing or drafting sale, lease or mandate documents or clauses contained therein. It is of the utmost importance that contracts should be correctly worded, not only to ensure their validity but also to avoid disputes between the parties thereto. The proposed inclusion of section 34B in the Act is intended to give effect to the Board's views on this matter.

Clauses 20 and 21

The short title and the long title of the Act wrongly create the impression that the legislation was introduced for the benefit of estate agents. This must be rectified because the purpose of the Act is to regulate the affairs of estate agents in the public interest in order to afford protection to members of the public in their dealings with estate agents. The proposed short title and long title of the Act reflect this objective more closely.

Parliamentary Procedure

The State Law Advisers and the Department of Trade and Industry are of the view that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.