

NOTES / AANTEKENINGE

COMPULSORY TRAINING REQUIREMENTS FOR ESTATE AGENTS: THE LEGAL ISSUES

1 Introduction

Draft regulations dealing with the training of estate agents were published by GN 971 and 973 in Government Gazette 30160 of 13 August 2007. The regulations, if promulgated, will be government's fourth attempt to regulate the training of estate agents in South Africa, the first attempt going back to 1983. The purpose of this Note is not to evaluate the educational model encapsulated in the draft regulations, but to focus on the legal ramifications should the regulations become law. To this end it is necessary to sketch the history of compulsory training requirements for estate agents in South Africa, and the legislative context within which this was introduced. It is submitted that a number of the provisions of the draft regulations are *ultra vires* and void, while some may be unenforceable on the ground of vagueness. Others are in conflict with section 22 of the Constitution, in terms of which every citizen has the right to choose their trade, occupation or profession freely.

2 Estate agents' training within the framework of the Estate Agency Affairs Act 112 of 1976

The legislative framework for compulsory training of estate agents was established by the Estate Agency Affairs Act 112 of 1976 ("the Act") which took effect on 1 August 1977. Prior to this, the training of estate agents was attended to by a number of voluntary associations in the estate agency industry, the biggest of which was the Institute of Estate Agents. At the time the Institute had an "in-house" qualification for its members, namely the CIEA (Certificate of Institute of Estate Agents). Training was provided by a small number of persons, mainly in the major cities. To obtain the qualification, candidates had to attend a training course (approximately one week) and write an examination conducted under the auspices of the Institute. This syllabus covered the basic principles of estate agency and contract law, marketing of real estate and ethics.

The Act provides for the establishment of the Estate Agency Affairs Board ("the Board"). The object of the Board is to

- (a) maintain and promote the standard of conduct of estate agents; and

(b) regulate the activities of estate agents,

having due regard to the public interest (s 7). The powers of the Board are set out in section 8. One of these powers (par (c)) is to “encourage and promote the improvement of the standard of training of and services rendered by estate agents”. The exact nature and scope of the Board’s power in this regard are not spelt out in the Act, but it is clear from the Act that the Board as such has no power to either create barriers to enter the estate agency industry, or to lay down educational requirements to be met in order to remain in the industry. Barriers on entering the industry are contained in section 27 of the Act, which deals with disqualifications relating to fidelity fund certificates. The relevant parts read as follows:

- “27. No fidelity fund certificate shall be issued to –
- (a) any estate agent who or, if such estate agent is a company, any company of which any director, or if such estate agent is a close corporation, any corporation of which any member referred to in paragraph (b) of the definition of ‘estate agent’ –
 - (i) ...
 - (ii) ...
 - (iii) ...
 - (iv) ...
 - (v) ...
 - (vi) does not comply with the prescribed standard of training;
 - (vii) does not have the prescribed practical experience.”

It is necessary to briefly explain the operation of section 27. In terms of the Act (s 26) no person may perform any act as an estate agent unless a fidelity fund certificate has been issued to such person and to every person employed by him or her as an estate agent. If such person is a company, a fidelity fund certificate must also be issued to every director of that company. If the person is a close corporation, a fidelity fund certificate must be issued to the corporation and to every member of that corporation as referred to in paragraph (b) of the definition of “estate agent” in section 1 of the Act. Applications for, and the issue of fidelity fund certificates, are covered by section 16. In terms of section 16(3) the Board is *obliged* to issue a fidelity fund certificate to an applicant, subject to certain provisions of the Act (which are not relevant for present purposes), provided the Board “is satisfied that the applicant concerned is not disqualified in terms of section 27 from being issued with a fidelity fund certificate ...” A person not disqualified in terms of section 27 is therefore *entitled* to be issued with a fidelity fund certificate, unconditionally. On the other hand, persons disqualified under section 27 have no such entitlement: section 27 constitutes a barrier to enter the industry in the sense that the Board is under no obligation to issue a fidelity fund certificate to any person subject to any of the disqualifications listed in section 27. Without such a certificate a person cannot enter the estate agency industry. However, although not *obliged* to issue a fidelity fund certificate to a disqualified person, a proviso to section 27 confers on the Board a *discretion* to do so if “the Board is satisfied that, to due regard to all the relevant considerations, the issue of a fidelity fund certificate to such

person will be in the interest of justice". When issuing a fidelity fund certificate in such circumstances, the Board may impose such conditions as it may determine.

The Board's discretionary power to issue a fidelity fund certificate to a disqualified person must not be understood to mean that the Board has the power to *exempt* any person from any provision of the Act. In terms of section 33(2), exemptions from the Act or any provision thereof may only be granted by the Minister of Trade and Industry. Any such exemption may be subject to such conditions as the Minister may determine. The word "Act" includes the regulations (s 1), meaning that the Minister may also exempt estate agents or categories of estate agents from any regulation made under the Act.

A fidelity fund certificate remains valid until 31 December of the year in which it has been issued (s 16(3)), and must be renewed annually on or before a certain date if an estate agent wishes to continue acting as an estate agent in the following year (reg 4 of the regulations pertaining to the issue of Fidelity fund and Registration Certificates – GN373 in GG 28588 of 2006-03-02). A fidelity fund certificate lapses automatically in certain instances, for example where an estate agent has been found guilty of an offence involving an element of dishonesty (s 28(5) read with s 27(a)(ii)). A certificate may also be withdrawn by the Board during the year, but only in those instances set out in the Act (ss 28(1) and 30(3)). One of these instances is where the Board has in terms of the proviso to section 27 issued a fidelity fund certificate to an estate agent who has not complied with the prescribed standard of training. Such withdrawal would typically occur if the estate agent in question has not complied with the conditions imposed by the Board at the time when the certificate was issued.

Section 27(a)(vi) requires closer scrutiny. It disqualifies a person from being issued with a fidelity fund certificate by the Board if such person "does not comply with a prescribed standard of training". The word "prescribe" is defined in the Act (s 1) as "prescribed by regulation". Regulations are dealt with in section 33. It empowers the Minister of Trade and Industry, after consultation with the Board, to make a number of regulations, including regulations "relating to the standard of training and practical experience of estate agents" (s 33(1)(gA)). From this it is abundantly clear that only the Minister, and not the Board, may introduce training requirements for estate agents constituting a barrier on newcomers to enter the industry. Similarly, only the Minister may lay down educational requirements to be met by practising estate agents in order to remain in the industry. The Board's powers are limited to exercising the discretionary power conferred on it under the *proviso* to section 27, namely to issue a fidelity fund certificate to a person who has not complied with the prescribed standard of training, if the Board considers this to be in the interest of justice. It is furthermore abundantly clear from section 27, read with section 33(1)(gA), that in so far as the *standard* of training for estate agents is concerned, such standard can *only* be prescribed by regulations made by the Minister of Trade and Industry. Accordingly, neither the Board nor any other institution or authority

may set the standard of training: this must be done by the Minister by way of regulations.

The Minister may delegate his powers under the Act to an official in the Department of Trade and Industry, other than the power to make regulations (s 35(1)). Since the standard of training must be prescribed by regulations made by the Minister, it follows that the Minister cannot abdicate his responsibility in this regard by making regulations purporting to empower a third party to prescribe the standard of training.

Section 33(1A) empowers the Minister to make different regulations in respect of different estate agents or categories of estate agents. The Minister may therefore introduce certain training requirements for certain estate agents and different training requirements for others. As mentioned earlier, the Minister may also exempt certain estate agents or categories of estate agents from any provision of the Act (including the regulations). It follows that the Minister may exempt certain estate agents or categories of estate agents from any or all of the training requirements (s 33(2)).

It is also clear from section 27(a)(vi) that the purpose of complying with the prescribed standard of training is primarily to overcome a *disqualification*, not to obtain a *qualification*. Accordingly, the standard of training prescribed by the Minister need not be qualification driven as such; the standard can be achieved without obtaining any formal qualification.

3 Compulsory training for estate agents within the constraints of the Estate Agency Affairs Act and the Constitution

It has been observed in passing that the aim of the Act is to convert the estate agency industry into a profession (*Noragent Edms v De Wet* – unreported 23 September 1983 (T)). With respect, this may be open to debate but for present purposes there is no need to discuss this further. Suffice to state that there is no indication in the Act that it was ever the legislature's intention to subject the estate agency industry to statutory control measures purely in order to enhance the status of estate agents. The Act is typically consumer-protection legislation, aimed at safeguarding the interests of consumers when dealing with estate agents (see *Rogut v Rogut* 1982 3 SA 928 (A); and Delpont *South African Property Practice and the Law* 2ed (2001) 820-821). Compulsory training requirements for estate agents must be seen in this context. The objective of such training cannot be divorced from the general objective of the Act, namely the promotion of consumer protection in the public interest. Accordingly, when introducing compulsory training requirements for estate agents and setting the standard of such training, the Minister must be mindful of the fact that the aim of the exercise is to ensure that estate agents are adequately equipped to perform their duties, in other words, that they have the necessary knowledge and skills to render the services expected of them. The intention can never be to use the training requirement as a strategy to limit the number of entrants to the industry in order to lessen competition, or to enhance the status of estate

agents. Accordingly, when making regulations prescribing the standard of training for estate agents the Minister cannot set an arbitrary standard but must determine the standard having regard to the general object of the Act.

There is no empirical evidence suggesting that compulsory training for estate agents benefit consumers in the sense that such training has the effect of limiting consumers' exposure to unscrupulous estate agency practices. Dishonest persons do not become honest through training. Nevertheless, it cannot be denied that the lack of knowledge on the part of an estate agent can impact negatively on the quality of the service rendered by such estate agent. To render a professional service an estate agent must be familiar with certain fundamental principles relating to estate agency practice. Lack of knowledge may lead to frustration on the part of consumers and, in the most serious scenario, may also cause consumers financial loss. To this extent government has a duty to ensure that estate agents, in their dealings with consumers, are properly equipped to render a level of service that can reasonably be expected of estate agents. But the training requirements must be realistic, having regard, on the one hand, to the benefit that is likely to result should such requirements be introduced and, on the other hand, the potential harm to consumers if they are not. The focus must be on what estate agents *must* know in order to perform their services, as opposed to what is useful to learn about property and the estate agency industry. There are many aspects relating to property that would be *useful* for an estate to know, without it being *essential* knowledge that must be possessed in order to render a professional service to a seller and buyer of a house.

It is submitted that regulations made by made the Minister setting a standard of training in excess of what is reasonably required to pursue the objectives of the Act are *ultra vires* the Act. From a constitutional perspective, such regulations fall foul of section 22 of the Constitution, in terms of which every citizen has the right to choose their trade, occupation or profession freely. Section 22 does permit that the practice of a trade, occupation or profession may be regulated by law, but this does not mean that such laws escape the application of the Bill of Rights. Where the regulation of a trade, occupation or profession is likely to impact negatively on a person's choice to become engaged in such trade, occupation or profession, such regulation infringes section 22 and will be constitutionally invalid unless it meets the "justification test" under section 36(1) of the Constitution: *Affordable Medicines Trust v Minister of Health* (2006 3 SA 247 (CC)). In terms of section 36 the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;

- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

It is submitted that compulsory training requirements imposed by the Minister in terms of regulations made under the Estate Agency Affairs Act can never be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom if the regulations

- (a) prescribe a syllabus unrelated to the work that the majority of estate agents perform, thereby adding no value to enhance estate agents' skills in respect of the services they render;
- (b) impose an unrealistic standard to be met in order to enter the industry, having regard to what estate agents reasonably ought to know to perform their work;
- (c) in effect empower those already in the industry to use the regulations to keep newcomers out of the industry, thereby restricting competition;
- (d) constitute a blanket barrier on entering the industry without any discernible benefit to the general public or the prospective estate agents affected by the barrier; and/or
- (e) introduce a dispensation designed to benefit the privileged few and entrench economic power in the hands of large industry players.

Essentially, the question whether compulsory training requirements for estate agents comply with constitutional requirements has to be determined with reference to two fundamental issues, namely

- (i) the services rendered by estate agents; and
- (ii) the level of knowledge or skill required to render those services.

In terms of the Act (see the definition of "estate agent" in s 1) the services rendered by an estate agent are the following:

- selling or buying immovable property / business undertakings;
- letting or hiring immovable property / business undertakings;
- negotiating sale / lease agreements;
- canvassing in connection with sale or lease transactions;
- publicly exhibiting immovable property for sale or for hire;
- collecting or receiving money payable on account of a lease of immovable property or a business undertaking;
- rendering any such other service as the Minister on the recommendation of the Board may specify from time to time by notice in the Government Gazette. (One of the services specified in this regard (GN1485 of 1981-07-17) is that of collecting or receiving money payable to a developer or a body corporate in terms of the Sectional Titles Act 95 of 1986 or the Share Blocks Control Act 59 of 1980.)

For present purposes the following aspects are to be noted:

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- In practice not all estate agents are engaged in all of the estate agency services referred to above. Some specialise in the sale of residential properties, other in letting, *etcetera*. Some confine themselves to relatively elementary services, such as canvassing or acting as “sitters” at show houses. A small number of estate agents are engaged in the commercial sector, namely the sale or lease of business undertakings. Others specialise only as managing agents of sectional title and share block schemes; there are “estate agents” in terms of the Act because they collect or receive sectional title and/or share block levies, but they are not in any way engaged in the sale or lease of immovable property as such. The nature of the skill and knowledge required to render each of these services differ, in some cases to a large degree. The managing agent of a sectional title scheme requires far more in-depth knowledge of the Sectional Titles Act than a person who merely sits at show houses on Sundays. This obviously has to be taken into account when deciding whether or not a specific training requirement imposed on all estate agents generally is reasonable and justifiable.
 - A distinction must be drawn between the *services* rendered by estate agents and the *specific tasks* performed by an estate agent in the course of rendering such service. Some tasks performed by estate agents in rendering a service require little or no technical skill as such. This includes tasks such as erecting a for-sale board, or dropping off marketing leaflets. Other tasks require knowledge as opposed to skills, such as the filling in of a standard pre-printed sale or lease document; assessing the likely market value of a property; commenting on the desirability of investing in a sectional title scheme; *etcetera*. In practice many estate agents take it upon themselves to render both these non-specialist and specialist tasks. However, there is no *legal obligation* on an estate agent to become engaged in the specialist tasks, and the quality of an estate agent’s service to a member of the public is not necessarily negatively affected if an estate agent confines himself to the non-specialist task only. For example, an estate agent instructed to sell a sectional title unit is under no legal obligation to explain to a prospective buyer how a sectional title scheme works; he is also under no obligation to fill in the relevant sale agreement for the seller and buyer. The estate agent can render a quite acceptable service by introducing the buyer to the sectional title unit and referring him to an attorney for technical advice and the completion of the sale agreement.

One must therefore be careful of the argument that there are compulsory training requirements for lawyers, financial advisors, accountants, plumbers, electricians, *etcetera*, and that estate agents should accordingly also be subjected to compulsory training. The aforesaid persons are subjected to compulsory training because the tasks they are required to perform demand specialist skills and knowledge – this is not necessarily so in respect of the tasks which estate agents are required to perform.

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- Given the nature of the estate agency business and the complexities of property transactions, it cannot be gainsaid that a person entering the industry to work as an estate agent requires at least *some* knowledge of the estate agency business. Such person also has to have a basic understanding of certain aspects of property and contract law. However, the standard thereof, and the method of obtaining the knowledge and of proving one's ability, need not be the same as that prescribed for persons engaged in rendering specialist services, such as lawyers, investment analysts and accountants. In fact, there is ample proof that a person can successfully and professionally render the services of an estate agent without having any formal educational qualification as such, and without having passed a formal examination. During the period 1984-1993, when passing an examination was compulsory in order to remain in the industry, the Board was inundated with applications from persons requesting exemption from the examination. This is discussed more fully below. In virtually all of these cases the applicants provided proof that during the period that they had worked as estate agents they were very successful and had rendered excellent services to members of the public, despite the fact that they had not passed the compulsory examination.
 - Estate agents can either work for themselves as principals or they can be employed as employee estate agents by principal estate agents. The level of knowledge required in order to render the services as a principal estate agent is not necessarily the same as that required to render services as an employee estate agent. This, too, has to be taken into account when deciding whether or not a specific training requirement imposed on all estate agents generally is reasonable and justifiable.

4 Compulsory training for estate agents: 1983-1990

On 1 July 1983 the Minister of Industries, Commerce and Tourism, after consultation with the Estate Agents Board (as it was then known), promulgated regulations in terms of section 33 of the Act prescribing, for the first time in the history of the estate agency industry, compulsory training requirements for estate agents (R1409 in Government Gazette 8783 of 1983-07-01). The regulations empowered the Board to conduct an examination for estate agents at least three times per year. In terms of regulation 5 the syllabus for the examination had to be compiled by the Board, the standard of which had to be approved by the Minister. The regulations detailed the aspects of estate agency practice to be covered by the syllabus; these were to include, amongst others, property economics, the time-value of money, investment analysis and feasibility studies.

The training regulations came into effect on 1 January 1984. In terms of regulation 8(a) any principal estate agent to whom a fidelity fund certificate had been issued for the first time during the period 1 January 1983 to 31 December 1983, and any employee estate agent to whom a fidelity fund certificate had been issued for the first time between 1 January 1980 and 31

December 1983, had to pass the examination by 31 December 1986, failing which such estate agents had to cease working as estate agents until they had passed the examination. These estate agents thus had three years in which they had to pass the examination (1 January 1984 to 31 December 1986). Any person who entered the industry for the first time after 1 January 1984, could be issued with a fidelity fund certificate by the Board, but then had to pass the examination within 12 months from the date of issue of the certificate. If the examination had not been passed within the 12-month period, such person's fidelity fund certificate forthwith lapsed and had to be returned to the Board; an application for a new certificate could then be made only after the examination had been passed.

The training requirements were couched in controversy from the outset. The syllabus was contained in a publication commissioned by the Board, entitled *The Study Guide for Estate Agents – Principles of Real Estate*. Many students found it difficult to read because of the small font size in which the book was printed. The examination took the form of 54 multiple questions, considered by most candidates to be too academic and not practically orientated. The major problem, however, was the syllabus. It gave scant attention to important legal issues in which estate agents were involved in on a daily basis, such as the proper completion of a pre-printed agreement of sale or lease document, commission, ethics, *etcetera*. Instead, the syllabus covered complicated financial issues and feasibility studies which were of no interest to estate agents engaged in the sale of residential properties. Those estate agents – by far the majority in the industry – considered the study material totally removed from their everyday work and extremely difficult to master. These criticisms escalated with the introduction in 1985 of a supplement to the study material, which *inter alia* contained a detailed discussion of the system of leasehold in Black urban areas. This, again, was of little concern to most estate agents at the time. To master the syllabus students had to buy a financial calculator costing a few hundred rand. The calculator in itself was difficult to master and most candidates found it necessary to attend a so-called calculator course where they were trained on how to operate the device.

The problems showed up in the failure rate. The first examination, written in March 1984, had a pass rate of 71%, in other words 29% failed. The trend continued from one examination to the next. Many of those that failed at their first attempt, sat for the examination again and again, still without success. While an average 70% pass rate, viewed in isolation, may be high, the average failure rate of 30% had a dramatic impact. Scores of experienced estate agents who had been in business from 1 January 1980 to 31 December 1983 had to leave the industry on 31 December 1986 because they had not passed the examination. The same applied to those who had entered the industry for the first time after 1 January 1984 but had failed to pass the examination within 12 months after the first issue to them of a fidelity fund certificate; they too had to close their doors. Most of these estate agents had a very successful track record: they had sold many properties during the period in which they had worked as estate agents, thereby not only rendering a valuable service to sellers and buyers but also providing a

livelihood for themselves and their families. Their only shortcoming was that they could not pass an academically-orientated multiple-choice examination covering a syllabus which they could hardly understand and relate to. Despite the fact that they were successful estate agents, they had to leave the industry.

The result was predictable: the Board was inundated with applications by persons who had failed their examination to be issued with fidelity fund certificates in terms of the proviso to section 27, while the Minister was flooded with requests in terms of section 33(2) for exemption from the training requirements. Applicants submitted affidavits by the estate agency firms they worked for, proclaiming their professional skills as estate agents despite the fact that they had not passed the examination. The affidavits were invariably accompanied by testimonials from sellers and buyers to the same effect. Most of these applications were granted, since neither the Board nor the Minister could find any justification for barring a competent and skilful estate agent from remaining in the industry – and earning a living – merely because such person could not pass the Board examination.

As stated earlier, one of the major criticisms of the syllabus was that it paid too little attention to everyday, practical issues affecting the estate agency industry and the work in which estate agents were involved. To address this issue the Board decided in 1987 to change the syllabus and to prescribe an additional publication to be studied, namely the book by Delport *SA Property Practice and the Law*. The Board took little cognisance of the fact that the book was never intended to be a study guide for estate agents, but was written primarily as a reference work for property practitioners. The effect of the Board's decision was that prospective estate agents henceforth had to study *two* books in order to pass the examination, namely *SA Property Practice and the Law* (which focused on legal issues) and *The Study Guide for Estate Agents* (which covered the economics of real estate). At the same time the number of examination questions was increased to 80, with an equal number of questions on the law side and the economics side.

The impact on the pass rate was disastrous. While most candidates could relate to the law side of the examination, the majority struggled desperately with the economic side. They were asked complicated questions on the time value of money, feasibility studies and market value. The outcome surprised no-one: large numbers of candidates failed the examination even after attending training courses and spending hours trying to master the study material. Many of those had not sat for academic examinations for years and found it extremely difficult to memorise the large volume of work. Despite all their effort, they had to leave the industry after 12 months from the date of the issue of their fidelity fund certificates because they could not pass the examination. The expected occurred: the number of applications to the Board in terms of the proviso to section 27 escalated dramatically, while the Minister's office experienced an avalanche of applications from persons seeking to be exempted from the training requirements.

Inevitably, both the Board and government started questioning the need for compulsory training in the estate agency industry. The industry

desperately wished to retain the compulsory training, but pressure was building from government's side to change the system (see Estate Agents Board *Newsletter* (40) March 1990 2). Government was not totally opposed to the idea of compulsory training, but insisted that an alternative way be found whereby persons could obtain entry into the industry, or remain therein, even if they failed the examination.

5 Compulsory training for estate agents: 1990-1993

On 29 June 1990 the Minister introduced amendments to the training regulations promulgated seven years earlier (R1468 and R1469 in *GG* 12554 of 29 June 1990). The main changes were the following:

- (a) As from 1 January 1991 no person could work as a principal estate agent (*ie*, operate an estate agency business) unless such person has first passed the Board examination.
- (b) All persons who entered the industry for the first time after 1 January 1991 and who had not passed a Board examination, were given a period of two years in which to pass the examination. Such persons were known as "candidate estate agents" and if the examination was not passed within the two year period, the fidelity fund certificate issued to them lapsed immediately. A candidate estate agent had to be employed by an estate agency business as an employee estate agent and had to
 - (i) disclose in all printed matter relating to his activities as an estate agent (excluding advertisements in the press) that he has not complied with the prescribed standard of training;
 - (ii) work under the active supervision and control of a principal estate agent;
 - (iii) complete or draft any documentation relating to a transaction negotiated by him, in the presence of an estate agent who had complied with the prescribed standard of training. The latter person then had to certify on the documentation that it had been completed in his presence.

(See Estate Agents Board *Newsletter* (42) December 1990 10.)

The new regulations did very little to ease the pressure on the most critical aspect of the training dispensation, namely that persons who did not pass the examination had to leave the industry. Essentially all that had been changed was that the period for passing the examination was extended from 12 months to 24 months. The issue of providing an alternative way to enter the industry or remain therein if a person failed the examination, was not addressed. Not surprisingly, therefore, the applications to the Minister for exemption from the training requirements remained at a high level, as did applications to the Board to be allowed to remain in the industry despite being disqualified on the ground of not complying with the prescribed standard of training.

6 Compulsory training for estate agents: 1993 to date

By 1993 pressures mounted on both the Board and government to make fundamental changes to the training regulations. The Board responded by comprehensively revising the syllabus and introducing the new study material in a publication entitled *An Introduction to the Fundamental Principles of Estate Agency*. The dreaded economic section was scrapped and the voluminous law side of the syllabus was greatly reduced. Government, in turn, reacted by introducing a completely new training system (R1923 and R1963 in GG 15200 of 1993-10-15). In terms of the new system a person who had not passed their examination could gain entry into the estate agency industry by working for an estate agency firm as a candidate estate agent. A candidate estate agent automatically achieved full status after holding a fidelity fund certificate for a period of 12 months. In other words, a person was no longer required to pass the examination within any period of time in order to remain in the industry. Moreover, a person could open his or her own estate agency business as a principal estate agent if he or she had passed the examination *or* had been in possession of a fidelity fund certificate as a candidate estate agent for a period of 12 months.

The Board's chairperson at the time motivated the introduction of the new dispensation as follows (see Estate Agents Board *Newsletter* April 1993 1):

"It has been found in practice that many candidate estate agents fail to pass the examination within the two-year period, mainly because they lacked the necessary academic background for this purpose, despite the fact that they had proved themselves to be successful or potentially competent estate agents during that period. The Board was consequently put under extreme pressure to exempt such persons from the examination requirement ...".

The chairperson added that requests for exemption from the examination were invariably approved by the Board almost "as a matter of course" since there could be no justification for refusing to allow a person to continue a career merely because he could not pass the Board examination. This situation together with a growing awareness that the regulatory application of the examination provisions were contrary to free market principles, highlighted the need for an alternative system "which would sensibly accommodate the aspirations of those people who were unable to pass a formal Board examination".

The new system had all the characteristics of a rushed process. The underlying intention was to introduce a system whereby a person could obtain entry into the industry in one of two ways, namely

- (a) by passing an examination; or
- (b) working as a candidate estate agent for 12 months, thus obtaining sufficient practical experience to enter the industry.

However, there was a major flaw: in terms of the regulations a person could obtain full status as an estate agent by simply being in possession of a

fidelity fund certificate for 12 months. In other words, a person could apply to the Board for a fidelity fund certificate as a candidate estate agent and then sit at home or continue with his or her other employment, and after 12 months automatically acquire full status as an estate agent. Having acquired full status such person could open his or her own business without any practical experience and without any knowledge of estate agency laws and procedures. In effect, the new system had abolished compulsory training for estate agents altogether, without introducing compulsory practical experience in its place.

These deficiencies did not, however, trouble the Board or government excessively. It came as a huge relief for both these stakeholders that persons could enter the estate agency industry, or remain therein, without passing a formal Board examination. Pressure on the Board and the Minister to be exempted from the examination was finally something of the past.

7 The draft regulations

The proposed new training requirements are contained in two separate Government Notices. The first (GN 971) contains what is called the "Learner Estate Agent Regulations", while the second (GN 973) covers the "Standard of Training of Estate Agents Regulations". Each of these is discussed next.

The Learner Estate Agent Regulations

The regulations (excluding the definitions contained in reg 1) read as follows:

- "2. A person who intends to become an estate agent must serve as a learner estate agent, under the supervision of a principal estate agent, for a continuous period of 12 months from the date of the first issue to that person of a learner fidelity fund certificate by the Board.
3. In the event of a learner estate agent being absent from the service contemplated in regulation 2, for any reason whatsoever, for a continuous period exceeding 30 days during the compulsory learnership period;
 - (a) the number of days of absence exceeding 30 days will be added to the compulsory learnership period; and
 - (b) an additional number of days amounting to one half of the period of absence from service exceeding 30 days will be added to the compulsory learnership period.
4. In the case of a learner estate agent having failed to comply with the prescribed standard of training during the compulsory learnership period contemplated in regulation 2, the learnership period must be extended for a further period until such time as the learner estate agent has duly complied with the prescribed standard of training, after which a full status fidelity fund certificate may be issued to the learner estate agent by the Board.
5. (1) A learner estate agent may not perform any act as an estate agent:
 - (a) unless the learner estate agent has duly disclosed in all printed matter relating to the learner estate agent's activities as an estate agent, excluding advertisements in the press, and in a manner determined by the Board, that the learner estate agent is a learner estate agent;

- (b) otherwise than under the active supervision and control of a principal estate agent or of an estate agent who has complied with the prescribed standard of training.
- (2) A learner estate agent may not:
 - (a) in any way, directly or indirectly, hold himself or herself out as someone who or advertises that he or she has complied with the prescribed standard of training;
 - (b) in any manner act or hold himself or herself out as a principal estate agent; or
 - (c) in his or her capacity as an estate agent, complete or draft any documentation relating to any transaction negotiated by him or her in his or her capacity as an estate agent, save in the presence of an estate agent who has complied with the prescribed standard of training and who certifies on the documentation in question that the said documentation has been completed in his or her presence.”

The following aspects of the draft regulations require closer analysis:

- The wording of regulation 2 suggests that the learnership regulations apply only to persons *intending to become* estate agents. This begs the question: What is the position of *current* candidate estate agents, and even *illegal* estate agents? Persons who are currently candidate estate agents do not *intend becoming* estate agents; they *are* estate agents as defined in the Act. Ironically, the same applies to illegal estate agents, that is, persons who work as estate agents without being in possession of fidelity fund certificates. These persons *are* estate agents for the purposes of the Act; they can be disciplined by the Board for not having fidelity fund certificates and the Estate Agents' Fidelity Fund can be held liable to reimburse persons who suffer pecuniary loss by reason of theft of trust money committed by any such estate agent (s 18). Illegal estate agents do not intend becoming estate agents; they *are* estate agents despite the fact that they render their services illegally.
- Regulation 2 refers to the issue of a “learner fidelity fund certificate”, while regulation 4 refers to a “full status fidelity fund certificate”. However, the two expressions are not defined in the draft regulations. They are expressions sometimes loosely used in the industry, but they are not concepts having any defined meaning in terms of the Act. The Board is not empowered by the Act to issue either of these fidelity fund certificates. It may only issue fidelity fund certificates, not *learner* or *full status* fidelity fund certificates. To the extent that regulations 2 and 4 purport to empower the Board to issue fidelity fund certificates not recognised by the Act, the regulations are *ultra vires* and void.
- In terms of the draft regulations a learner estate agent must “serve” under the “supervision” of a principal estate agent. However, the regulations are silent about what “serve” and “supervision” mean. What must the learner do during the learnership and what are the principal's duties in respect of the learner? Is the principal obliged to teach the learner anything and is the learner obliged to learn anything? Who will determine whether in fact the learner has “served” and whether the principal estate agent has “supervised” such learner?

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- The practical effect of the learnership regulations is that a “learnership” terminates after 12 months provided the learner has been “present” only one day every 30 days (*ie* 12 days in total during the year), and such learner has completed the prescribed training during the 12-month period. What purpose is served by the 12-day learnership? What can a learner effectively learn during this period? Is there any rational basis for keeping an estate agent out of business for a whole year, while effectively he needs to undergo a learnership of 12 days only?
 - Regulation 2, on the face of it, imposes a blanket prohibition on a person to enter the estate agency industry unrestricted. Such person cannot obtain from the Board a fidelity fund certificate to commence his own business before a period of 12-months has lapsed, during which period the person has to engage himself in something unspecified in the regulations and which serves no identifiable purpose. It is difficult to see on what basis it could be said that this is reasonable and justifiable from a constitutional point of view.
 - In terms of regulation 3 the learnership period is extended for a certain number of days, should the learner estate agent be “absent from the service contemplated in the regulation 2, for any reason whatsoever, for a continuous period exceeding 30 days during the compulsory learnership period”. What is meant by the expression “absent from the service contemplated in regulation 2”? As stated above, regulation 2 does not contemplate any specific service. But apart from that, when would an estate agent be “absent” from that unspecified service? Estate agents are not compelled by law to render services from specified premises. Many principal estate agents work from home and so do the estate agents employed by them. Estate agents do not have office hours and do not report for duty like other employees. In practice, many employee estate agents do not even see their principals during any 30-day period. Would they now be “absent” from service? Moreover, who is going to supervise or control whether or not a learner estate agent has in fact been “absent”? Is a principal estate agent obliged to keep a logbook of some sort? What will be the position if a learner estate agent disputes the fact that he had been “absent” for a period exceeding 30 days during the learnership period? Does that dispute lie with the Board, or with the relevant principal estate agent? How are those disputes to be addressed and settled?
 - From a practical point of view the regulations in effect pave the way for “life-long” learnerships. Persons who cannot afford or master the training will be confined to life-long learner status. They will never be able to commence their own businesses unless the Board in its discretion issues to them a fidelity fund certificate under the proviso to section 27, or the Minister exempts them from the training requirements. During the period of the learnership they may well prove to be very successful estate agents, but this would constitute no ground to escape from the learnership status: they will remain learners forever, unless they are given relief by either the Board or the Minister. It requires no special

insight to see that the problem that had plagued the Board in the past is simply going to repeat itself: hordes of estate agents who fail to master the training requirements, for whatever reason, will launch applications to the Board under the proviso to section 27, or approach the Minister for exemption from the training requirements. History will simply repeat itself.

- A major problem for many prospective estate agents is that they may experience grave difficulties in finding learnerships, especially in rural areas. There is fierce competition in the estate agency industry and no estate agency firm would want to train a learner who, after 12 months, is going to turn into a competitor. The result is that newcomers could be effectively excluded from the industry by existing firms fearing competition. Instead of serving a useful educational purpose, the training regulations could therefore be used as an instrument to stifle competition and growth, entrenching economic power in the hands of existing firms. This is clearly not in the public interest.

The Standard of Training of Estate Agents Regulations

Regulation 1 contains some definitions, including a definition of “NQF”. This reads as follows:

“NQF” means the National Qualifications framework as defined in section 1 of the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995)”.

Regulations 2-6 state the following:

“Registration

2. A person who intends to:
 - (a) register as an estate agent with the Board, whether as:
 - (i) a non-principal estate agent; or
 - (ii) a principal estate agent,must comply with the educational requirements prescribed by the NQF in accordance with the Regulations made under the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995);
 - (b) perform the functions and activities of a non-principal estate agent, must, as from the date of the coming into operation of these regulations, complete the Further Education and Training Certificate: Real Estate; or
 - (c) perform the functions and activities of a principal estate agent, must, as from the date of the coming into operation of these regulations, complete the National Certificate: Real Estate.

Fidelity fund certificate

3. Subject to the proviso to section 27 and section 33(2) of the Act, no person may, as from the date of the coming into operation of these regulations, be issued with a full status fidelity fund certificate by the board unless such person has fulfilled the educational requirements referred to in regulation 2(b) and (c).

Standard of Training

4. (1) An estate agent who is registered as either a non-principal estate agent or a principal estate agent as from the date of the coming into operation of these regulations will be required to undergo:
 - (a) a process of Recognition of Prior Learning as contemplated in the NQF; including
 - (b) the identification, assessment and acknowledgement of skills and knowledge that has been obtained by that estate agent;
- (2) The process contemplated in sub-regulation (1), will:
 - (a) be undertaken within the context of the qualifications referred to in regulation 2(b) and (c), whether such skills or knowledge have been obtained through:
 - (i) formal training and education; or
 - (ii) informal or non-formal training and education, including on-the-job training and life experience; and
 - (b) be completed on or before 31 December 2010 or within such extended period as the Board may grant for this purpose.
5. Credit towards the educational requirements referred to in regulation 2(b) and (c) will, after due assessment in accordance with prescribed National Qualifications Framework procedures, be granted to the currently registered estate agents: Provided that the knowledge and skill of the particular applicant matches the learning outcomes of either the Further Education and Training Certificate: Real Estate or the National Certificate: Real Estate, as the case may be.
6. The Board may prescribe any Continuing Professional Development requirements as contemplated in the NQF.
7. The prescribed Continuing Professional Development requirements must be complied with by all estate agents, prior to the renewal of any fidelity fund certificate issued by the Board to an estate agent, failing which, such fidelity fund certificate may not be issued to such an applicant."

The following aspects of these regulations deserve attention:

- Regulation 2(a) refers to persons intending to *register* as estate agents with the Board. The Act, however, makes no provision for any registration process as such. No prospective estate agent ever "registers" with the Board. An application is made for the issue of a fidelity fund certificate, no more. The Board is not compelled by the Act to keep a register, or to "register" anyone. Technically, therefore, regulation 2(a) is meaningless.
- In terms of the Act (s 27(a)(vi)) the duty rests on the Minister of Trade and Industries to prescribe the standard of training by way of regulations made under the Estate Agency Affairs Act. The Minister cannot delegate this power to anybody else. However, in terms of regulation 2 the standard of training prescribed by the Minister is the "education requirements prescribed by the NQF in accordance with the regulations made under the South African Qualifications Authority Act". As mentioned earlier, "NQF" is defined in regulation 1 as "the National Qualifications framework as defined in section 1 of the South African Qualifications Authority Act, 1995 (Act No. 58 of 1995)". It needs to be noted in passing that the NQF is not a body that can prescribe anything: it is merely a qualifications framework administered by the National Qualifications Framework Authority (NQFA). This is a body appointed by the Minister of

Education in consultation with the Minister of Labour. But this is not the main problem. The main problem is that the regulations under the South African Qualifications Authority Act are not made by the Minister of Trade and Industries (the relevant Minister for the purposes of the Estate Agency Affairs Act), but by the Minister of Education in consultation with the Minister of Labour. Clearly, therefore, the Minister of Trade and Industry has not prescribed the standard training in terms of the Estate Agency Affairs Act: he has delegated that duty to the Minister of Education. This is certainly not what the legislature intended with section 27(a)(vi) of the Estate Agency Affairs Act. It is submitted, therefore, that regulation 2(a) is *ultra vires* the Act and *void*.

- Regulation 2(b) and (c) apparently refer to two qualifications, namely the “Further Education and Training Certificate: Real Estate” and the “National Certificate: Real Estate”. However, it is not clear from the regulations what these qualifications entail, under whose auspices or authority they fall and what one must do to obtain the qualifications. Presumably they are qualifications registered by the NQFA on the NQF, but it is anyone’s guess whether this is in fact so. Without obtaining or completing either of the qualifications a person cannot work as an estate agent, but it is impossible to obtain or complete any of the qualifications because the regulation fails to give any indication how to go about doing so. In the circumstances the conclusion is inescapable: the regulation is void for vagueness.
- In terms of regulation 3 *no person* may as from the date of the coming into operation of the regulations be issued with a full-status fidelity fund certificate unless such person has complied with the educational requirements referred to in the regulation 2(b) and (c), subject to the proviso to section 27 and section 33(2) of the Act. What this means is that not even *existing* estate agents will be able to continue working as full-status estate agents when the new regulations take effect. They may (presumably) continue working as estate agents until their current fidelity fund certificates expire on 31 December, but they will not be issued with fidelity fund certificates for the following year (meaning that they will have to close doors) until they have
 - (a) complied with the educational requirements referred to in regulation 2(b) and (c);
 - (b) undergone the process contemplated in regulation 4 and were credited with sufficient credits towards the qualification based on their prior learning (see below);
 - (c) been issued with a fidelity fund certificate by the Board in terms of the proviso to section 27; or
 - (d) been exempted by the Minister from the educational requirements in terms of section 33(2) of the Act.

Unless a notice will be published by the Minister in terms of section 33(2) exempting *all* existing estate agents from the Act, one can expect tens of thousands of applications to be lodged with the Board in terms of

the proviso to section 27. According to recent newspaper reports (*Die Burger* 31 October 2007 18) the Board is not even capable of handling the normal volume of applications for the issue of fidelity fund certificates – how is it going to deal with all these applications in terms of the proviso to section 27?

- Regulation 4 is seriously flawed. It purports to introduce a special dispensation for existing estate agents who have not formally completed the relevant qualification referred to in regulation 3. In terms of regulation 4(1) all existing estate agents would be required to undergo

“(a) a process of Recognition of Prior Learning as contemplated in the NQF; including

(b) the identification, assessment and acknowledgement of skills and knowledge that has been obtained by that estate agent.”

The regulation must be read with regulation 5. Taken together, the idea seems to be that all existing estate agents will have to undergo a RPL process to determine whether and to what extent they have complied with the educational requirements prescribed under regulation 2. If their prior learning earns them sufficient credits they will not be required to complete the qualifications referred to regulation 2 as such in order to be issued with a fidelity fund certificate by the Board. However, the draft regulations are totally silent on what the position would be if existing estate agents have *insufficient* “prior learning” to meet these educational requirements. Read with regulation 3 it seems that such estate agents will have to keep their doors closed until they obtain whatever credits they may still require in order to complete the relevant qualification referred to in regulation 2: they will not be issued with fidelity fund certificates by the Board until this occurs, except if they are fortunate enough to be exempted from the training requirements or are issued with a fidelity fund certificate pursuant to the proviso to section 27. In the process thousands of estate agents would lose their jobs, despite the fact that they have been very successful estate agents all along. On what basis can this be remotely justified?

According to newspaper reports (*Die Burger* 31 October 2007 18) there are currently in excess of 80 000 practising estate agents in South Africa. In terms of regulation 4 they are all to go through a RPL process which must be completed on or before 31 December 2010, in other words, in just over three years’ time. This means that approximately 80 estate agents will have to undergo the RPL process every single day for the next three years to meet the deadline. It is safe to say that the deadline will not be met and that the Board will have no choice but to extend the period as contemplated in regulation 4(2)(b). The process can go on for years to come. In the meantime existing estate agents who have not yet gone through the RPL process and/or who have not obtained sufficient credits towards the qualification referred to in regulation 2, cannot be issued with fidelity fund certificates and cannot continue with their work. The industry will grind to a halt – all because of the training requirements. Existing estate agents would therefore have no choice but to complete the qualifications referred to in regulation 2 at their

earliest opportunity in order to keep their businesses alive. Some insiders with influence may be able to speed matters and arrange that they undergo the RPL process during the period of their current fidelity fund certificate; if their prior learning affords them sufficient credits they will then be able to apply to the Board for a fidelity fund certificate for the following year. But the majority will not be as fortunate.

Presumably assessors and moderators will be empowered by the NQFA to RPL existing estate agents and to take decisions whether or not they are sufficiently qualified to enter the estate agency industry. It is an open question what prior learning will be taken into account – this is to be decided upon by the assessors and moderators. But this begs the question: what provision of the Estate Agency Affairs Act authorises the Minister of Trade and Industry to make regulations empowering assessors and moderators appointed by the NQFA to decide whether an estate agent has sufficient prior learning to meet the standard of training prescribed in terms of the Estate Agency Affairs Act?

It is hard to escape the conclusion that regulation 4 is *ultra vires* the Act and void. It is submitted that the regulation in any event falls foul of constitutional requirements. Scores of estate agents may be found to have insufficient prior learning to meet the educational requirements. However, despite this “shortcoming” they may have been extremely successful estate agents, providing jobs to hundreds (perhaps thousands) of other persons. They would have to close their doors simply because someone clothed with authority by the NQFA took the view that they are insufficiently qualified. On what basis can this ever meet the justification test contemplated in section 36 of the Constitution?

- Regulations 6 and 7 are *ultra vires* the Act and void. The reason is obvious: the Act does not empower the Board to lay down any educational requirement as a barrier to enter the industry, or to remain therein. Of course, nothing prohibits the Board from becoming engaged in continuing professional development pursuant to the powers conferred on it by section 8(c), but this is something completely different from prescribing compulsory education requirements.

8 Conclusion

It is difficult to find anything positive to say about the draft regulations. The substantive provisions are couched in wide, loose terms giving rise to uncertainty and more questions than answers. A number of regulations are void, either because they are *ultra vires* the Estate Agency Affairs Act or because they are too vague to be enforceable. Some do not pass the justification test contemplated in section 36 of the Constitution. Clearly, the legal issues have not been given sufficient consideration. In fact, one wonders whether they have been considered at all.

From a policy point of view the fundamental question is whether the new dispensation will really benefit consumers and the industry in general. Unfortunately the draft regulations are so vague and badly worded that it is

difficult to express a considered opinion in this regard. What *is* clear is that the regulations will impact negatively on competition in the industry, should they become law. A further certainty is that the number of illegal estate agents in South Africa will swell substantially should the new educational requirements come into operation. It is unrealistic to expect that estate agents who have proved their success in the industry over many years will close their doors simply because some or other NQFA assessor has made a determination that they have had insufficient prior learning to meet the compulsory educational requirements. Unless those estate agents are exempted from the training requirements altogether or are issued with fidelity fund certificates by the Board in terms of the proviso to section 27 of the Act, they will merely continue with business.

Training requirements for estate agents will only be effective and respected if adherence thereto can be effectively monitored and enforced. Setting artificial or unrealistic educational requirements can give rise to such complexities in practice that enforcement of the system becomes an impossible task. The Board simply does not have the resources to effectively implement, and monitor compliance with, the training requirements envisaged by the draft regulations.

Proponents of the draft regulations will undoubtedly argue that the industry needs improved and more extensive educational standards compared to the current standards. Whether or not that is true, requires a separate debate. What has to be remembered, however, is that raising training requirements in itself does not make any industry or profession more attractive for newcomers, more respected in the public eye, or more professional. On the contrary, raising the barriers to enter an industry invariably leads to reduced competition, and resultant inefficiencies.

Job creation and economic empowerment, especially in the previously disadvantaged communities, are of paramount importance in South Africa. These processes will never gain any momentum in the estate agency industry if the requirements to enter the industry are out of touch with what people generally can achieve and afford. Any training system for estate agents which fails to take into account the realities of modern day South Africa is doomed from the outset, especially if the process achieves little more than to play in the hands of the privileged few.

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