

SUBMISSIONS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON PROPERTY PRACTITIONERS BILL (B-2016)

The Law Society of South Africa (LSSA) represents more than 24 000 practising attorneys and almost 6 000 candidate attorneys countrywide. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL) and the four statutory provincial law societies, namely the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KSNLS), the Law Society of the Northern Provinces (LSNP) and the Law Society of the Free State (LSFS).

We hereby make the following comments to the Bill:

AD SECTION 49 (a)(vii):

The requirement for a valid tax clearance certificate in order for a property practitioner to practice may discriminate against or impede upon the constitutional rights of property practitioners. Section 22 of the Constitution provides that every citizen has the right to choose their trade, occupation or profession freely. An error on the part of the South African Revenue Service (SARS) may result in a practitioner's tax clearance being suspended, resulting in a Fidelity Fund certificate not being issued, which will either preclude an otherwise qualified person from practising as property practitioner or turn him or her into a criminal for practising without a Fidelity Fund certificate.

AD SECTION 57 (1)(b):

Insert the words "*including an attorney*" in line 2 after the words "service provider".

Attorneys regularly find that sellers and purchasers are pressurised by the estate agent (property practitioner) to appoint a particular attorney to attend to the conveyancing, or that the agent without the knowledge of the parties inserts the name of a particular attorney and sends the signed deed of sale to such attorney to proceed with the registration. This undermines the attorney-client relationship, which is the essence of attorneys' services, as the estate agent becomes the *de facto* "client" of the attorney. [Also refer comments hereunder on section 65]

AD SECTION 62(3):

Insert the words "*whether directly or indirectly*" in line 1 after the words "not entitled"

Many problems (including for the Attorneys' Fidelity Fund) arise when estate agents anticipate payment of commission and take out "bridging finance" where the attorney must then undertake to repay the financier upon registration of transfer when the proceeds of the transaction become available. Predictably, agents who require bridging finance are often in financial trouble and in a failing practice.

AD SECTION 65(1):

Insert the words "*or receive from*" in line 2 after the words "*in any way offer..* "

And

AD SECTION 65(2):

Insert the words "*or offers*" in line 2 after the words "*person who accepts..* "

It is rare for an estate agent to attempt to influence a person who issues a certificate. Rather, the opposite is much more common, namely that the agent requests the certificate on behalf of the parties and may demand some financial return ("kickback") from the person concerned. Such kickbacks are almost invariably paid discreetly and without the knowledge of the seller who pays for it.

AD SECTION 65 (GENERALLY):

Add a further category (d) to include specialist reports on the condition of the property.

Although Section 66 requires the mandatory disclosure form, many purchasers require, and sellers offer, an independent specialist report on the condition of the property. This practice is likely to spread. The purchaser strongly relies on such specialist report, which becomes very important when any defects or problems manifest. For obvious reasons, it will be undesirable if property practitioners influence such reports and/or demand hidden kickbacks from the specialist.

For the same reason, we recommend that a similar further clause (e) be inserted to prohibit any influence or incentive regarding the selection and appointment of the conveyancer for the transaction. Kickbacks are often involved and are the bane of the legal profession. Such kickbacks are invariably hidden and very difficult to track and to prove when both agent and attorney collude and for obvious reasons do not disclose same. A routine audit of the books of an estate agent's practice is unlikely to reveal any kickbacks, but often reveal a remarkable propensity of its clients to overwhelmingly select only one or two conveyancers (who pays the agent's commission upon registration of transfer) for their transactions.

AD SECTION 67:

This section requires serious reconsideration.

It should replicate Section 83(8)(a) of the Attorneys Act 53/1979, which essentially prohibits any person, except a practising legal practitioner, in expectation of any fee, gain or reward, direct or indirect, to himself or to any other person, from drawing up, preparing or causing to be drawn any agreement, deed or writing

relating to immovable property or to any right in or to immovable property, other than contracts of lease for periods not exceeding five years, conditions of sale or brokers' notes.

Firstly, it is not clear why the Bill requires the seller (and not the property practitioner) to "draft" the agreement to sell in any of eleven official languages when by definition it is the property practitioner who introduces the purchaser (with its particular language requirements) to the seller, almost invariably with a pre-printed offer to purchase in English under the practitioner's brand.

Secondly, how is a valid written "offer to purchase" constituted unless first drafted in a language different from what the seller can write and understand? What happens if another purchaser in the meantime offers to purchase in a document that the seller can understand?

Thirdly, the Bill appears not to take into account Section 83(8)(a) of the Attorneys Act 53/1979, which section prohibits any non-attorney from drawing up or preparing any agreement relating to immovable property (except leases not exceeding 5 years).

AD SCHEDULE 1:

It is not clear why the definition of "debt collector" is amended in section 1 of the Debt Collectors Act 114/1998 to exclude property practitioners, but without any corresponding amendment in section 8(1) of the said Act. It begs the question as to whether a property practitioner will be considered a debt collector or not? In collecting rent or other debts for a client, how far may the practitioner go? May an "intention to issue summons" in almost identical form to a valid summons be sent to the debtor, or may the practitioner report a delinquent debtor to a credit bureau? More clarity is required on this issue.