

## **ESTATE AGENTS**

### **ESTATE AGENTS ACT 112 OF 1976**

**[ASSENTED TO 5 JULY 1976] [DATE OF COMMENCEMENT: 1 AUGUST 1977]**

*(Signed by the President)*

as amended by

Estate Agents Amendment Act 28 of 1987

## **ACT**

**To provide for the establishment of an Estate Agents Board and an Estate Agents Fidelity Fund; for the control of certain activities of estate agents; and for incidental matters.**

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### 1 Definitions

**In this Act, unless the context otherwise indicates-**

**"annual financial statements"** means a balance sheet, an income statement and any notes thereon;

**"auditor"** means any person registered in terms of section 23 of the Public Accountants and Auditors Act, 1951 (Act 51 of 1951), as an accountant and auditor, and engaged in public practice as such;

[ Definition of "auditor" inserted by sec 1 (a) of Act 28 of 1987.]

**"bank"** means a banking institution registered under the Banks Act, 1965 (Act 23 of 1965);

**"board"** means the South West African Estate Agents Board established by section 2, and includes, for the purposes of subsections (2) and (3) of section 30, and section 32(7) (a) (ii) in so far as it relates to the said subsections, any disciplinary committee of the board acting pursuant to and in accordance with the provisions of section 8B;  
[Definition of "board" substituted by sec 1 (b) of Act 28 of 1987.]

**"building society"** means a permanent building society registered under the Building Societies Act, 1965 (Act 24 of 1965);

**"court"** means the Supreme Court of South West Africa or a judge of that court;  
[Definition of "court" substituted by sec 1 (c) of Act 28 of 1987.]

**"estate agent" -**

(a) means any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person-

- (i) sells or purchases 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
- (ii) lets or hires 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
- (iii) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or
- (iv) renders any such other service as the Cabinet on the recommendation of the board may specify from time to time by notice in the *Official Gazette*;

[Subpara (iv) substituted by sec 1 (d) of Act 28 of 1987.]

(b) for purposes of section 3(2) (a), includes any director of a company which is an estate agent as defined in paragraph (a);

- (c) for purposes of sections 7, 8, 9, 12, 15, 16, 18, 19, 21, 26, 27, 30 and 33, includes-
- (i) any director of a company which is an estate agent as defined in paragraph (a) ; and
  - (ii) any person who is employed by an estate agent as defined in paragraph (a) and performs on his behalf any act referred to in subparagraph (i) or (ii) of the said paragraph;
- (c A ) for the purposes of section 7, 9(1) (a) , 16, 26, 27, 28 and 33, includes any person who is employed by an attorney or a professional company as defined in section 1 of the Attorneys Act, 1979 (Act 53 of 1979), otherwise than as an attorney or an articled clerk, and whose duties consist wholly or primarily of the performance of any act referred to in the subparagraph (i) or (ii) of paragraph (a) on behalf of such attorney or professional company;  
[Para (c A ) inserted by sec 1 (e) of Act 28 of 1987.]
- (d) does not include an attorney who, on his own account or as partner in a firm of attorneys or as a member of a professional company , as defined in section 1 of the Attorneys Act, 1979 (Act 53 of 1979), or an articled clerk as defined in the said section of that Act, who performs any act referred to in paragraph (a) , in the course of and in the name of and from the premises of such attorney's or professional company's practice: Provided that such an act is not performed-
- (i) in partnership with any person other than a partner in the practice of that attorney as defined in section 1 of the Attorneys Act, 1979 (Act 53 of 1979);
  - (ii) through the medium of or as a director of a company other than such professional company;
- [Para (d) substituted by sec 1 (f) of Act 28 of 1987.]
- (e) for the purposes of section 30(2), (3), (4) and (5) of regulations made under section 33(1) (h) , includes any person who was an estate agent at the time when he was guilty of any act or omission which allegedly constitutes improper conduct referred to in section 30;  
[Para (e) added by sec 1 (g) of Act 28 of 1987.]

**"executive committee"** means the executive committee appointed in terms of section 8A(1);  
[Definition of "executive committee" inserted by sec (1) (h) of Act 28 of 1987.]

**"fidelity fund certificate"** means a fidelity fund certificate referred to in section 16; and includes for the purposes of sections 26 (a) , 27, 28 and 33(1) (e) and (f) , a registration certificate referred to in section 16;  
[Definition of "fidelity fund certificate" substituted by sec 1 (i) of Act 28 of 1987.]

**"fund"** the Estate Agents Fidelity Fund for South West Africa established by section 12(1);  
[Definition of "fund" substituted by sec 1 (j) of Act 28 of 1987.]

**"immovable property"** includes-

- (a) any unit as defined in section 1 of the Sectional Titles Act, 1971 (Act 66 of 1971), and any proposed unit;
  - (b) any right to claim transfer of immovable property;
  - (c) any undivided share in immovable property;
  - (d) any interest in immovable property; other than a right or interest registered or capable of being registered under the Mines, Works and Minerals Ordinance, 1968 (Ordinance 20 of 1968);
  - (e) any share in a private company referred to in the Companies Act, 1973 (Act 61 of 1973), the whole or the major portion of whose assets consists of immovable property;
- [Definition of "immovable property" inserted by sec 1 (k) of Act 28 of 1987.]

**"inspector"** means any person designated under section 6(2) as an inspector;  
[Definition of "inspector" inserted by sec 1 (k) of Act 28 of 1987.]

**"institute"** means any single body having as its aim the promotion and maintenance of the interests of estate agents in the territory on a representative basis and which is recognised by the Cabinet for purposes of this Act;  
[Definition of "institute" inserted by sec 1 (k) of Act 28 of 1987.]

**"Minister"** .....

[Definition of "Minister" deleted by sec 1 (l) of Act 28 of 1987.]

**"prescribed"** means prescribed by regulation;

**"Republic"** .....

[Definition of "Republic" deleted by sec 1 (m) of Act 28 of 1987.]

**"territory"** means the territory of South West Africa;

[Definition of "territory" inserted by sec 1 (n) of Act 28 of 1987.]

**"this Act"** includes any regulation issued thereunder.

## **CHAPTER I**

### **ESTATE AGENTS BOARD (ss 2-11)**

#### **2 Establishment of Estate Agents Board**

There is hereby established a juristic person to be known as the South West Africa Estate Agents Board.

[Sec 2 substituted by sec 2 of Act 28 of 1987.]

#### **3 Constitution of board**

(1) The board shall consist of seven members appointed under subsection (2) by the Cabinet.  
[Subsec (1) substituted by sec 3 (a) of Act 28 of 1987.]

(2) The Cabinet shall appoint as members of the board-

(a) four estate agents nominated by the institute;

(b) three other persons who, in the opinion of the Cabinet, are fit to serve as members of the board.

[Subsec (2) substituted by sec 3 (b) of Act 28 of 1987.]

(3) If after the expiry of a period of three months from the date on which the Secretary for Economic Affairs in writing requested the institute to nominate estate agents in accordance with subsection (2) (a), the institute has failed to nominate in accordance with that subsection estate agents, the Cabinet shall appoint suitable estate agents as members of the board in the place of the estate agents he would have appointed if the institute had not so failed to so nominate estate agents.

[Subsec (3) substituted by sec 3 (c) of Act 28 of 1987.]

(4) The board shall from time to time elect from among its members a chairman and vice-chairman of the board, who shall hold office for a period of one year, and, if neither the chairman nor the vice-chairman is present at any meeting of the board, the members present shall elect from among their number a person to preside at such meeting.

(5) A member of the board shall hold office for such period, but not more than three years, and on such conditions as the Cabinet may determine at the time of his appointment:

Provided that any member shall, subject to the provisions of subsections (2) and (3), on the expiry of his term of office be eligible for reappointment.

(6) No person shall be appointed as a member of the board if he-

- (a) is an unrehabilitated insolvent;
- (b) has failed or is unable to comply in full with a judgment or order, including an order as to costs, given against him by a court of law in civil proceedings;
- (c) has been convicted of an offence involving an element of dishonesty or has been sentenced for any other offence to a period of imprisonment without the option of a fine; or
- (d) is not in possession of an identity document issued under section 2 of the Identification of Persons Act, 1979 (Act 2 of 1979).  
[Para (d) substituted by sec 3 (d) of Act 28 of 1987.]

(7) A member of the board shall vacate his office if he-

- (a) becomes subjected to any disqualification referred to in subsection (6);
- (b) becomes of unsound mind;
- (c) in the case of a member appointed in accordance with the provisions of section (2) (a) or (3), ceases to be an estate agent;
- (d) fails to comply with a condition referred to in subsection (5) applicable to him; or
- (e) has been absent from more than two consecutive meetings of the board without the leave of the board.

(8) If any member of the board dies, or resigns by notice in writing addressed to the Cabinet, or ceases to be a member of the board in terms of subsection (7), the Cabinet may, with due regard to the provisions of subsections (2) and (3), appoint any person as successor to such member for the unexpired period of office of such member.

#### **4 Meetings of board**

(1) The board shall meet for the first time at a time and place determined by the Cabinet and therefor at least once in each financial year at such times and places as the chairman or, in his absence, the vice-chairman may determine.

(2) The chairman or, in his absence, the vice-chairman may at any time of his own accord or at the written request of not fewer than four members convene a special meeting of the board.  
[Subsec (2) substituted by sec 4 (a) of Act 28 of 1987.]

(3) A notice convening a special meeting of the board shall state the purpose of such meeting.

(4) The quorum for any meeting of the board shall be four members thereof.  
[Subsec (4) substituted by sec 4 (b) of Act 28 of 1987.]

(5) The decision of a majority of the members of the board present at a meeting of the board shall constitute the decision of the board, and in the event of an equality of votes on any matter, the person presiding at the meeting in question shall have a casting vote in addition to his deliberative vote.

(6) No decision taken by the board or act performed under the authority of the board shall be invalid merely by reason of a vacancy on the board or of the fact that any person not entitled to sit as a member of the board, sat as a member of the board at the time the decision was taken or the act was authorized, if the decision was taken or the act was authorized by the majority of the members of the board present at the time and who were entitled to sit as members of the board.  
[a112y1976s5]

#### **5 Remuneration and allowances of members of board**

Any member of the board who is not in the full-time employ of the State, shall be paid out of the funds of the board such remuneration and allowances as may be determined generally or in any particular case by the Cabinet in consultation with the Cabinet.

## **6 Staff of board**

(1) The work incidental to the carrying out of its functions by the board shall be performed under its directions and control by persons appointed by the board on such conditions and at such remuneration as the board may determine.

(2) The board may designate persons appointed in terms of subsection (1) and any other persons whom he may deem fit, to perform the functions of inspectors under this Act subject to its control.

[Sec 6 substituted by sec 5 of Act 28 of 1987.]

## **7 Object of board**

The object of the board shall be to maintain and promote the integrity of estate agents.

## **8 Powers of board**

The board shall, in addition to any other power conferred upon it by this Act, have the power-

- (a) to appoint committees, of which persons other than members of the board may with the approval of the Cabinet be members, to advise the board on any matter in respect of which the board possesses any power;
- (b) to frame and publish, with the approval of the Cabinet, a code of conduct which shall be complied with by estate agents and to take such steps as may be necessary or expedient to ensure such compliance;
- (c) to encourage and promote the improvement of the standard of training of and services rendered by estate agents;
- (d) to receive any application for exemption from the provisions of this Act and to submit such application to the Cabinet;
- (e) in general to take such other steps and to perform such other acts as may be necessary or expedient in order to achieve its object.

### **8A Executive committee**

(1) The board may appoint two or more of its members as an executive committee of the board which, subject to the provisions of subsection (2) and the directions of the board, shall have the power to exercise all the powers and perform all the functions of the board during the periods between meetings of the board.

(2) Except in so far as the board may direct otherwise, the executive committee shall not have the power to set aside or amend any decision of the board.

(3) Any act performed or decision taken by executive committee shall be of force and effect except in so far as it is amended or set aside by the board at its next ensuing meeting.

[Sec 8A inserted by sec 6 of Act 28 of 1987.]

### **8B Disciplinary committees**

(1) The board may from time to time appoint such number of disciplinary committees as it deems fit, each consisting of at least three members, from amongst its members.

(2) A disciplinary committee may exercise or perform any power or function which is granted or entrusted to the board by subsections (2) and (3) of section 30.

(3) The provisions of section 4(5) and (6) shall, subject to subsection (5) of this section, apply *mutatis mutandis* in respect of a disciplinary committee .

(4) The board may, subject to the provision of this section, alter the constitution of any

disciplinary committee before the committee has commenced with an investigation contemplated in section 30(2).

(5) If a vacancy occurs on a disciplinary committee 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) only by unanimous vote.

(6) Any person who feels aggrieved by any decision taken by a disciplinary committee in the exercise of its power and the performance of its functions under section 30, may within one month after the disciplinary committee-

(a) has informed him in writing of such decision and upon payment of the prescribed fees request the disciplinary committee in writing to furnish him in writing with its reasons for such decision;

(b) has in accordance with paragraph (a) furnished him with its reasons for such decision and after notice to the disciplinary committee, appeal in writing to the board against such decision, and the board may thereupon-

(i) dismiss the said appeal;

(ii) if it is of the opinion that the disciplinary committee has not acted in accordance with the relevant provisions of this Act, give an order opposite to the decision of the disciplinary committee or amending the decision of the disciplinary committee;

(iii) refer the matter back to the disciplinary committee for further consideration; or

(iv) vary any penalty imposed by the disciplinary committee as it may deem fit.

[Sec 8B inserted by sec 6 of Act 28 of 1987.]

## **9 Funds of board**

(1) The funds of the board shall consist of-

(a) the prescribed levies paid to the board by estate agents;

(b) all moneys derived from any investments;

(c) all other moneys which may accrue to the board from any other source.

(2) The board shall utilize its funds to defray the expenses incurred by the board in the performance of its functions and the exercise of its powers under this Chapter: Provided that-

(a) any moneys or other property donated or bequeathed to the board shall be utilized in accordance with the conditions of such donation or bequest;

(b) if the board-

(i) after an investigation has found that an estate agent failed to comply with any duty imposed upon him in terms of this Act; or

(ii) has incurred any liability to pay attorney and client costs in respect any proceedings instituted by it in terms of this Act for the recovery from an estate agent of any amount which is payable by him to the board or fund,

the board may recover the costs of such investigation in so far as it relates to such duty, or the taxed amount of such attorney and client costs, as the case may be, from the estate agent concerned.

[Subsec (2) substituted by sec 7 (a) of Act 28 of 1987.]

(3) The board shall deposit all the moneys received by it under this Chapter in an account opened by it at any bank approved by the Cabinet.

(4) The board may invest any moneys received under this Chapter and not required for immediate use in such manner as may be determined by the Cabinet.

[Subsec (4) substituted by sec 7 (b) of Act 28 of 1987.]

## **10 Keeping of accounting records, drawing up of financial statements and auditing**

(1) The financial year of the board shall end in each year upon the date determined by the board with the approval of the Cabinet.

(2) The board shall cause-

- (a) to be kept in one of the official languages at an address in the territory approved by the Cabinet such accounting records as are necessary fairly to reflect and explain the state of affairs-
- (i) of all moneys received or expended by it in terms of this Chapter;
  - (ii) of all its assets and liabilities;
  - (iii) of all its financial transactions and the financial position of its business; and
- (b) as soon as possible, but not later than six months, after the end of each financial year, annual financial statements to be prepared showing, with all the appropriate particulars, the moneys received and the expenditure incurred by it during, and its assets and liabilities at the end of, the financial year.

(3) The accounting records and financial statements referred to in subsection (2) shall be audited by an auditor appointed by the board.

[a112y1976s11]

## **11 Report by board**

(1) The board shall furnish the Cabinet with such information as he may desire from time to time in connection with functions and financial position of the board, and shall in addition submit to the Cabinet an annual report, including annual financial statements audited in accordance with section 10(3), on its functions.

(2) Every report furnished under subsection (1) shall as soon as may be practicable be laid upon the table of the Nationals Assembly by the Cabinet.

[Subsec (2) substituted by sec 8 of Act 28 of 1987.]

## **CHAPTER II**

### **ESTATE AGENTS FIDELITY FUND (ss 12-28)**

## **12 Establishment and control of Estate Agents Fidelity Fund**

(1) There is hereby established a fund to be known as the Estate Agents Fidelity Fund for South West Africa, into which shall be paid-

- (a) all moneys paid as annual contributions in accordance with the provisions of this Chapter to or on account of the fund;
- (b) income derived from the investment of moneys in the fund;
- (c) all moneys recovered by or on behalf of the fund in the exercise of any right of action conferred by this Chapter;
- (d) all moneys received on behalf of the fund from any insurance company;
- (e) interest paid to the fund in terms of section 32(2) (c) ; and
- (f) any other moneys accruing to the fund from any other source.

(2) The fund shall be controlled and managed by the board, which shall utilise the moneys in the fund in accordance with the provisions of this Chapter.

(3) All moneys forming part of the fund shall, until they are invested or spent in accordance with the provisions of this Chapter, be paid into a bank approved by the Cabinet, to the credit of an account to be called the Estate Agents Fidelity Fund Account.

[Sec 12 amended by sec 9 of Act 28 of 1987.]



### **13 Payments out of fund**

Subject to the provisions of this Chapter, there shall be paid out of the fund whenever it is required-

- (a) the amount of all claims, including costs, allowed or established against the fund as hereinafter provided;
- (b) any contribution in the discretion of the board in respect of any expense incurred by any claimant in establishing his claim;
- (c) all legal expenses incurred in defending claims made against the fund or otherwise incurred in relation to the fund;
- (d) all premiums payable in respect of contracts of insurance entered into by the board in terms of section 23;
- (e) the expenses involved in the control of the fund, including remuneration and allowances to members of the board in connection with the management of the fund;
- (f) interest on and redemption of loans negotiated by the board on behalf of the fund;
- (g) any other moneys which shall or may be paid out of the fund in accordance with this Act.

### **14 Auditing of accounts of fund**

The board shall-

- (a) cause to be kept in one of the official languages at an address in the territory approved by the Cabinet such accounting records as are necessary fairly to reflect and explain the state of affairs-
  - (i) of all moneys received or expended by or on behalf of the fund;
  - (ii) of all the assets and liabilities of the fund;
  - (iii) of all the financial transactions of the fund and the financial position of its business;
- (b) as soon as possible, but not later than six months, after the end of each financial year of the fund ending in each year on a date determined by the board with the approval of the Cabinet, cause annual financial statements in respect of the fund to be prepared showing, with all the appropriate particulars, the moneys received and expenditure incurred by the fund during, and its assets and liabilities at the end of, the financial year of the fund;
- (c) cause the accounting records and annual financial statements of the fund to be audited by an auditor appointed by the board; and
- (d) submit to the Cabinet the audited annual financial statements of the fund in respect of each financial year.

### **15 Contributions to fund by estate agents**

Every estate agent shall, on making application in any year for a fidelity fund certificate in accordance with the provisions of section 16, in addition to the levies referred to in section 9(1) (a) , pay as an annual contribution to the fund such amount as may be prescribed.

### **16 Applications for and issue of fidelity fund certificates**

(1) Every estate agent or prospective estate agent, excluding an estate agent referred to in paragraph (c A ) of the definition of "estate agent" in section 1, shall, within the prescribed period and in the prescribed manner, apply to the board for a fidelity fund certificate, and such application shall be accompanied by the levy referred to in section 9(1) (a) and the contribution referred to in section 15.

(2) An estate agent or prospective estate agent referred to in paragraph (c A ) of the definition of "estate agent" in section 1, shall, within the prescribed period and in the prescribed manner,

apply to the board for a registration certificate, and such application shall be accompanied by the levy referred to in section 9(1) (a) .

(3) If the board upon receipt of any application referred to in subsection (1) or (2) and the levy and contribution referred to in those subsections, is satisfied that the applicant concerned complies with the requirements of this Act, 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.

(4) No fidelity fund certificate or registration certificate shall be issued unless and until the provisions of this Act are complied with, and any fidelity fund certificate or registration certificate issued in contravention of the provisions of this Act shall be invalid and shall be returned to the board at its request.

[Sec 16 substituted by sec 10 of Act 28 of 1987.]

## **17 Investment of moneys in fund**

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

## **18 Application of moneys in fund**

(1) Subject to the provisions of this Chapter, the fund shall be held and applied to reimburse persons who suffer pecuniary loss by reason of-

(a) theft, committed after the commencement of the Estate Agents Amendment Act, 1987, by an estate agent-

(i) of any money or other property entrusted by or on behalf of such persons to him in his capacity as an estate agent;

(ii) of any moneys collected or received by him and payable in respect or on account of a contract of purchase and sale in respect of immovable property, including any agreement or intermediate transaction as defined in section 1(1) of the Sale of Land on Instalments Act, 1971 (Act 72 of 1971);

(iii) of any other moneys, including insurance premiums, collected or received by him and payable in respect of immovable property, any interest in immovable property or any business undertaking;

(b) the failure of an estate agent to comply with the provisions of section 32(1).

[Subsec (1) substituted by sec 11 (a) of Act 28 of 1987.]

(2) Every action against the board in respect of the fund may, subject to the provisions of this Act, be brought in the court within whose jurisdiction the cause of action arose.

(3) No person shall have any claims against the board in respect of a theft or failure referred to in subsection (1) unless-

(a) the claimant has, within three months after he became aware of such theft or failure or by the exercise of reasonable care should have become aware of such theft or failure, given notice in writing to the board of such claim;

(b) the claimant has, within six months after a written demand was sent to him by the board, furnished to the board such proof as the board may reasonably require:

Provided that if the board is satisfied that, having regard to all the circumstances, a claim was lodged or the proof required by it was furnished as soon as practicable, it may in its discretion extend any of the periods referred to in this subsection.

[Subsec (3) amended by sec 11 (b) of Act 28 of 1987.]

## **19 Claims against board in respect of fund**

(1) The board may, at any time after the commission of any theft, or any failure to comply with the provisions of section 32(1), in respect of which a claim against him relating to the fund arose, receive such claim and may, subject to the provisions of section 18, settle such claim: Provided that no person shall without the permission of the board commence any action against the board, unless and until the claimant has exhausted all relevant rights of action and other legal remedies available against the estate agent in respect of whom the claim arose and against all other persons liable in respect of the loss suffered by such claimant.  
[Subsec (1) amended by sec 12 (a) of Act 28 of 1987.]

(2) No person shall recover from the board any amount larger than the difference between the amount of the loss suffered by him and the amount or value of all moneys or other benefits which he received or is entitled to receive out of any other source in respect of such loss.

(3) No amount shall be paid out of the fund as interest on the amount of any judgment obtained or any claim admitted against the fund.

(4) No right of action shall lie against the board in respect of any loss suffered by-

(a) the spouse of an estate agent by reason of any theft committed by such estate agent; or

(b) any estate agent by reason of any theft committed-

(i) by his partner; or

(ii) if such estate agent is a company, by any director of such company; or

(iii) if he is a director of a company, by any co-director in such company; or

(iv) by any person employed by him as an estate agent.

(c) any person as a result of theft, or as a result of any other act or omission in connection with trust moneys held or received on account of any other person, by any person referred to in paragraph (c A ) of the definition of "estate agent" in section 1 of this Act.

[Subpara (i) added by sec 12 (b) of Act 28 of 1987.]

## **20 Defenses relating to claims against fund**

In any action against the board in respect of the fund, the board may raise any defence which could have been raised by the person against whom the claim arose.

## **21 Transfer of rights and remedies to board**

If the board settles in full or in part any claim under this Chapter, there shall pass to the board, to the extent of such settlement, all the rights and remedies of the claimant in respect of such claim against the estate agent concerned or any other person or if applicable, in the case of the death, insolvency or other legal incapacity of such estate agent or other person, against the estate of the said estate agent or other person.

## **22 Computation of claims against future additions to fund**

(1) Only moneys in the fund shall be available for the satisfaction of any judgment obtained in relation to the fund or for the payment of any claim allowed by the board, but if at any time there are insufficient moneys in the fund to settle all such judgments and claims, they shall, to the extent in which they are not so settled, be charged against future accumulations of the fund.

(2) The board may in its discretion determine the order in which the judgments and claims against the fund may be settled and may, if the moneys in the fund are insufficient to settle in full

all such judgments and claims, settle any such judgment or claim *pro rata* to the amount available in the fund.

### **23 Board may conclude insurance contracts**

(1) The board may in its discretion enter into a contract with an insurer who carries on an insurance business in the territory whereby the board will be indemnified, to the extent and in the manner provided by such contract, against liability to pay claims under this Chapter.

(2) Any contract referred to in subsection (1) shall be entered into in respect of estate agents generally.

### **24 Application of insurance moneys**

No claimant having a claim against the board under this Chapter shall have-

(a) by virtue of any contract entered into in terms of section 23 by the board with an insurer, any right of action against such insurer;

(b) any right or claim in respect of any money paid or payable to the board by such insurer in accordance with such contract, but such money shall be paid into the fund and applied by the board in accordance with the provisions of this Chapter to settle any relevant claim.

### **25 Fund exempt from insurance laws**

No provision of any law relating to insurance shall apply in respect of the fund.

### **26 Prohibition of rendering of services in certain circumstances**

No person shall perform any act as an estate agent unless-

(a) a valid fidelity fund certificate has been issued to him, and to every person employed as an estate agent by him, and, if such person is a company, to every director of such company;

(b) he has, in respect of every person who is in his employment, taken out fidelity insurance to an amount which in the opinion of the board is sufficient.

### **27 Disqualifications relating to fidelity fund certificates**

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-

(i) has at any time by reason of improper conduct been dismissed from a position of trust;

(ii) has at any time been convicted of an offence involving an element of dishonesty;

(iii) is an unrehabilitated insolvent;

(iv) is of unsound mind;

(v) has been dealt with in accordance with section 30(3) (a) ;

(vi) does not comply with the prescribed standard of training;

(b) any estate agent who-

(i) has failed in respect of his financial year which has expired before the date on which application for a fidelity fund certificate is made, to comply with any provision of section 29 (b) or section 32(3) (b) ; or

(ii) has at any time, whether before or after the commencement of the Estate Agents Amendment Act, 1987, been guilty of any act or omission in respect of which any person had to be compensated pursuant to the provisions of section 18 from the fund or the Estate Agents Fidelity Trust Fund, established by the said section 12 before its amendment by section 9 of the

last-mentioned Amendment Act, unless the estate agent has repaid the relevant amount in full to the board concerned or the board is of the opinion that satisfactory arrangements for the settlement of such amount have been made and the board concerned has confirmed such arrangements;

- (c) any estate agent who is a director of a company-
  - (i) of which the fidelity fund certificate was withdrawn by the board in terms of section 28 or 30; or
  - (ii) which was prohibited in terms of section 32(6) from operating in any way on its trust, savings or other interest- bearing account referred to in section 32(2) (a) ,

or any estate agent who within a period of six months before or on the date on which such fidelity fund certificate was so withdrawn or such company was so prohibited, was a director of such company:

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 Cabinet may determine, a fidelity fund certificate to such person when he applies therefor.

[Sec 27 substituted by sec 13 of Act 28 of 1987.]

## **28 Withdrawal of fidelity fund certificates**

- (1) The board may withdraw a fidelity fund certificate issued to any person-
  - (a) if such person or, if such person is a company, any director of such company becomes subject to any disqualification referred to in section 27;
  - (b) if such person is a company, when such a company is being wound up.

(2) Any person who has in his possession or under his control any fidelity fund certificate withdrawn in terms of subsection (1), shall at the request of the board return such certificate to the board.

(3) The court may, on good cause and upon application by the board or any other competent person, withdraw any fidelity fund certificate issued to any person, and thereupon such person or any other person having such certificate in his possession or under his control shall forthwith return it to the board.

(4) If it appears to the court that a person in respect of whom the board intends making an application under subsection (3) or section 32(6), has left the territory and that he probably does not intend to return to the territory and that his whereabouts are unknown, the court may order that service on that person of any process in connection with such application may be effected by the publication of such process in an English and an Afrikaans newspaper circulating in the districts in which the said person's last known business address, as entered in the records of the board, is situated.

[Subsecs (3) and (4) added by sec 14 of Act 28 of 1987.]

## **CHAPTER III GENERAL PROVISIONS (ss 29-37)**

### **29 Duty of estate agent to keep accounting records**

Every estate agent shall in respect of his activities as such-

- (a) keep in one of the official languages at an address in the territory such accounting records as are necessary fairly to reflect and explain the state of affairs-

(i) of all moneys received or expended by him, including moneys deposited to a trust account referred to in section 32(1) or invested in a savings or other interest-bearing account referred to in section 32(2) (a) ;

(ii) of all his assets and liabilities; and

(iii) of all his financial transactions and the financial position of his business;

(b) cause the accounting records referred to in paragraph (a) to be audited by an auditor within four months after the final date of the financial year of the estate agent, which final date shall after the commencement of section 15 of the Estate Agents Amendment Act, 1987, not be altered by him without the prior written approval of the board.

[Para (b) substituted by sec 15 of Act 28 of 1987.]

### **30 Improper conduct by estate agents**

(1) Any estate agent shall be guilty of improper conduct if he-

(a) receives any remuneration for any act performed by him as an estate agent from two or more than two persons whose interests are not in all respects identical in respect of the performance of such act, unless such persons agreed thereto in writing;

(b) fails in respect of any act performed by him as an estate agent to give proper account, within 30 days of being called upon in writing to do so, to any person having a material interest in the performance of such act;

(c) fails to pay any moneys due by him to the board or in respect of the fund within one month after such moneys become due;

[Para (c) substituted by sec 16 (a) of Act 28 of 1987.]

(d) fails to furnish within such period as the board may determine such information as the board may request and reasonably require in order to exercise its powers properly under this Act;

(e) contravenes any provision of the code of conduct referred to in section 8 (b) or fails to comply with any such provision;

(f) commits any deed of insolvency referred to in section 8 of the Insolvency Act, 1936 (Act 24 of 1936);

(g) fails to comply with any provision of section 16(1), (2) or (4), 29 or 32, or contravenes any provision of section 26 or 32A(2) (a) or (b) ;

[Para (g) substituted by sec 16 (b) of Act 28 of 1987.]

(g A ) in his capacity as a director of a company which is an estate agent and which fail to comply with the requirements of section 29 or 32, did not take all reasonable steps to prevent such failure; and

[Para (g A ) inserted by sec 16 (c) of Act 28 of 1987.]

(h) commits an offence involving an element of dishonesty.

(2) The board may in the prescribed manner bring and investigate any charge of improper conduct against any estate agent.

(3) When any estate agent is found guilty of improper conduct by the board, the board 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 is a director of a company which is an estate agent, of such company; or

(iii) if he in partnership acts as an estate agent, of every partner in such partnership;

(b) impose on such estate agent a fine not exceeding R1000 which is payable to the board;

[Para (b) substituted by sec 16 (d) of Act 28 of 1987.]

(c) reprimand such estate agent.

(4) The acquittal or conviction of an estate agent by any court of law upon any criminal charge shall not be a bar to proceedings against him under this Act on a charge of improper conduct, notwithstanding the fact that the facts set forth in the charge of improper conduct would, if proved, constitute the offence set forth in the criminal charge on which he was so acquitted or convicted or any other offence on which he might have been convicted at his trial on the said criminal charge.

(5) If the improper conduct with which the estate agent is charged amounts to an offence of which he has been convicted by a court of law, a certified copy of the record of his trial and conviction by such court of law shall, upon the identification of such estate agent as the person referred to in the record as the accused, be sufficient proof of the commission by him of such offence, unless the conviction has been set aside by a superior court: Provided that the estate agent charged shall be entitled to adduce evidence to show that he was in fact wrongly convicted.

### **31 Appeal against certain decisions of board**

Any person who feels aggrieved by any decision taken by the board in the exercise of its powers under section 8B(6), 16, 27, 28 or 30 may at any time after he became aware of such decision but not later than one month after the board-

(a) has informed him in writing of such decision and upon payment of the prescribed fees, request the board in writing to furnish him in writing with its reasons for such decision;

(b) has in accordance with paragraph (a) furnished him 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.

[Sec 31 amended by sec 17 of Act 28 of 1987.]

### **32 Trust account of and investment of trust moneys by estate agent**

(1) Every estate agent shall open and keep a separate trust account, which shall contain a reference to this section, with a bank and shall forthwith deposit therein the moneys held or received by him on account of any person.

[Subsec (1) substituted by sec 18 (a) of Act 28 of 1987.]

(2) (a) Notwithstanding the provisions of subsection (1), any estate agent may invest in a separate savings or other interest-bearing account opened by him with any bank, building society or any institution or class of institution designated by notice in the *Official Gazette* by the Cabinet, any moneys deposited in his trust account which are not immediately required for any particular purpose.

[Para (a) substituted by sec 18 (b) of Act 28 of 1987.]

(b) Any savings or other interest-bearing account referred to in paragraph (a), shall contain a reference to this subsection.

(c) Interest on moneys deposited in a trust account referred to in subsection (1), and on moneys invested in terms of paragraph (a), shall, subject to the express terms of the mandate in question, which shall be in writing, be paid to the fund by the estate agent concerned.

[Para (c) substituted by sec 18 (c) of Act 28 of 1987.]

(d) The board may in the prescribed circumstances refund to an estate agent a prescribed portion of the interest paid by such estate agent to the fund in terms of paragraph (c).

[Para (d) added by sec 18 (d) of Act 28 of 1987.]

(3) Every estate agent shall-

(a) keep separate accounting records of all moneys deposited by him in his trust account and of all moneys invested by him in any savings or other interest-bearing account referred to in subsection (2) (a) ;

(b) balance his books and record relating to any account referred to in paragraph (a) at intervals of not more than one month, and cause them to be audited annually by the auditor referred to in section 29 (b) , within four months after the final date of the financial year of the estate agent concerned.

[Para (b) substituted by sec 18 (e) of Act 28 of 1987.]

(4) Any auditor who does an audit contemplated in subsection (3) (b) , shall forthwith after completing such audit, transmit a report in the prescribed form in regard to his findings to the board, and a copy thereof to the relevant estate agent.

[Subsec (4) substituted by sec 18 (f) of Act 28 of 1987.]

(5) Notwithstanding the provisions of subsection (3), the board may, on good cause, at any time order any estate agent by notice in writing to submit to the board within a period stated in such notice, but no less than thirty days, an audited statement fully setting out the state of affairs in respect of the matters referred to section 29 (a) .

[Subsec (5) substituted by sec 18 (g) of Act 28 of 1987.]

(6) The court may, on good cause, upon application by the board or any other competent person, prohibit any estate agent to operate in any way on his trust, savings or other interest-bearing account referred to in subsection (2) (a) and may appoint a *curator bonis* to control and administer such trust, savings or other interest-bearing account, with such rights, duties and powers as the court may deem fit.

(7) If-

(a) the board under the provisions of this Act-

(i) refuse to issue a fidelity fund certificate to any estate agent who applied therefor; or

(ii) has withdrawn a fidelity fund certificate issued to any estate agent; or

(b) any estate agent ceases to act as such; or

(c) any estate agent fails to apply timeously for a fidelity fund certificate in respect of any year,

the estate agent concerned shall wind up his trust, savings or other interest-bearing account in the prescribed manner and pay out in the prescribed manner the amount standing to the credit of any such account to the person entitled to it.

(8) The amount standing to the credit of the trust, savings or other interest-bearing account referred to subsection (2) (a) , of any estate agent, shall not form part of the assets of such estate agent or, if he was a natural person and has died or has become insolvent, of his deceased or insolvent estate.

[a112y1976s32A]

### 32A

(1) Any inspector furnished with inspection authority in writing by the board may conduct an investigation to determine whether the provisions of this Act are being or have been complied with and may, subject to subsection (5), for that purpose without giving prior notice, at all reasonable times-

(a) enter any place in respect of which he has reason to believe that-

(i) any person there is performing an act as an estate agent;

(ii) it is connected with an act performed by an estate agent;

(iii) there are books, records or documents to which the provisions of this Act are applicable;



- (b) order any estate agent or the manager, employee or agent of any estate agent-
  - (i) to produce to him the fidelity fund certificate of that estate agent;
  - (ii) to produce to him any book, record or other document in the possession or under the control of that estate agent, manager, employee or agent;
  - (iii) to furnish him, at such place and in such manner as he may reasonably specify, with such information in respect of that fidelity fund certificate, book, record or other document as he may desire;
- (c) examine or make extracts from or copies of such fidelity fund certificate, book, record or other document;
- (d) seize and retain any such fidelity fund certificate, book, record or other document to which any prosecution or charge of improper conduct under this act may relate: Provided that the person from whose possession or custody any fidelity fund certificate, book, record or other document was taken, shall at his request be allowed to make, at his own expense and under the supervision of the inspector concerned, copies thereof or extracts therefrom.

(2) No person shall-

- (a) fail on demand to place at the disposal of any inspector anything in his possession or under his control or on his premises which may relate to any inspection;
- (b) hinder or obstruct any inspector in the exercise of his powers under this section;
- (c) falsely hold himself out to be an inspector.

(3) Any inspector shall issue a receipt to the owner or person in control of anything seized and retained under this section.

(4) Any inspector who exercises any power in terms of this section shall, at the request of any person affected by the exercise of that power, produce the inspection authority in writing furnished to him in accordance with subsection (1).

(5) Notwithstanding anything contained in this section, the provisions thereof, excluding subsection (2) (c) , shall not apply in respect of-

- (a) any attorney, member of a professional company or articled clerk, as defined in section 1 of the Attorneys Act, 1979 (Act 53 of 1979), or any employee of any such attorney, member or company;
- (b) any premises from which such attorney or company conducts his or its practice; and
- (c) any book, record or document on such premises or in the possession or under the control of any person referred to in paragraph (a) .

[Sec 32A inserted by sec 19 of Act 28 of 1987.]

### **33 Regulations**

(1) The Cabinet may after consultation with the board make regulations-

- (a) to regulate, control or prohibit any practice followed by estate agents;
- (b) prescribing the tariff of fees at which estate agents may act as such;
- (c) prescribing the levies payable to the board by estate agents;
- (d) prescribing the contributions payable to the fund by estate agents;
- (e) prescribing the period within and the manner in which application shall be made for a fidelity fund certificate;
- (f) prescribing the form of a fidelity fund certificate;
- (g) prescribing the manner in which money in the fund not needed for immediate use, may be invested;
- (g A ) relating to the standard of training and practical experience of estate agents;  
[Para (g A ) inserted by sec 20 (a) of Act 28 of 1987.]
- (h) prescribing the manner in which a charge of improper conduct against any estate agent shall be brought and investigated;
- (i) prescribing the fees payable under section 31 (a) ;

(i A ) prescribing the times at which accounting records are to be audited in accordance with section 29 (b) and 32(3);

(i B ) prescribing the portion of the interest which, and the circumstances in which such portion, may be refunded to the estate agent concerned in terms of section 32(2) (d) ;

[Paras (i A ) and (i B ) inserted by sec 20 (b) of Act 28 1987.]

(j) prescribing the form of the report referred to in section 32(4);

(k) prescribing the manner in which any account referred to in section 32(7) shall be wound up and the amount standing to the credit of such account shall be paid out;

(k A ) prescribing the conditions on which any person may carry on his business as an estate agent from any residential premises;

[Para (k A ) inserted by sec 20 (c) of Act 28 of 1987.]

(l) as to, generally, any matter considered necessary or expedient to prescribe in order to achieve the objects of this Act.

(l A ) Different regulations may in terms of subsection (1) be made in respect of different estate agents or categories of estate agent.

[Subsec (l A ) inserted by sec 20 (d) of Act 28 of 1987.]

(2) .....

[Subsec (2) deleted by sec 20 (c) of Act 28 of 1987.]

### **34 Offences and penalties**

Any person who contravenes or fails to comply with any provision of this Act or any order or request issued or addressed thereunder, shall be guilty of an offence and liable on conviction to a fine not exceeding R5 000 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.

[Sec 34 substituted by sec 21 of Act 28 of 1987.]

### **35 Delegation of powers of Cabinet**

(1) The Cabinet may upon such conditions as it may deem fit, delegate in writing to an officer in the Department of Economic Affairs any or all the powers conferred upon him by this Act, save the power to make regulations.

[Subsec (1) substituted by sec 22 of Act 28 of 1987.]

(2) The Cabinet may at any time in writing revoke any delegation under subsection (1), and the delegation of any power under this Act shall not prevent the exercise of that power by the Cabinet itself.

### **36 Application of Act to South West Africa**

This Act shall apply in the territory of South West Africa, including the Eastern Caprivi Zipfel.

[Sec 36 substituted by sec 23 of Act 28 of 1987.]

### **37 Short title and commencement**

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