

STBB The
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**STBB'S GUIDE
TO THE NEW
PROPERTY
PRACTITIONERS
ACT**

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INTRODUCTION

INTRODUCTION

The PPA and me: Relax and consult our 10 instalments on what to do now

On Friday 14 January 2022, a notice in the Government Gazette announced that the Property Practitioners Act will become effective on 1 February 2022. Final regulations were also released.

In our short series of 10 instalments that we will issue over the next 10 working days, we will highlight the most important requirements that you must implement to be ready and compliant.

These are:

1. The New Property Condition report: What it looks like, when it must be completed and to which documents it must be attached.
2. What changes must be made to your mandate document?
3. All the new Rules: Sanctionable Conduct, Undesirable Practices and a new Code of Conduct
4. Your list of new administrative tasks, courtesy of the Property Practitioners Act.
5. Disclosure Form, voetstoots & who is liable when the defects show up.
6. When you are not entitled to receive commission.
7. Re-looking your professional relationships.
8. All about you and your FFC.
9. Less red tape and good news.
10. How the authority will deal with complaints against you.

GET THE NEW PROPERTY CONDITION REPORT READY AND BRANDED BEFORE SIGNING A MANDATE

This is #1 in our short series of 10 instalments on the most important requirements that you must implement to be ready and compliant with the Property Practitioners Act on 1 February 2022.

The new Property Condition report: What it looks like, when it must be completed and to which documents it must be attached.

1. **Download:** Section 67 of the Act makes it mandatory for a property practitioner to procure a completed Disclosure Form (Property Condition Report) regarding the condition of the property from a seller and/or landlord. Download the form from our website so that you can brand it and use for concluding mandates from 1 February 2022 onwards.
2. **When:** The Act states that a “property practitioner must ... not accept a mandate unless the seller or lessor of the property has provided him or her with a completed and signed mandatory disclosure in the prescribed form”. In other words, the Disclosure Form must be completed and signed by the seller or landlord **before conclusion of the mandate**.
3. **Share with buyers (and tenants):** The prescribed wording contained in the Condition Report includes a statement to the effect that the owner authorises the appointed property practitioner “marketing the property for sale to provide a copy of this statement, and to disclose any information contained in this statement, to any person in connection with any actual or anticipated sale of the Property.”
4. **Attach to sale agreement:** A copy of the Disclosure Form **must be supplied to prospective purchasers or lessees** if they intend to make an offer for the purchase or lease of a property. It does not have to be furnished to all and sundry that make enquiries, but must be furnished to those who are serious about the property and wishes to conclude an agreement. The signed completed Disclosure Form **must be attached to any agreement for the sale or lease**.
5. **Failure to comply with this requirement:** If the Disclosure Form was not completed, signed or attached, the agreement must be interpreted as if no defects or deficiencies of the property were disclosed to the purchaser. The relevant property practitioner who failed to comply with this requirement may be held liable by an affected consumer.
6. **Advise buyer and lessee of option to conduct own inspection:** The Act and regulations state that a buyer (and lessee) must be advised of his or her right to arrange for a separate inspection of the property, if required, and for his own account. The property practitioner must advise the purchaser/lessee hereof. (A clause to this effect is included in the Disclosure Form that we have provided in par 1 above.)
7. **Owner certifies the information:** The signature clause in the Disclosure Form provides for signature by the owner or by person who completes it on his/her/its behalf, as well as the signature of the property practitioner and purchaser/lessee. The owner is required to certify that the information provided is, to the best of the owner’s knowledge and belief, true and correct as at the date of signature. **If a person other than the owner of the property provides the required information** that person must **certify** that he/she is duly authorised by the owner to supply the information and that he/she has supplied the correct information on which the owner relied for the purposes of this report and, in addition, that the information contained herein is, to the best of that person’s knowledge and belief, true and correct as at the date on which that person signs this report.
8. The property condition report must be **kept for 5 years**, together with all the other documents that property practitioners must retain. (This is discussed in more detail in a later instalment in this series.)

For more information, contact us at info@stbb.co.za

WHAT CHANGES ARE REQUIRED TO YOUR MANDATE AND OTHER DOCUMENTATION?

This is #2 in our short series of 10 instalments on the most important requirements that you must implement to be ready and compliant with the Property Practitioners Act on 1 February 2022.

1. On **all letterheads and marketing material** a guarantee regarding the existence of a Fidelity Fund Certificate must appear. The wording is prescribed, and is as follows:
“Registered with the PPA”.
2. **All agreements** must contain a sentence with the following prescribed wording:
“(Insert name of property practitioner named in the agreement) hereby warrants the validity of his/her/its Fidelity Fund certificate as at date of signature of this Agreement.”
3. Make provision, in your lease and sale agreements (and even in the mandate as well), **for attachment of the prescribed Disclosure Form**. The regulations require that the Disclosure Form must be completed by the landlord/seller before a mandate is concluded. For more detail relating to the Disclosure Form, see Instalment 1 in this series.
4. **All emails, letters, contracts, business cards, marketing material and similar communications** must reflect the following:
 - o In respect of the agency or sole proprietorship: That the business holds a Fidelity Fund Certificate in its capacity as a business property practitioner; and whether or not that business operates a trust account;
 - o In respect of each natural persons that is associated with or operates under the auspices of that business property practitioner:
 - i. the name of that person and a statement that he/she holds a Fidelity Fund Certificate; and
 - ii. the capacity in which such person acts (i.e. principal, a full status property practitioner or otherwise).
5. **Co-signature** in respect of **candidate estate agents**: When a candidate estate agent concludes a mandate in respect of a sale or lease, or drafts documentation in respect of a transaction, make sure to include a place for co-signature by the full status property practitioner that supervises the candidate.
6. With regards to **sole mandates**, remember
 - i. to ensure that the expiry date of the mandate (or extension, as the case may be) is expressed as a calendar date; and
 - ii. that it records an undertaking on the part of the seller not to confer a similar mandate on another property practitioner before the expiry of the agreed period.

For more information, contact us at info@stbb.co.za

WHAT NEW CONDUCT RULES MUST ESTATE AGENTS COMPLY WITH?

THE CODE OF CONDUCT, SANCTIONABLE CONDUCT, AND UNDESIRABLE PRACTICES

This is #3 in our short series of 10 instalments on the most important ducks to have in a row by 1 February 2022. In this instalment, the new Code of Conduct and related conduct provisions are listed.

1. **The existing (soon to be 'old') Code of Conduct**

With the repeal of the Estate Agency Affairs Act, the Code issued in terms thereof will also fall away on 1 February 2022.

2. **Sanctionable conduct and the new Code of Conduct**

- o A new Code of Conduct is housed in the regulations to the Property Practitioners Act. Fortunately, for practicing estate agents, the new Code's provisions are already familiar to them, as the provisions are largely taken from the current Code.
- o In preparing the new Code, the legislature had taken the provisions of the old Code and repackaged the provisions as follows:
 - First, it took the provisions in chapter 3 of the old Conduct and renamed these "sanctionable conduct". These are now part of the regulations and not found in the new Code itself.
 - Then the remaining provisions were taken and divided into two parts, namely those that will apply to all property practitioners in the real estate sector and those that will apply only to estate agents (such as the provisions relating to mandates and the duty to disclose, etc.).

3. **Undesirable Practices**

In regulation 35, two forms of undesirable practices are listed. The first applies to certain arrangements in franchisor-franchisee relationships that limits the use of service providers.

The second relates **to arrangements between agents** (and other property practitioners) **and the management bodies of residential property developments** (including a body corporate or homeowners' association). It states:

- o Any arrangement where there is payment or reward in exchange for some benefit or preferential treatment in respect of the **marketing** of properties in such property development, is undesirable.
- o It is also problematic if owners in the development are obliged to sell their properties through the agency of such a managing organisation or an estate agent appointed by the organisation.
- o Also listed as an undesirable practice is an arrangement where owners are obliged only to sell their properties to the managing organisation or someone appointed by that organisation.

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- o Further, and stated in broad terms, it is an undesirable practice where such arrangement between an estate agent and managing body effectively provides an advantage to that estate agent (or property practitioner/s) over others to render services in that development. Clearly this could have the effect to exclude or disadvantage some practitioners and is disallowed.

For more information, contact us at info@stbb.co.za

YOUR LIST OF NEW ADMINISTRATIVE TASKS, COURTESY OF THE PROPERTY PRACTITIONERS ACT

This is #4 in our short series of instalments on all the ducks to have in a row following the coming into operation of the Property Practitioners Act on 1 February 2022.

In this instalment, a list is provided of some new administrative tasks that the Act imposes.

1. Diarise 1 October (or earlier) to start with the application process for your Fidelity Fund Certificate. All applications must be submitted by **31 October** in the year that your current certificate expires. Remember that you need to lodge confirmation that your tax affairs are in order with the application; and, when applying for the FFC for the agency, also a BBEE certificate.

Going forward, FFCs will be issued for a period of 3 years, and you must then diarise accordingly.

2. Make sure that you have systems in place to ensure that **all records are maintained for 5 years**. These records include: Agreements, Disclosure Forms, Mandates, Accounting records, and email communications with the public regarding transactions.
3. Make sure to do the necessary training to get your **CPD points**. Over a three year period, 12 points must be collected and you must ensure to achieve an allocation of **4 points per year** (and not leave it all to one year).
4. Add **prescribed sentences** to:
 - o **Letterheads and marketing material**. The following prescribed wording must appear on all marketing material and letterheads: "Registered with PPRA" (and if it is a candidate using the material, this fact must be mentioned too).
 - o If the agency has a **trust account, the letterhead** must also have a statement to this effect.
 - o **Agreements**: Any agreement that the practitioner is involved in, must contain these words: "[Insert name of property practitioner as defined in the agreement] hereby warrants the validity of his / her / its Fidelity Fund certificate as at the date of signature of this Agreement."
5. **Email signatures and letterheads**: Make sure that the capacity of the practitioner is mentioned, for example if he or she is a principal or non-principal agent.

For more information, contact us at info@stbb.co.za

DISCLOSURE FORM, VOETSTOOTS & WHO IS LIABLE WHEN THE DEFECTS SHOW UP

This is #5 in our short series of instalments on all the new things to bear in mind with the coming into operation of the Property Practitioners Act on 1 February 2022.

1. The Property Practitioners Act, in section 67, states that a property practitioner must:
“(a) not accept a mandate unless the seller or lessor of the property has provided him or her with a fully completed and signed mandatory disclosure in the prescribed form; and
(b) provide a copy of the completed mandatory disclosure form to a prospective purchaser or lessee who intends to make an offer for the purchase or lease of a property.”
2. In addition, the completed “mandatory disclosure form signed by all relevant parties” must be attached to any agreement for the sale or lease of a property.
3. The section goes on to state that if such a Disclosure Form was not completed, signed or attached, “the agreement must be interpreted as if no defects or deficiencies of the property were disclosed to the purchaser.”

What does this mean for an estate agent?

4. Apart from constituting a minor offence (for which the Authority may impose a R15000 penalty) for failure to comply with the Act, it also triggers potential liability for the estate agent to stand in for the purchaser’s losses that may result from the fact that the Disclosure Form was not provided (section 67(3)).

This would be the case where, *for example*, the estate agent decided not to bother with getting the form completed and nonetheless successfully negotiated the sale. Then afterwards, when serious pre-sale damage to a roof or other part of the house is established, the buyer may have a claim against the agent for losses incurred in repairing the damage.

Presumably, of course, the agent will only be held liable where (i) the buyer did not neglect also to perform his/her own inspection; and (ii) could not reasonably detect the damage on such inspection; and (iii) had the Disclosure Form been completed and furnished to the buyer, he or she would have been alerted thereto.

Does a voetstoots clause in the agreement change this or assist the estate agent?

5. No.

The voetstoots clause is a provision in a sale agreement which stipulates that the purchaser buys the property from the seller as it stands and thereby indemnifying the seller against claims for damages in respect of defects on the property, whether patent or latent. A claim may exist in the hands of the purchaser if he or she can show that the seller knew of a latent defect, chose not to disclose it whilst knowing full well that it was an important factor for the purchaser in making a decision to buy and the amount of the offer.
6. Clearly a voetstoots provision essentially involves the relationship between a seller and purchaser and will (generally) not involve the agent (unless the agent, in facilitating the sale, failed to respond honestly to the purchaser’s enquiries).

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Don't attract unwanted liability

7. The obligation to liaise with the buyer in providing the Disclosure Form therefore places an important new obligation on estate agents. Where an agent is presented with an instance where a buyer is unwilling to comply, it is best to speak to your conveyancer at STBB for assistance, to ensure that you do not open yourself to unnecessary financial liability.

For more information, contact us at info@stbb.co.za

WHEN YOU ARE NOT ENTITLED TO RECEIVE COMMISSION

This is #6 in our short series of instalments on all the new things to bear in mind with the coming into operation of the Property Practitioners Act on 1 February 2022.

No payment, no commission

Take note of the following strict provisions:

1. In order to commit estate agents (and other property practitioners) to comply with the provisions of the Act and to ensure that consumers are protected, the Act states that you are not entitled to commission (or any payment) if you do not have a Fidelity Fund certificate at the time of performing your services as estate agent. Non-compliance results in an obligation to pay whatever money you may have received, to the Authority. The person who is entitled to the money (usually the seller who entrusted you with a mandate to sell) must then claim the funds back from the Authority, within three years.

Any such funds not claimed back (by a seller or other person entitled thereto) within the three year period, will be forfeited to the Authority.

2. In addition, conveyancers are prohibited from paying any remuneration to estate agents when a transaction registers in the Deeds Office, unless they have been provided with a valid Fidelity Fund certificate from both the agent who was involved in the transaction and the agency. The certificates must be valid:
 - i. at the time that the transaction was concluded, and
 - ii. on the date of the payment by the conveyancer.

For more information, contact us at info@stbb.co.za

RE-LOOKING YOUR PROFESSIONAL RELATIONSHIPS

This is #7 in our short series of instalments on all the new things to bear in mind with the coming into operation of the Property Practitioners Act on 1 February 2022.

In this instalment we highlight the provisions that place limitations on certain relationships that estate agents may form in their daily operations.

- Relationship with the HOA, body corporate or management body of a residential property development**
 - Regulation 35, in very broad terms, prohibits the management body (be it a person in control of management, or the HOA or body corporate) of a residential development to receive money or a reward in return for granting some advantage in respect of the marketing of properties in such property development.
 - It also prohibits the placing of a limitation on the sale of property in such property development: An arrangement whereby a property may only be sold through the managing body or a specific agency designated by the managing body, is outlawed.
 - Similarly, a provision that an owner may only sell his or her property to a designated purchaser, will attract scrutiny.
 - Lastly, any arrangement that provides an advantage to some estate agent(s) (or other property practitioner) over others in providing services in the development; or, where it excludes other estate agents (or property practitioners) from rendering services in the development, is prohibited as “undue business practices”.

“One must bear the regulations’ exact wording in mind when considering the prohibition, and you are invited to discuss this with a STBB conveyancer.”

- Prohibition on conduct to influence issuing of Compliance Certificates**

An estate agent (or other property practitioner) may not offer or receive any incentive (or exert influence) in respect of the issuing of Compliance Certificates.
- Limitation on relationships with other industry service providers (for example mortgage originators, bridging finance suppliers, and the like)**

Estate agents (and others property practitioners) may not be part of an arrangement (whether formally or not) whereby the consumer (such as a buyer or seller) is obliged or encouraged to use a particular service provider only, to the exclusion of others. This includes the conveyancing attorney, mortgage originator, service providers for compliance certificates, and the like.

For more information, contact us at info@stbb.co.za

ALL ABOUT YOU AND YOUR FFC

This is #8 in our short series of instalments on all the new things to bear in mind with the coming into operation of the Property Practitioners Act on 1 February 2022.

This instalment summarises all the provisions that apply to Fidelity Fund Certificates.

1. WHEN

- o Every property practitioner is required to apply to the Authority for a Fidelity Fund certificate ('FFC') every three years. In the relevant year that the current certificate expires, the application must be submitted by no later than 31 October.
- o The application must be accompanied by payment of the prescribed fee (R2 340 from 2020, escalating annually in accordance with the CPI). Late applications will attract a penalty.

2. LOOK & FEEL

- o The Authority will categorise property practitioners across the different industries within the real estate sector, and your industry will be reflected on the FFC. (The industry categorisation has not yet been done as at date hereof.)
- o If an estate agent or agency practices in more than one industry, this will be indicated on the FFC.

3. APPLICATION PROCESS

The regulations indicate that applications will be submitted online, via the Authority's website. The Authority has not yet launched a new portal and the (now defunct) Estate Agency Affairs Board's website is still operational.

4. BE VISIBLE

- o It is a requirement that the FFC must be prominently displayed in every place of business where the estate agent or agency conducts property transactions. Make sure to download and print your valid certificate from the website and put it up where everyone can see it!
- o Also:
 - make sure that letterheads and marketing material reflect the prescribed sentence, namely "registered with the PPRA"; and
 - that the prescribed clause guaranteeing that the agent or agency is in possession of a valid Fidelity Fund certificate appears on all agreements relating to property transactions, i.e., as follows: "[Name of property practitioner] hereby warrants the validity of his/her/its Fidelity Fund certificate as at the date of signature of this Agreement".

5. WHO MUST HAVE CERTIFICATES?

Section 48 of the Act contains a clear prohibition on any person or entity to act as a property practitioner unless he/she/it has been issued with a Fidelity Fund certificate **and** –

- o in the case of a juristic property practitioner, every director, member or trustee of the property practitioner has been issued with a Fidelity Fund certificate (as may be applicable); and
- o if the property practitioner employs any other person as a property practitioner, that employee has also been issued with a valid Fidelity Fund certificate.

6. **NON COMPLIANCE**

- o An agent who contravenes or fails to comply with this requirement will be guilty of an offence.
- o Such agent must also repay any money received to the Authority which, in turn, will pay it to a seller or landlord concerned, provided the latter brings an application to the Authority for the return of the money within three years. (Failing this, the money becomes the property of the Fidelity Fund.)

Conveyancers appointed as 'police force'

- o Conveyancers are prohibited from paying any remuneration or other money to an estate agent unless that agent and agency has provided the conveyancer with a copy of his/her/its FFC that was valid during the time that the transaction was concluded and at the time of making payment.

7. **WHO IS DISQUALIFIED FROM BEING ISSUED WITH A FCC?**

Someone who:

- o is not a South African citizen and a lawful resident of South Africa;
- o has been found guilty of contravening the Act, the Estate Agency Affairs Act or any similar legislation in any other jurisdiction within the preceding five years;
- o has been found in any civil or criminal proceedings by a court of law (locally or elsewhere) to have acted fraudulently, dishonestly, unprofessionally, dishonourably, or in breach of a fiduciary duty, or any other offence carrying a sentence of imprisonment without the option of a fine;
- o is of unsound mind;
- o is an unrehabilitated insolvent;
- o has been dismissed from a position of trust at any time within the preceding five years by reason of improper conduct; has been prohibited by any legislation (enacted in South Africa or elsewhere) from practising as a property practitioner or occupying a position of trust;
- o has been found guilty by a competent tribunal or court of unfairly differentiating or excluding (directly or indirectly) anyone on the basis of race, gender, sex, pregnancy, marital status, ethnicity, sexual orientation, disability, age, religion, language, birth, or other prohibited ground;
- o is not in possession of a valid tax certificate;
- o is not in possession of a valid BBBEE certificate;
- o intends carrying on business as a property practitioner under a trade name identical or confusingly similar to the trade name of another property practitioner (who has already been issued with a FFC or such certificate has lapsed or been withdrawn); or
- o is a director or member of a property practitioner which has had its FFC withdrawn by the Authority.

For more information, contact us at info@stbb.co.za

LESS RED TAPE AND GOOD NEWS

This is #9 in our short series of instalments on all the new things to bear in mind with the coming into operation of the Property Practitioners Act on 1 February 2022.

In this instalment we change tack and highlight **some hidden but valuable bits of information from the regulations, to lighten the load of coming to terms with the new Act.**

1. ONLINE PORTALS

- o Parties who are considered to be property practitioners simply because they provide a portal for the advertisement of properties for sale by estate agents, can apply for exemption from the provisions of the Act. That it is assumed that they will do so, appears from the wording of regulation 41.15, which states that where someone applies for exemption who “acts solely as a conduit or platform for the placing of advertisements by property practitioners, such exemption should in the absence of other considerations relating to protecting the interests of consumers, be granted.”
- o **Note though that this practitioner will have to apply every three years for the exemption to be renewed, and exemptions may be revoked by the Authority.**

2. TAX AFFAIRS

- o Regulation 41.19 is quoted in full. It states that: “Other than for sole proprietors, all property practitioners who are natural persons will, upon making application for a Fidelity Fund certificate, be deemed by the fact of such application itself to have applied for exemption from the provisions section 50 (vii) of the Act and the Authority must by default grant such exemption.”
- o Section 50 (vii) relates to the provision in the Act that deals with disqualification from being issued with a FFC. Subregulation (vii) prohibits the Authority from issuing a FFC to someone who is not in possession of a valid tax clearance certificate.
- o Thus, regulation 41.19 has the effect that all natural person estate agents (excepting sole practitioners) are automatically assumed to have applied for, and have been granted, an exemption from the requirement to submit a tax clearance certificate.
- o It is not necessary to make a formal application for this default exemption.

3. BBBEE CERTIFICATE

- o Regulation 41.20 is also quoted in full. It states: “All property practitioners who are natural persons will, upon making application for a Fidelity Fund certificate, be deemed by the fact of such application itself to have applied for exemption from the provisions of section 50 (x) of the Act and the Authority must by default grant such exemption.”
- o Section 50(x) relates to the provision in the Act that deals with disqualification from being issued with a FFC, and subregulation (x) deals with the requirement to be in possession of a valid BBBEE certificate. Thus it is clarified, if this was even necessary, that natural person estate agents need not obtain BBBEE certificates.

For more information, contact us at info@stbb.co.za

HOW THE AUTHORITY WILL DEAL WITH COMPLAINTS AGAINST YOU

This is #10 in our short series of instalments on all the new things to bear in mind with the coming into operation of the Property Practitioners Act on 1 February 2022.

In this instalment we familiarise you with the process that has been put in place for dealing with complaints raised against estate agents by the man in the street (or other property practitioners).

ANY PERSON MAY LODGE A COMPLAINT WITH THE AUTHORITY

Section 28 of the Act provides for the lodging of complaints by any person, and in respect of financing, marketing, management, letting, hiring, sale or purchase of property.

A prescribed form is contained in regulation 5 for the lodging of the complaint. The form has spaces where full details of the complaint must be indicated, and the claimant must also disclose the identity and details of the estate agent or other practitioner involved.

On receipt, the Authority may immediately investigate the matter or may request further information.

The Authority must, on receipt of the formal complaint, acknowledge receipt thereof, and provide the practitioner against whom the claim is brought ('the respondent'), with a copy of the complaint. The respondent is then invited to respond thereto, in writing and within the prescribed period.

RESOLVING THE COMPLAINT

The Authority will, after its own investigation:

- deal with the matter itself;
- refer the matter for (voluntary and free) mediation; or
- decide to refer it to adjudication. This is likely to be the case when the complaint is of a serious nature, for example when it constitutes 'sanctionable conduct' or an 'undesirable business practice'. (See instalment #3 in the series.)

MEDIATION

- Section 29 provides that the Authority may, if it believes that a complaint can be resolved through mediation, or on application of the person concerned, refer the complaint to mediation. The Authority must thereafter, within seven days of the referral, appoint a suitably qualified person as a mediator, who must within seven days set the matter down within 30 days of referral to mediation, and will assist the parties to resolve the dispute.
- If the mediation is successful, the mediator will issue a certificate stating the outcome and a copy must be served on the complainant and respondent. On the other hand, if it was unsuccessful, the matter must be adjudicated in accordance with the adjudication process offered by the Authority.

ADJUDICATION

Section 30 deals with the adjudication process. This will be triggered when (i) a matter was not resolved during the mediation; or (ii) where the serious nature of the complaint and the contravention in question warrants adjudication.

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The Authority must appoint an independent legally qualified person as an adjudicator. It may also appoint assessors to assist the Adjudicator in respect of any complaint, and depending on the complexity.

Once the process is completed, the adjudicator must make a determination. If the complaint is upheld, the adjudicator must make an appropriate order. Such an order will have the status of an order of the Magistrates' Court and must be executed accordingly. The order may include a fine.

COMPLAINTS AMONGST PROPERTY PRACTITIONERS

The Act provides that the Authority's mediation and adjudication processes may also be used by property practitioners (not only consumers generally) in respect of complaints against other property practitioners. In such an event, the services of the Authority is not free (as in the case where it is a consumer bringing the action) and the parties will be required to contribute to the costs of the mediation and adjudication.

For more information, contact us at info@stbb.co.za