



ESTATE AGENCY AFFAIRS BOARD
OF SOUTH AFRICA

AMNESTY POLICY

1. Definitions

For the purposes of the implementation of the Amnesty Policy the meaning ascribed to the following words shall be as follows:

“Amnesty Committee” means the Amnesty Committee established by the Board in accordance with this Policy.

“Applicant” means any person, including both natural and/or juristic persons, who lodges an application to the Board for the grant of an amnesty as contemplated in this Policy.

“Application” means an application for amnesty brought by an applicant in terms of this Policy.

“Date of approval” means the date on which the grant of amnesty in terms of this Policy by the Amnesty Committee is delivered to the applicant.

“Deliver”, in relation to any document or information that must be delivered in accordance with this Policy, means:

- (a) personally handing that document to the relevant person;
- (b) sending that document to the relevant person by registered post to that person’s last known address, whether that address be a residential address, office or place of business or post office box number;
- (c) transmitting that document to the relevant person by facsimile; or
- (d) transmitting that document to the relevant person by electronic means.

“EAAB” means the Estate Agency Affairs Board.

“The Act” means the Estate Agency Affairs Act, 112 of 1976 and all regulations promulgated thereunder.

“The Board” means the Accounting Authority of the EAAB.

“Unlawful activity” means an unlawful activity as defined in the Prevention of Organised Crime Act, 121 of 1998.

2. Introduction and Objectives of the Amnesty Policy

The Board has resolved that the bringing of persons presently illegally conducting the functions and activities of an estate agent, as defined in both section 1 of the Act and Regulation 2 of Government Notice R1485 of 17 July 1981, into compliance with the provisions of the Act, including the mandatory regulatory regime for the estate agency profession established by the Act, is more desirable and in the long-term interests of both consumers and the estate agency profession than simply seeking to punish those persons for any past transgressions and offenses that they may have committed or be committing.

The primary objective of this Amnesty Policy, therefore, is to prescribe the circumstances under which the EAAB may waive any previous and/or present non-compliance by applicants with the provisions of the Act and/or the regulations promulgated in terms of the Act.

The secondary purposes of this Amnesty Policy are, where possible, to:

- avoid the EAAB having to initiate the launching of expensive and time consuming criminal prosecutions against offenders, especially having regard to the large number of offenders that may potentially be involved;
- encourage offenders who might, for various reasons including fear of the consequences and victimisation, not otherwise be amenable to doing so, to come forward and to regularise their activities as estate agents; and
- promote a climate of transparency and reconciliation between the EAAB, offenders and economic citizens.

3. Some material requirements of the Act

3.1 Definition of 'estate agent'

'Estate agent' is, inter alia, defined in the Act as:

"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 or publicly exhibits for sale 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 or publicly exhibits for hire 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 Minister on the recommendation of the board may specify from time to time by notice in the *Gazette*."

In terms of the Specification of Services Notice published under Government Notice R1485 of 17 July 1981 a person is also regarded as an estate agent if that person, for the acquisition of gain, or on that person's own account or in partnership, in any manner holds himself/herself out as a person who, or directly or indirectly,

advertises that he/she, on the instructions of or on behalf of any other persons collects or receives money:

- (a) payable by any person to or on behalf of a developer or a body corporate in terms of the Sectional Titles Act, in respect of a unit or proposed unit;
- (b) on behalf of a share block company payable by the holder of a share in such company or his/her nominee;
- (c) in consideration of a promise or an undertaking by the person receiving such money or his/her agent or nominee to the person paying such money, his/her agent or nominee to make available to such person, his/her agent or nominee, information or details of immovable property, any interest in immovable property or any business undertaking with a view to bringing potential buyers, sellers, lessors, lessees or occupiers thereof into contact with one another.

3.2 The application for, and the issue of, fidelity fund certificates

Section 16(1) of the Act obliges every estate agent, or prospective estate agent, to apply to the EAAB, within the prescribed period and in the prescribed manner, for the issue of a fidelity fund certificate and to pay the prescribed levies, and contribution to the Fidelity Fund where applicable, for the issue of that fidelity fund certificate. If the EAAB is satisfied that the applicant concerned is not disqualified in terms of section 27 of the Act from being issued with a fidelity fund certificate, the EAAB duly issues a fidelity fund certificate to the estate agent or prospective estate agent concerned which fidelity fund certificate is expressed as being valid until 31 December of the year in question.

It is apparent, therefore, that every person who is practicing, or who intends to practice, as an estate agent, and who is not disqualified from doing so in terms of the Act, is obliged to apply to the EAAB for the issue of a valid fidelity fund certificate.

26.3 Prohibition against the rendering of services as an estate agent

Section 26 of the Act provides that no person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to that person and to every person employed by that person as an estate agent and, if that person is:

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

3.4 Disqualifications

Section 27 of the Act provides that:

1. No fidelity fund certificate shall be issued to -
 - a) any estate agent who or, if such estate agent is a company, any company of which any director, or if such estate agent is a close corporation, any corporation of which any member referred to in paragraph (b) of the definition of 'estate agent' –
 - i) 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 in respect of whom the trustee of the insolvent estate has not certified that the insolvent is a fit and proper person to assume a position of trust and to be issued with a fidelity fund certificate;
 - 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;
 - vii) does not have the prescribed practical experience.
- A) 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 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, unless the estate agent has repaid the relevant amount in full to the board, or the board is of the opinion that satisfactory arrangements for the settlement of such amount have been made and has confirmed such arrangements;
- B) any estate agent referred to in paragraph (a) of the definition of 'estate agent' if such estate agent carries or intends to carry on business as an estate agent under a trade name which is identical or confusingly similar to the trade name of an estate agent:
- i) already issued with a fidelity fund certificate; or
 - ii) whose fidelity fund certificate is suspended or has lapsed or has been withdrawn in terms of this Act;
- C) any estate agent who is a director of a company, or who is a member referred to in paragraph (b) of the definition of 'estate agent', of a close corporation:
- i) of which the fidelity fund certificate was withdrawn by the board in terms of section 28 or 30;
 - 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 or close corporation was so prohibited, was a director of such company, or such a member of such close corporation:

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

3.5 The duty of estate agents to keep accounting records

In terms of section 29 of the Act every estate agent must, in respect of that estate agent's activities as such, keep such accounting records as are necessary fairly to reflect and explain the state of affairs –

- i) of all monies received or expended by that estate agent, including moneys deposited to 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 of the assets and liabilities of that estate agent; and
- iii) of all of the financial transactions of that estate agent and the financial position of that estate agent's business;

The estate agent must, furthermore, have such accounting records audited by an auditor within four months after the final date of the financial year of the estate agent concerned.

3.6 The opening and maintenance of trust accounts by estate agents

Section 32(1) of the Act obliges every estate agent to open, and keep, one or more separate trust accounts, containing a reference to that section, with a bank and such estate agent or his or her employee, as the case may be, are obliged forthwith to deposit into such trust accounts trust moneys held or received by or on behalf of such estate agent.

3.7 Educational requirements for estate agents

The Education Regulations promulgated under Government Notice R.633 of 4 June 2008 require every prospective estate agent to serve as an intern estate agent, acting under the supervision of a principal estate agent, for a continuous period of twelve months from the date of the first issue to that person of an intern fidelity fund certificate. No person may, in addition, perform the functions and activities of a non-principal estate agent unless that person has completed the Further Education and Training Certificate: Real Estate or a principal estate agent unless that person has completed the National Certificate: Real Estate.

4. Who should apply for amnesty?

Any applicant who is currently performing, or has previously performed, the functions, duties and activities of an estate agent, as more fully set forth in paragraph 3.1 above, without having applied for, or having been issued with, a valid fidelity fund certificate by the EAAB authorising that person legally to act as an estate agent, is encouraged by the EAAB to apply for amnesty.

5. Application for amnesty and period for amnesty application

Any applicant wishing to apply for an amnesty, as contemplated in this Amnesty Policy, shall submit an application for amnesty, by way of a sworn affidavit or a solemn declaration to the EAAB.

Such sworn affidavit or solemn declaration must be delivered to the Amnesty Committee **during the amnesty period which commences on 15 April 2011 and ends on 15 July 2011** at the address and in the form and manner as may be prescribed by the Amnesty Committee.

6. Appointment of Amnesty Committee

The Board shall, in its sole and absolute discretion, appoint an Amnesty Committee for the purpose of considering and evaluating all applications for amnesty that may be received from applicants. The Amnesty Committee shall comprise not fewer than three and not more than five members and may include such independent advisers and/or consultants as may be required. The Amnesty Committee, however, shall always be chaired by a member of the Board who shall have a casting vote when the voting is tied. The Chairperson of the Amnesty Committee shall be elected by the Amnesty Committee at its first meeting.

The Amnesty Committee is authorised by the Board, after due consideration and full and proper evaluation, to:

- grant;
- refuse; or
- postpone for further investigation;
- amnesty applications received.

7. Disclosure of interest

Any member of the Amnesty Committee who has any personal, financial or other interest in respect of any matter which has been brought before the Amnesty Committee for consideration must disclose that interest and withdraw from the proceedings of the Amnesty Committee when that specific matter is being considered and evaluated.

8. Objection against any decision of the Amnesty Committee

Any applicant (appellant) who feels aggrieved by a decision of the Amnesty Committee may, against payment of a fee to be determined by the Board from time to time, lodge an objection against that decision to the Chairperson of the Amnesty Committee. The applicant (appellant) must deliver a Notice of Objection, duly dated and signed by the applicant (appellant), to the Chairperson of the Amnesty Committee, fully indicating the grounds of the applicant's (appellant's) appeal, within thirty days after the date of delivery to the applicant (appellant) of the finding of the Amnesty Committee.

The Chairperson of the Amnesty Committee must thereupon refer the Notice of Objection to an independent panel, comprising one senior legal practitioner and one senior estate agency practitioner, neither of who shall be Board members, and who are co-opted by the Amnesty Committee for the purpose of reconsidering the application. The applicant (appellant) may, at the applicant's (appellant's) own cost, appear before, and address, the independent panel in support of the appeal.

An applicant (appellant) who is dissatisfied with the decision of the independent panel co-opted to reconsider the application may appeal that decision to a court of law having jurisdiction.

9. Required information to be disclosed by applicant

Applicants applying to the Amnesty Committee for amnesty in terms of this Amnesty Policy are required, in the application referred to in paragraph 5 above, to make full, honest, open and truthful disclosure of all facts and information in respect of their illegal activities as estate agents during the time when such applicants had not been issued with valid fidelity

fund certificates by the EAAB and were, as a result, not authorised to perform the functions and activities of an estate agent.

Such required facts and information shall include, but are not limited to, the provision by the applicant of comprehensive details pertaining to:

- 9.1 whether the applicant had previously applied for the issue of a fidelity fund certificate to the EAAB and, if so, the reason why such fidelity fund certificate was not issued by the EAAB;
- 9.2 whether the applicant had, at any stage, previously been issued with a valid fidelity fund certificate by the EAAB and, if so, the reasons for the failure by the applicant to renew such fidelity fund certificate from time to time thereafter;
- 9.3 the time period during which the applicant actually practiced as an estate agent when a valid fidelity fund certificate had not been issued to the applicant by the EAAB;
- 9.4 whether the applicant practiced as an estate agent as a sole proprietor, a partnership, a close corporation or a company;
- 9.5 the business and/or trade name(s) used by the applicant when practicing as an estate agent;
- 9.6 the postal address used by the applicant as well as the physical address(es) from which the applicant practiced as an estate agent;
- 9.7 whether or not the applicant opened and maintained a trust account during the time when the applicant practiced as an estate agent and, if so, full details of that trust account including all trust moneys received and/or expended and the bank at which the trust account was opened and the number of the trust account;
- 9.8 if a trust account was not opened details of all bank accounts used by the applicant to channel trust moneys received and/or expended;
- 9.9 details of all business and/or other banking accounts used by the applicant in and about the estate agency operations;
- 9.10 all estate agency business transacted by the applicant during the entire period when the applicant practiced as an estate agent;
- 9.11 amounts of all commissions and/or other payments earned and/or received by the applicant as a result of estate agency services rendered to consumers;
- 9.12 if the applicant practiced as an estate agent in partnership or as a co-member with other members of a close corporation or as a co-director with other directors of a company, full details of all other partners, members or directors, as the case may be;
- 9.13 of all employees or non-principal estate agents in the service of the applicant when the applicant rendered estate agency services to consumers;
- 9.14 all assets and liabilities of the applicant;

- 9.15 all of the financial transactions of the applicant including the current financial position and standing of the applicant's estate agency undertaking;
- 9.16 income tax returns, if any, submitted by the applicant to SARS in respect of the estate agency activities undertaken as well as personal income tax;
- 9.17 returns submitted by the applicant to any other relevant authority, such as the Department of Labour, in respect of the estate agency activities undertaken;
- 9.18 details of any auditor(s) and/or auditing firm(s) and/or accountant(s) and/or bookkeeper(s) whose services were used by the applicant in the preparation and/or auditing of accounting records in respect of the applicant's estate agency activities;
- 9.19 educational qualifications of the applicant as well as information on whether any attempt was made by the applicant to attain either the NQF Level 4 or 5 real estate qualifications;
- 9.20 any criminal actions, whether or not finalised, that may have been brought against the applicant or civil actions, whether or not finalised, that may have been instituted against the applicant.

10. The evaluation of applications

All applications shall be duly considered and evaluated by the Amnesty Committee having regard to the following criteria, namely;

- 10.1 the apparent motive of the applicant in bringing the application;
- 10.2 the context in which the admitted contravention of the provisions of the Act took place;
- 10.3 the legal and factual nature of the contraventions of the Act committed by the applicant;
- 10.4 the disqualifications more fully referred to in section 27 of the Act (see paragraph 3.4 above);
- 10.5 the interests of both the public as well as the general body of estate agents; and
- 10.6 justice to the applicant as a fit and proper person.

11. Approval of applications

If the Amnesty Committee is satisfied that all requirements for the grant of an amnesty have been satisfactorily discharged by the applicant and that, in the interest of justice, the applicant is a fit and proper person to be granted amnesty, the Amnesty Committee shall approve the application upon such terms, conditions and timelines relating to:

- 11.1 any application to be made by the applicant for registration as an estate agent by the EAAB and the subsequent issue by the EAAB to that estate agent of a valid fidelity fund certificate;
- 11.2 the payment of any administrative or other penalties;
- 11.3 the opening and maintenance of a properly designated trust account;
- 11.4 the appointment of auditors registered with the Independent Regulatory Board for Auditors (“IRBA”);
- 11.5 the auditing of the books and records of the estate agency undertaking;
- 11.6 the obtaining of the required estate agency educational qualification(s) that may be applicable to the applicant in question; and
- 11.7 any other matter or matters that the Amnesty Committee may have taken into account when making the decision to approve the application;

as the Amnesty Committee may reasonably determine and prescribe.

The Amnesty Committee shall ensure that an appropriate notification informing the applicant of the decision of the Amnesty Committee is delivered to the applicant as soon as possible after the decision to approve the application has been taken. Such notification shall indicate both the date of approval of the application and the nature of any conditions that might have been imposed by the Amnesty Committee when approving the application.

12. Waiving of disciplinary steps

No internal disciplinary steps or measures shall be instituted by the EAAB against any applicant who has been granted indemnity for the non-compliance with the provisions of the Act for any estate agency activities that may have been undertaken by the applicant prior to the date of approval.

13. Refusal of applications

If, in the view of the Amnesty Committee, the requirements for the grant of amnesty have not been met or it is apparent that the applicant has engaged in any unlawful activity, the application for amnesty shall be refused.

The Amnesty Committee must ensure that an appropriate notification informing the applicant of the decision of the Amnesty Committee is delivered to the applicant as soon as possible after the decision to refuse the application has been taken. Such notification shall, in addition, set forth the reasons for the denial by the Amnesty Committee of the application.

14. Reporting

The Chairperson of the Amnesty Committee shall ensure that all meetings of the Amnesty Committee are mechanically recorded. A meeting of the Amnesty Committee shall, however, proceed in the absence of mechanical recording provided that the meeting is recorded by the Company Secretary of the EAAB. The minutes of all meetings of the Amnesty Committee shall be drafted and prepared by the Company Secretary of the EAAB as soon as possible

after the date of the meeting but, in any event, by no later than seven working days after the date of the meeting.

The minutes of each meeting of the Amnesty Committee shall be required to indicate the number of applications that were considered at the meeting and, in respect of each application, whether or not the application was approved, refused or postponed for further investigation. If the application was approved the minutes shall specify any conditions that may have been imposed upon the applicant while, if the application was refused, the minutes shall set forth the reasons for such refusal. If the application was postponed for further investigation the minutes shall indicate the reason for this step and when it is intended that the application will be reconsidered.

PLEASE NOTE THE AMNESTY POLICY IS AVAILABLE ON OUR WEBSITE www.eaab.org.za