

## IF YOU ARE STILL WAITING FOR YOUR FIDELITY FUND CERTIFICATE YOU NEED TO READ THIS

It has come to our attention that the Property Practitioners Regulatory Authority (the PPRA) has issued a *pro forma* application form that Property Practitioners (PP's) who have not yet received their fidelity Fund Certificates (FFCs) can complete and submit, which allows PP's to be exempted from holding an FFC. The reason cited on the application reads as follows: "I am advised that the PPRA is currently in a transitional phase in implementing the Property Practitioners Act 22/2019 and the registration and issuing of FFCs to all practitioners. In the interim I apply for an exemption from the requirement to be issued with an FFC in terms of S48(1) of the Act, until 31/8/2022 to allow for time to register and obtain an FFC."

A copy of the application form can be found by clicking on the link below:

<http://www.miltons.law.za/.../PREPOPULATED-EXEMPTION-FORM...>

The question that springs to mind is this? Is this in accordance with our law and what are the consequences of such a step?

Section 48(1) of the Act reads as follows:

"No person or entity may act as a property practitioner unless, in addition to any other requirements provided for in or under this Act —

- a) he or she or it has been issued with a Fidelity Fund certificate contemplated in section 47; or
- b) if he or she or it employs any other person as a property practitioner, that person has also been issued with a Fidelity Fund certificate contemplated in section 47."

The holding of a FFC by a property practitioner is accordingly mandatory.

Section 4 of the Act does give the PPRA the power to exempt any person from compliance with any provision of the Act, but this is only after careful consideration of the circumstances of the case, including the following:

- Whether the exemption "is likely to impact negatively on the interests of the general public"; and
- whether consumers rights and interests will continue to be protected.

Our submission is that the proposed exemption falls foul on both of these points primarily for the simple reason set out below.

The purpose of a FFC is to not only to ensure that all property practitioners are registered with the PPRA. The Fidelity Fund provides valuable statutory insurance for members of the public who might be the victims of theft of trust money by a property practitioner, and in section 34(1)(a) this insurance is limited to cover the theft of trust monies by a property practitioner “who was in possession of a FFC at the time of the theft”. The question then arises as to whether the Fidelity Fund would be entitled to compensate a member of the public who is the victim of a theft by a property practitioner who had been exempted from holding a FFC. Our opinion is that the FFC might well be legally obliged to follow the Act and to repudiate such a claim.

In section 48 of the Act strict timelines are set out for the issue of FFC’s and provision is made for circumstances where the PPRA causes a delay. In terms of this section the PPRA has 30 working days to consider an application for an FFC that meets the prescribed requirements, and if it fails to do so, the application for the FFC is “deemed to be approved”, and the PPRA must, within 10 working days of a written request, issue the applicant with their certificate.

So where to from here?

We all know that a PP cannot earn commission when they do not hold an FFC, so this issue is of high importance to every PP who has not yet received their FFC. We accordingly advise as follows:

Firstly, apply for the exemption, as no purpose would be served by failing to play along with the PPRA’s attempts to cover up their inability to do their job. Also, who knows how the courts will interpret the situation if it ever comes to that.

Secondly, for those of you who have made proper applications and have waited more than 30 working days for their FFC, go ahead and send a written request for your FFC, quoting section 48(3) of the Act. Just remember to keep proof of the delivery of this written request, and obviously also your original application, to prove your case if this ever becomes necessary. We believe that this step will give you a better chance of ensuring that your clients are insured, and that you are paid the commission that you have earned when the transfer is registered.