

**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**



**CASE NO: 74313/16**

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER</u>
	<u>JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>

*[Handwritten signature and date 16/05/18 over the box]*

In the matter between:

<b>PROXI SMART SERVICES (PTY) LTD</b>	<b>Applicant</b>
and	
<b>THE LAW SOCIETY OF SOUTH AFRICA</b>	<b>1<sup>st</sup> Respondent</b>
<b>THE CHIEF REGISTRAR OF DEEDS</b>	<b>2<sup>nd</sup> Respondent</b>
<b>ROGER DIXON</b>	<b>3<sup>rd</sup> Respondent</b>
<b>THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT</b>	<b>4<sup>th</sup> Respondent</b>
<b>THE ATTORNEYS FIDELITY FUND</b>	<b>5<sup>th</sup> Respondent</b>
<b>THE LAW SOCIETY OF KWAZULU-NATAL</b>	<b>6<sup>th</sup> Respondent</b>
<b>THE LAW SOCIETY OF CAPE GOOD HOPE</b>	<b>7<sup>th</sup> Respondent</b>
<b>THE LAW SOCIETY OF THE FREE STATE</b>	<b>8<sup>th</sup> Respondent</b>
<b>THE LAW SOCIETY OF THE NORTHERN PROVINCES</b>	<b>9<sup>th</sup> Respondent</b>
<b>NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS</b>	<b>10<sup>th</sup> Respondent</b>
<b>BLACK LAWYERS ASSOCIATION</b>	<b>11<sup>th</sup> Respondent</b>

THE BLACK CONVEYANCERS ASSOCIATION	12 <sup>th</sup> Respondent
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	13 <sup>th</sup> Respondent
THE NATIONAL FORUM OF THE LEGAL PROFESSION	14 <sup>th</sup> Respondent

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## J U D G M E N T

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### MATOJANE, J:

#### Introduction

[1] This is an opposed application for declaratory relief concerning the lawfulness of the applicant's business model for performing the administrative and related services pertaining to property transfers that applicant contends is not by law reserved to conveyancers or legal practitioners.

[2] The applicant applies in its notice of motion for an order:

"Declaring that the performance of the steps involved in the process of transfer of ownership of immovable property ("the transfer process") in accordance with the model described more fully in the founding affidavit, and pursuant to which the applicant performs the steps in the transfer process identified in schedule 'FA4B' hereto, does and will not:

- 1.1 contravene or otherwise fall foul of:
  - 1.1.1 s 83(8)(a) of the Attorneys Act 53 of 1979;
  - 1.1.2 s 33(3) of the Legal Practice Act 28 of 2014
  - 1.1.3 ss15 and 15A of the Deeds Registries Act 47 of 1937 ("the Deeds Registries Act"); or
  - 1.1.4 regulations 43(1), 44(1) and 44A of the regulations made under the Deeds Registered Act and Published in GN474 of 1963;
- 1.2 otherwise constitute the performance by the applicant of conveyancing work reserved by law to an attorney or conveyancer. in

[3] The first respondent, the fourth respondent, the fifth respondent (the fund) have formally opposed the relief sought by the applicant. The seventh and ninth respondents have made common cause with other respondents who have filed answering papers. The other respondents were joined at the insistence of the first respondent.

[4] The first respondent in addition to opposing the relief sought by the applicant, seeks by way of counter-application, an order declaring the applicant's model to be in contravention of:

- 4.1 paragraph 7 of the Code of Conduct for Estate Agents, published by the Estate Agencies Affairs Board under section 8 of the Estate Agency Affairs Act 112 of 1976;
- 4.2 rules 43.1, 48, 49.8 and 49.17 of the Consolidated Rules for the Attorneys Profession published in accordance with section 74 (4) of the Attorneys Act;
- 4.3 the contractual freedom and autonomy a seller and common under common law to appoint his or her conveyancer; in a new
- 4.4 section 11(1) of the Consumer Protection Act, 68 of 2008;
- 4.5 sections 4 (1)(a) and 4 (1)(b) of the Competition Act, 89 of 1998.

[5] The opposing respondents contend that all work, of whatever nature associated with immovable property transactions and transfers indivisibly and inseparably forms part of conveyancing practice, which has, by usage, custom and practice over centuries, become work that is performed, and ought to continue to be performed, exclusively by conveyancers.

## **Background**

[6] The applicant is a newly established company which had intended to commence business operations by implementing its business model with effect from 1<sup>st</sup> March 2016 with a pilot operation with third respondent

commencing in April 2016. In terms of the model, the applicant will perform what it terms "administrative and related services" that are routinely performed in the course of property transfer.

[7] The applicant has attached to the founding affidavit (as annexure "FA4A") a schedule setting out what it regards as all legal work, tasks and actions in regard to property transfer that is reserved to conveyancers and practitioners in terms of the Deeds Registers Act, the Attorneys Act and any other legislation or regulation.

[8] In a second schedule, "FA4B" the applicant list tasks it intends to perform, the so-called "non-reserved work". It is in respect of the tasks listed in FA4B that applicant seeks a declarator that performance thereof by the applicant will not contravene or otherwise fall foul of the subject legislation.

[9] The distinction between "reserved" and "non-reserved" work is of the applicant's making. The subject legislation does not divide the functions performed by a conveyancer between "reserved" and "non-reserved" work.

### **Statutory framework**

[10] Section 20 of the Deeds Registries Act<sup>1</sup> provides that Deeds of transfer shall be prepared in the forms prescribed by law or by regulation, and, shall be executed in the presence of the registrar by the owner of the land described therein, or by a conveyancer authorized by power of attorney to act on behalf of the owner, and shall be attested by the registrar.

[11] Regulation 63(2) of the regulations<sup>2</sup> in terms of the Deeds Registries Act, provides that all deeds, bonds, diagrams, or documents necessary in connection with the examination, execution, or registration of any deed, bond, power or other document lodged in a Deeds Registry, including all receipts or certificates required by law to be produced, shall accompany such deed.

<sup>1</sup> DEEDS REGISTRIES ACT 47 OF 1937

<sup>2</sup> Published in GN R474 Gazette 466 of 29 March 1963

[12] In terms of section 15 of the Deeds Registries Act no deed of transfer, mortgage bond or certificate of title or any certificate of registration of whatever nature, mentioned in this Act, shall be attested, executed or registered by a registrar unless it has been prepared by a conveyancer.

[13] Section 15A of the Deeds Registries Act provides that a conveyancer who prepares a deed or other document for the purposes of registration or filing in a deeds registry, and who signs a prescribed certificate on such deed or document, accepts by virtue of such signing the responsibility, to the extent prescribed by regulation for the purposes of this section, for the accuracy of those facts mentioned in such deed or document or which are relevant in connection with the registration or filing thereof, which are prescribed by regulation".

[14] Section 83(8)(a)(i) of the Attorneys Act prescribes documents that must be prepared by an attorney. The section reads:

"(8) (a) Any person, except a practising practitioner, who for or in expectation of any fee, gain or reward, direct or indirect, to himself or any other person, draws up or prepares or causes to be drawn up or prepared any of the following documents, namely -

(i) any agreement, deed or writing relating to the immovable property or any right in or to immovable property, other than contracts of lease for periods not exceeding five years, conditions of sale or brokers' notes;

(ii) -(v)

shall be guilty of an offence and on conviction liable in respect of each offence to a fine not exceeding R2 000 and in default of payment thereof to imprisonment not exceeding six months."

Section 83(8)(a)(i) of the Attorneys Act reserves not only '*preparing*' but also '*drawing up*' reserved documents for practising practitioners<sup>3</sup>; and secondly prohibits any person other than a practising practitioner from causing such a document to be '*drawn up or prepared*'

[15] Applicant contends that section 83(8)(a)(i) does not extend to the documents the applicant will be responsible for preparing or procuring, including transfer duty receipts, rate clearance certificates, uploading of information to the applicant's data base to be used by conveyancers in producing reserved documents.

[16] The applicant assert that it will not draw up or prepare or cause to be drawn up or prepared "any agreement, deed or writing relating to immovable property or any right in or to immovable property", as envisaged in s83(8)(a)(i) of the Attorneys Act. The applicant will also not prepare any certificates that are required by section 15A of the Deeds Registries Act to be prepared by a conveyancer.

### **The features of the applicant's proposed model**

[17] The proposed model is based on supporting documents that may be required to be lodged in a "*typical transfer of immovable property*" involving the sale by private treaty of a freehold property. This ignores the fundamental reality that every property transaction is unique and is not typical.

[18] Supporting documents that are required to be lodged with a deed of transfer requires the exercise of professional discretion and legal knowledge as they depend on many factors, including the type of transaction (sale, exchange, donation, expropriation etc.). The nature of land transferred (whole, part, shared, rural or urban) and the parties concerned therein (living persons, deceased estates, incapacitated persons, juristic persons, insolvents etc).

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<sup>3</sup> Practising practitioner is defined in s 1 as "an attorney, notary or conveyancer"

[19] In step 5 of Annexure 'FA4B the applicant states:

" A Senior staff member at Proxi will: study the deed of sale and establish a transaction timeline, potential bottlenecks and critical path (' the transfer program') leading up to the agreed transfer date recorded in the deed of sale. Regarding 5. A and b Proxi will employ suitably experienced individuals to review the deed of sale and program the sequence of the documented in the deed of sale."

[20] On its version, the experienced individuals to be employed by the applicant will use their skills and knowledge that is beyond clerical administration to verify information and identify problems. They will check whether suspensive conditions have been fulfilled and in doing so they will be interpreting information and will inevitably be dispensing legal advice pertaining to the provisions contained in the contract. This relates to more than providing administrative services as the employees of the applicant would be causing documents to be '*drawn up or prepared*'.

[21] Under the proposed model, the applicant will have its panel of conveyancers approved by way of a tender process or by way of individual negotiations with the respective conveyancers. The applicant and the attorneys on the applicant's panel will operate in parallel in carrying out their respective tasks on a custom-build, partitioned conveyancing software platform with the applicant in overall control of the registration process.

[22] Before the conclusion of a deed a sale a dual mandate will be given by the seller under which the applicant will be appointed by the seller under an "administration services agreement" to perform the "non-reserved administrative services" regarding a property transfer. The seller will, separately, select a practising conveyancer on the applicant's panel to perform the agreed reserved work under a "legal services mandate".

[23] On receipt of the Legal Services Instruction, the conveyancer performing the reserved work communicates with his client, the seller by acknowledging receipt of the Legal Services Instruction via the estate agency

responsible for the sale. The conveyancer sends his pro forma statement of account to the purchaser setting out the conveyancers reserved work fee with a request for the sum to be paid into the conveyancer's trust account to be debited against registration of transfer.

[24] Attorneys on the panel will sign a "parallel mandate management agreements" with the applicant regulating the interaction between the applicant and those attorneys regarding the execution of seller's dual mandate. The agreement provides, among other things, that the applicant and the attorneys will independently negotiate and agree their fees with consumers. Attorneys will provide a proposed schedule of maximum fees to the applicant before concluding a parallel mandate management agreement.

[25] The fee charged by the conveyancer will be capped to ensure that the conveyancer does not charge more than his or her share of the standard conveyancing tariff recommended by the statutory Provincial Law Societies by charging a fee only in respect of what applicant regards as "reserved work".

[26] The applicant and the conveyancer on the panel will work together to ensure "effective direct, electronic and online communication links are used between them. The conveyancers will be provided with the prescribed systems or technologies free of charge.

[27] Rule 43 (1) of the Consolidated Rules of the Attorneys Profession ("the Consolidated Rules") states."

"A member shall not, directly or indirectly, enter into any express or tacit agreement, arrangement or scheme of operation or any partnership (express, tacit or implied), the result or potential result whereof is to secure for the practitioner the benefit of professional work, solicited by a person who is not a practitioner,\* for reward, whether in money or kind; but this prohibition shall not in any way limit bona fide and proper marketing activities by full-time employees of the member."

[28] The model envisages that the applicant is to be authorised by the consumers, by way of written investment mandates, to open and operate



specific purpose bank accounts on behalf of individual consumers. Purchasers of immovable property would deposit the sum of the purchase price and other amounts in those bank accounts.

**Applicant will cause the reserved documents to be drawn up or prepared.**

[29] The applicant's staff will collate and capture data relating to the buyer, seller and property description into the software capture fields. The captured data will be stored in a database until needed by the panel attorney when preparing reserved work document. The software platform will prevent the applicant from being able to assess the reserved work document templates or using the data it is captured to prepare reserved work documents.

[30] The procuring of information to be inserted in a reserved document and capturing that information onto a software platform from which it will be accessed by the conveyancer who will import it into a template on the platform created by the applicant forms an integral part of *'drawing up'* or *'preparing'* the document concerned.

[31] The meaning to be given to the word *'cause'*, *'causing'* and *'preparing'* must take into account the applicable text as whole as well as the purpose and efficacy of the legislature authorizing practitioners' employees to *'cause to be drawn or prepared any of the documents concerned'*. Otherwise the prohibition in section 83(12) of the Attorneys Act would be redundant if the administrative work of the type the applicant proposes to perform were not included in the definition of *'causing to draw up or prepare'*.

[32] The applicant will deal with all finances relevant to the transfer; such as to pay rates and levy payments<sup>4</sup>. It will submit payment of transfer duty to

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<sup>4</sup> In terms of the provisions of the Chief Registrar's Circular, no. 8 of 2014, clearance certificates obtained from local municipalities are to be certified by a conveyancer to be a true copy of the local authority's certificate produced to the Deeds Registrar.

SARS<sup>5</sup> from the purchaser's client funds account and will forward the transfer duty receipt to the conveyancer performing the reserve work to place in the lodgment cover; make requests to the purchaser and seller to make specified payments into the specific purpose bank account controlled by the applicant.

[33] The applicant asserts that it is an authorised financial services provider (FSP) registered with the Financial Services Board. Under its Category 1 licence, the applicant claims that it is authorised to hold clients investment mandates and that it falls under the regulatory authority of the Financial Advisory and Intermediary Services Act ("FAIS Act")<sup>6</sup> which will ensure financial regulation for consumer protection against loss of funds.

[34] The FAIS Act regulates the activities of all financial services providers (FSP) who give advice or provide intermediary services to Consumers of specific financial products. The Act specifies the nature of financial products it can regulate<sup>7</sup>. On its version form, the applicant intends rendering "administrative services" to conveyancers which do not constitute "financial product" as defined.

<sup>5</sup> a transfer duty declaration and transfer duty payments are submitted to SARS via eFiling after which SARS issues a transfer duty receipt to the registered conveyancer. Thereafter, and prior to lodging the transfer duty receipt at the Deeds Registry, the conveyancer is obliged to append a certificate that reads:

"Declaration by conveyancer/attorney: I certify that this is a true copy of the transfer duty declaration/receipt/exemption certificate drawn from the SARS eFiling site, which will be retained by me for 5 years from the date of registration of transfer

<sup>6</sup> The Financial Advisory and Intermediary Services Act (37 of 2002)

<sup>7</sup> "financial product" means, subject to subsection (2) –

1. a) securities and instruments, including –
  1. i) shares in a company other than a "share block company" as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980);
  2. ii) debentures and securitised debt;
  3. iii) any money-market instrument;
  4. iv) any warrant, certificate, and other instrument acknowledging,
 

conferring or creating rights to subscribe to, acquire, dispose of, or convert securities and instruments referred to in subparagraphs (i), (ii) and (iii);
  5. v) any "securities" as defined in section 1 of the Financial Markets Act, 2012 (Act No. 19 of 2012);

[Subparagraph (v) amended by section 175(d) of Act No. 45 of 2013]
2. b) a participatory interest in one or more collective investment schemes;
3. c) a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), and the Short-term Insurance Act, 1998 (Act No. 53 of 1998), respectively;
4. d) a benefit provided by –
  1. i) a pension fund organisation as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), to the members of the organisation by virtue of membership; or
  2. ii) a friendly society referred to in the Friendly Societies Act, 1956 (Act

[35] The applicant will hold comprehensive insurance cover in the form of professional indemnity cover and director's liability cover. The difficulty with the protections that applicant offers to put in place is that the protection of clients funds will remain within the discretion and capacity of the applicant to maintain. There is no statutory scheme and no regulator that will ensure that the guarantees that applicant undertakes to put in place to protect clients funds are in fact maintained.

[36] Section 25 of the Attorneys Act establishes and regulates the Fidelity Fund whose purpose is to reimburse persons who suffer pecuniary loss as a result of misappropriation of trust monies by a practitioner or his subordinates.

[37] The Attorneys Fidelity Fund secures fidelity re-insurance in terms of section 40(2) to back its liability for claims against the fund for misappropriation of trust funds by practitioners. Funds in a practitioner's trust account are excluded from the insolvent estate of a conveyancer by section 78(7) of the Attorneys Act.

[38] The applicant asserts that management of conveyancing funds constitute administrative tasks which will be managed by the applicant. Section 78 of the Attorneys Act ensures that buyers and sellers can deposit their funds with conveyancing attorneys risk-free. It provides that:

"Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit therein the money held or received by him on account of any person."

[39] Subsection (2)(a) and (3) provide that funds not immediately required for any particular purpose may be invested in a separate trust saving account or interest-bearing account with a banking institution or building society and the interest accrued will be paid to the Fund.

[40] Subsections (2A) and (4) provide that a practitioner may, upon instruction, invest funds deposited in a trust banking account and that the interest accrued shall be paid over to the consumer.

[41] The applicant will also conclude "introduction agreements" with estate agencies under which the applicant will remunerate agencies that bring its services to the attention of home sellers and buyers. The agency is required to make known the services of the applicant<sup>8</sup> and then require the agent to state:

"If you would like to appoint Proxi [i.e. the applicant], then you can select any one of the attorneys presented below that work with Proxi to complete your transfer."

[42] Self-evidently, the model depends solely on estate agents to market the applicant and the conveyancers on the applicant's panel in exchange for which the agency receives payment from the applicant. This in my view, contravenes paragraph 49.17 of the Consolidated Rules for the Attorneys Profession<sup>9</sup> which states that:

"A member shall not tout for professional work. A member will be regarded as being guilty of touting for professional work if he or she either personally or through the agency of another, procures or seeks to procure, or solicits for, professional work in an improper or unprofessional manner or by unfair means, all of which for purposes of this rule will include, but not be limited to:

1. 49.17.1 the payment of money, or the offering of any financial reward or another inducement of any kind whatsoever, directly or indirectly, to any person, in return for the referral of professional work; or
2. 49.17.2 directly or indirectly participating in an arrangement or scheme of operation resulting in or calculated to result in, the member's securing professional work solicited by a third party

<sup>8</sup> Paragraph 7 of the Code of Conduct of Estate Agents provides: No estate agent shall without good and sufficient cause, directly or indirectly, in any manner whatsoever, solicit, encourage, persuade or influence any party or potential party to a pending or a completed transaction to utilise or refrain from utilising -

5 7.1 the services of any particular attorney, conveyancer or firm of attorneys;

7 2 the services or financial assistance offered by any financial institution to members of the public in general; or

7.3 the financial assistance offered to such party by any person.

<sup>9</sup> Each Provincial Statutory Law Society has by virtue of section 74 of the Attorneys Act promulgated rules for the profession dealing with inter alia conduct on the part of the practitioner or candidate attorney shall constitute unprofessional or unworthy conduct. The consolidated rules came into operation on 1 March 2016.

[43] Under the proposed model the applicant will manage all communications between the purchaser, seller, estate agents and bond attorneys relating to payment of the deposit, agents commission, FICA documents and the cancellation of the bond and financial implications thereof. It will request financial guarantees from the bond attorney, receive and pass them on to the bond cancellation attorney.

[44] The day before the scheduled lodgment date applicant will make contact with all linked conveyances to inform them that the lodgment date is the next day. On the scheduled lodgment date, the conveyancer performing the reserved work will lodge the transfer documents at the deeds registry.

[45] Upon notification from the conveyancer performing the reserved work that the deeds have been registered, applicant notifies all transaction parties of registration, namely, seller; purchaser estate agency; local authority; body corporate and others.

[46] The conveyancer performing the reserved work takes delivery of the Title Deed at the deeds registry and sends it to the applicant for delivery to the purchaser or the mortgagee bank.

[47] The conveyancer will not be personally involved in the managing the finances involved in the transaction and will rely to his or her peril on the applicant to ensure that he or she does not pass transfer of the property to the seller until the applicant has secured payment of the purchase price to complete the transaction.

[48] Section 33(3) of the Legal Practice Act provides:

"No person may in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or

notary, unless that person is an advocate, attorney, conveyancer or notary, as the case may be."

[49] Currently, bond attorneys issue guarantees and prepare bond documents based on documents delivered to them by the transferring attorney. Transferring attorneys are expected to certify that the price recorded in the fly- sheet is the actual price being paid by the purchaser to protect the interest of the mortgagor. Until the model is implemented, the court cannot postulate whether bond attorneys will be willing to cooperate with a third party who is not an attorney and a conveyancer.

[50] The highest standard of professionalism and honesty are fundamental to conveyancing transactions which involve large sums of money represented by undertakings exchanged on trust. The public derives comfort from the fact that attorneys and conveyancers are regulated by statutory law societies, the Fund and a Code of Conduct that prescribes high ethical standards which they must adhere to ensure that the public is protected.

[51] On its version, the applicant will be doing everything necessary to enable a conveyancer at a push of a button to have all prescribed documents populated by data its staff has collated and captured. Put differently, all the conveyancing process that started with the signing of a deed of sale will be done by the applicant's staff. The legislature has prohibited persons other than employees of the practitioner from preparing or causing to be drawn or prepared any documents on behalf of a practitioner.<sup>10</sup>

[52] When interpreting a statute a court is required in general terms to ascertain the meaning of the provision to be interpreted by an analysis of its purpose and in doing so, have regard to the context of the provision in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it; While words must be given their

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<sup>10</sup> (12) The provisions of subsection (8) shall not apply to -  
Any person in the employment of a practising practitioner drawing or preparing or causing to be drawn or prepared any of the documents concerned in the course of his employment and on behalf of his employer.

ordinary meaning, a contextual and purposive reading of the statute is also important<sup>11</sup>.

[53] On a proper construction of section in 83(8)(a)(i) the legislature had in mind that a conveyancer or his subordinates will obtain the information required to be contained in the reserved documents, check and verify the information contained therein and do everything involved in "causing" them to "be drawn up" or "prepared" as contemplated in the section. For the reasons stated above, the applicant's model would contravene section 83(8)(a)(i) of the Attorneys Act.

### **The relief sought by the applicant is incompetent**

[54] The Constitutional Court has emphasised that court orders must be framed in unambiguous terms and must be practical and enforceable. It must leave no doubt as to what the order requires to be done. In **Eke v Parsons**<sup>12</sup> the Constitutional Court stated the following:

"The rule of law requires not only that a court order is couched in clear terms but also that its purpose is readily ascertainable from the language of the order. This is because disobedience of a court order constitutes a violation of the Constitution. Furthermore, in appropriate circumstances, non-compliance may amount to a criminal offence with serious consequences like incarceration."

[55] At paragraph 74 the court stated further that:

"If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person to whom it applies, the discretion to comply or disregard it."

<sup>11</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) para 18

<sup>12</sup> 2016 (3) SA 37 (CC) Judgment of Japhtha J para 64. See also *Camps Bay Ratepayers Association v Harrison* 2011(4) SA 42 par 57; *Kaunda v President of the RSA* 2004(5) SA 191 para 35.

[56] Prayer 1 of the notice of motion seeks a declarator that certain conduct of the applicant would not fall foul of the provisions of various pieces of legislation. This conduct is referred to as:

"the performance of the steps involved in the process of the transfer of ownership of property ('the transfer process') in accordance with the model described more fully in the founding affidavit, and pursuant to which the applicant performs the steps in the transfer process identified in schedule 'FA4B' hereto."

[57] The applicant explains that whilst the software platform is important for the practical implementation of the model, the implementation of the model, will have to conform to the principles set out in the founding affidavit (relating particularly to the separation of reserved and non-reserved work) failing which the applicant will not be acting within the confines of the relief sought in the notice of motion.

[58] The applicant confirms that the implementation of the model in accordance with annexure FA4B will require many practical steps and arrangements that are not set out exhaustively in annexure FA4B, including the development and deployment of the software package. Applicant states that it will tailor its model in line with any relief granted by this court. It is impossible to know before the model is implemented how it will work.

[59] The declaration sought by the applicant is vague, unenforceable and will not bring finality to what conduct the court has sanctioned. The court cannot determine in advance without facts that the conduct listed in FA4B which admittedly, is not set out exhaustively, does not breach the provisions of various statutes.

[60] The prayer incorporates by reference parts of applicant's founding affidavit *"the model described more fully in the founding affidavit", and principles set out in the founding affidavit*. In order to understand the model which has been sanctioned those bound by the order must first consider the



contents of the founding affidavit to understand the principles set out therein. The said principles are not set out.

[61] The relief sought also incorporates by reference an annexure to the founding affidavit, annexure FA4B. The FA4B consists of 23 pages in the form of a table that lists some 75 steps or functions that are alleged to fall outside the ambit of reserved work and 13 steps that are admitted to constitute reserved work in a "typical" transfer process. Various technical terms like "E-HUB", the "API" and "peripheral service conditions" are used which are not adequately explained.

[62] FA4B has a column headed "remarks" which contains applicant's comments, opinions and explanations of the process. It also refers to various pieces of legislation and statutes and explanations of applicant's interpretation and opinions about the transfer process.

[63] The terms and the purpose of the order sought are not clear. There can be no clarity without first implementing the proposed model to determine whether it will fall foul of the listed legislation. I would dismiss the application on this ground alone.

[64] In an attempt to overcome the lack of clarity, the ambiguity and non-specificity of the declaratory order, the applicant, in its replying oral argument, sprung upon the respondents an application for an amendment of the relief sought in the notice of motion. In that regard, the applicant in closing argument handed up a draft order encompassing the amended relief sought. That amendment was not served upon any of the respondents or made available to them before it is moved in closing argument.

[65] A cursory reading of the draft order reveals a whole new case on the part of the applicant. The business model is now on the basis of annexure FA2 which comprises a set of documents, a letter and a document headed Business Model. That case was accordingly not dealt with in the answering papers. The respondents are ambushed. The relief now sought is a reliance

on a document other than schedule "FA4B", and which differs completely from that which is alleged to be gleaned from annexure "FA4B".

[66] That approach of the applicant is an abuse of process. The prejudice to the respondents should the amendment be granted, cannot be cured by an appropriate cost order. It would require that the application is postponed to enable the respondents to deal in addition to that afresh.<sup>13</sup> The applicant would also be obliged to supplement its papers in that regard. It would accordingly render the whole process to date irrelevant and nugatory.

[67] The application for amendment stands to be dismissed.

#### **The declaratory order is impermissible**

[68] Regarding the provisions of s 21(1)(c) of the Superior Courts Act<sup>14</sup> the High Court may grant a declaratory order:

"in its discretion, and at the instance of any interested person, to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

[69] The correct approach to section 21(1)(c) the wording of which is similar to the erstwhile power conferred upon the court under section 19(1)(a)(iii) of the now repealed Supreme Court Act 59 of 1959 was summed up by Corbett CJ in *Shoba v OC, Temporary Police Camp, Wagendrift Dam*<sup>15</sup> as follows:

"An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case (see *Ex Parte Nell* 1963 (1) SA 754 (A) at 759H - 760B). But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (*Nell's* case, at

<sup>13</sup> Cf. *Tengwa v Metrorail* 2002 (1) SA 739 (CPD) at 745F-746D

<sup>14</sup> 10 of 2013

<sup>15</sup> 1995 (4) SA 1 (A) at 14F-I

760B - C). In Neil's case, *supra* at 759A - B, Steyn CJ referred with approval to the following statement by Watermeyer JA in *Durban City Council v Association of Building Societies* 1942 AD 27, at 32, with reference to the identically worded s 102 of the General Law Amendment Act 46 of 1935:

'The question whether or not an order should be made under this section has to be examined in two stages. First, the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'

[70] The Supreme Court of appeal in **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd**<sup>16</sup> confirmed the two-stage approach adopted by the then Appellate Division in *Durban City Council v Association of Building Societies* 1942 AD 27 at 32 and held that:

"the two-stage approach under the subsection consists of the following. During the first leg of the enquiry, the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage, the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exists. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

[71] It is common cause that the applicant has not as yet implemented its 'model'; has not yet developed the software on which it and its panel conveyancers will perform their tasks; and has not as yet performed any of the 'steps' in respect of which it seeks declaratory order. It is not clear how the model will work in practice as it is abstract and hypothetical.

[72] The first respondent and its constituent members have not prevented applicant or the estate agents and conveyancers it wishes to contract with from implementing the model. The first respondent merely advised applicant that its Council cannot support the proposed business model and the relevant statutory Law Societies have cautioned their members that if conveyancers

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<sup>16</sup> [2006] 1 All SA 103 (SCA) (30 May 2005)

participate in applicant's model disciplinary proceedings against such members will follow as they will be acting in contravention of the Attorney's Act, as well as the Rules of Conduct of the Law Societies.

[73] An applicant for declaratory relief must have a legally recognised interest in an existing, future or contingent right or obligation; an interest akin to the interest that a party has to intervene in proceedings in the High Court, i.e. have a direct and substantial interest in the subject matter.<sup>17</sup> It is not sufficient that an applicant has an indirect interest, such as a financial or commercial or derivative interest in the outcome of litigation<sup>18</sup>.

[74] In *Ex parte Nel*<sup>19</sup> the Appellate Division, as it was then known, held that an existing dispute was not required in respect of the interest, however, the decision is to be binding upon the parties, i.e. *res iudicata* as between the parties.<sup>20</sup>

[75] The participation of the conveyancers and estate agents in the applicant's model will create a dispute between the relevant Law Societies or Estate Agency Board and its members. The implementation of the model will not create a dispute between the applicant and the respondents that would be resolved by the declaratory order as applicant is not subject to the disciplinary powers of any of the law societies. Consequently, the applicant has not proven that it has any direct and substantial interest in the subject matter above.

[76] The court will not grant a declaratory order where the issue raised before it, is hypothetical, abstract and academic, or where the legal position is clearly defined by statute. The applicant states in its founding affidavit that;

"Proxi's business model has been approved by senior and junior counsel as meeting all applicable requirements of legality and professional propriety."

<sup>17</sup> *Milani et al v SA Medical and Dental Council et al* 1990(1) SA 899 (T) at 902G

<sup>18</sup> *Trinity Assets Management (Pty)Ltd & Others v Investec Bank & Others* 2009(4) SA 89 (SCA) para 49

<sup>19</sup> 1963(1) SA 754 (A)

<sup>20</sup> *Ex parte Attorney-General, Witwatersrand Local Division* 1997(2) SA 778 (W) at 783F

[77] Applicant seeks legal advice from the court about the permissibility of its proposed business model under circumstances where the model is an abstract hypothetical intended entry into the conveyancing industry which is not set out and is liable to change.

[78] The applicant does not comply with the first requirement to obtain declaratory relief. Failing in that regard, there is no basis why the court must determine whether the present case is one in which the court's discretion is to be exercised in determining the application. Accordingly, the applicant's application stands to be dismissed.

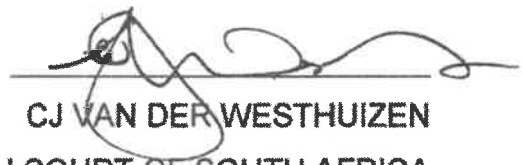
### Conclusion

[79] The applicant has not made out a case for the relief it seeks. In the result, the application is dismissed with costs including the costs of two counsels where so employed.



K E MATOJANE  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

I agree,



CJ VAN DER WESTHUIZEN  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

I agree,



Handwritten signature of JJ Strijdom in black ink, written over a horizontal line.

JJ STRIJDOM  
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENTG DIVISION, PRETORIA

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