**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

Case No: 74313/2016

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| **PROXI SMART SERVICES (PTY) LTD** | Applicant |
| and | |
| **THE LAW SOCIETY OF SOUTH AFRICA** | First Respondent |
| **THE CHIEF REGISTRAR OF DEEDS** | Second Respondent |
| **ROGER DIXON** | Third Respondent |
| **THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** | Fourth Respondent |
| **THE ATTORNEYS FIDELITY FUND** | Fifth Respondent |
| **THE LAW SOCIETY OF KWAZULU-NATAL** | Sixth Respondent |
| **THE CAPE LAW SOCIETY** | Seventh Respondent |
| **THE LAW SOCIETY OF THE FREE STATE** | Eighth Respondent |
| **THE LAW SOCIETY OF THE NORTHERN PROVINCES** | Ninth Respondent |
| **NATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS** | Tenth Respondent |
| **BLACK LAWYERS ASSOCIATION** | Eleventh Respondent |
| **THE BLACK CONVEYANCERS ASSOCIATION** | Twelfth Respondent |
| **MINISTER OF RURAL DEVELOPMENT AND LAND REFORM** | Thirteenth Respondent |
| **THE NATIONAL FORUM ON THE LEGAL PROFESSION** | Fourteenth Respondent |

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# APPLICANT'S HEADS OF ARGUMENT

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**INTRODUCTION**

1. The Applicant is a newly-established company that aims to implement a business model for performing the administrative and related services pertaining to property transfers that are not by law reserved to conveyancers or legal practitioners ("**reserved work**").[1]

2. On 1 March 2016, the Applicant gave notice to the First Respondent (the "**LSSA**") and its four constituent Law Societies of its intention to establish its business.[2]

3. In response, on 2 June 2016, the LSSA notified the Applicant that the Council of the LSSA asserted that the full conveyancing process – thus all administrative and related services, in addition to legal services – is reserved work and should remain so.[3]

4. The effect of the LSSA's stance is (i) to create a dispute between the Applicant and the LSSA in regard to whether any or all of the services the Applicant proposes to perform constitute reserved work and (ii) to prevent the Applicant from commencing business.[4]

5. The Applicant accordingly 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

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1 FA paras 7, 16 & 27.1, record 10, 14 and 17.

2 FA para 27, record 17. The Applicant's notice is annexure FA2, record 53 – 104.

3 FA para 27.2, record 18. The LSSA's response is annexure FA3, record 105.

4 FA para 28.2, record 19.

accordance with its business model (as described more fully in its founding affidavit),[5] does or would not:

5.1. contravene or otherwise fall foul of:

5.1.1. section 83(8)(a)(i) of the Attorneys Act, 53 of 1979 (the "**Attorneys Act**");

5.1.2. section 33(3) of the Legal Practice Act, 28 of 2014 (the "**Legal Practice Act**" or the "**LPA**");

5.1.3. sections 15 and 15A of the Deeds Registries Act, 47 of 1937 (the "**Deeds Registries Act**" or "**DRA**"); or

5.1.4. regulations 43(1), 44(1) and 44A of the regulations made under the Deeds Registries Act and published in GN474 of 1963 (the "**DRA Regulations**");

5.2. otherwise constitute the performance by the Applicant of conveyancing work reserved by law to an attorney or conveyancer.

6. The LSSA, the Fourth Respondent (the "**Minister**"), the Fifth Respondent (the "**Fund**") have formally opposed the relief sought by Applicant.

7. The Sixth to Fourteenth Respondents were joined at the insistence of the LSSA.[6] The Seventh and Ninth Respondents (the Cape Law Society and

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5 Pursuant to which the Applicant performs the steps in the transfer process identified in annexure FA4B to the founding affidavit, record 119 – 136.

6 LSSA AA para 3, record 250 – 252.

the Law Society of the Northern Provinces) subsequently filed answering affidavits.

8. Despite the LSSA's insistence that they be joined because of their alleged direct and substantial interest in the matter, none of the BLA (the Tenth Respondent), Nadel (the Eleventh Respondent), BCA (the Twelfth Respondent), the National Forum on the Legal Profession (the "**National Forum**") or the Minister of Rural Development and Land Reform (the Fourteenth Respondent) has opposed the application or filed any answering affidavits.[7] This insistence, we shall show, has been calculated to delay.

9. In addition to opposing the relief sought by the Applicant, the LSSA seeks, by way of counter-application, an order declaring the Applicant's model to be a contravention of:[8]

9.1. paragraph 7 of the Code of Conduct for Estate Agents (the "**Estate Agents Code**"), published by the Estate Agencies Affairs Board under section 8 of the Estate Agency Affairs Act, 112 of 1976 (the "**EAAA Act**");

9.2. rules 43.1, 48, 49.8 and 49.17 of the Consolidated Rules for the Attorneys' Profession (the "**Consolidated Rules**") published in accordance with section 74(4) of the Attorneys Act;

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7 Applicant's RA para 27, record 888.

8 The Notice of Counter-Application is at record 224 – 227.

9.3. the contractual freedom and autonomy a seller enjoys under common law to appoint his or her own conveyancer;

9.4. section 11(1) of the Consumer Protection Act, 68 of 2008 (the "**CPA**");

9.5. sections 4(1)(a) and 4(1)(b) of the Competition Act, 89 of 1998 (the "**Competition Act**").

10. For the reasons discussed in greater detail below, it is submitted that the Applicant's model is in all respects lawful and does not contravene any of the legislative and other provisions identified in the Applicant's notice of motion or the LSSA's notice of counter-application, each of which is addressed separately below.

11. A general theme that runs through the answering affidavits is that the distinction drawn by the Applicant between reserved work and non-reserved work is "*artificial, self-created and self-serving*" and that it "*has no basis in law*".[9] 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,[10] which has, "*by usage, custom and practice over centuries*", become work that is performed, and ought to continue to be performed, exclusively by conveyancers.[11]

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9 LSSA AA paras 7.1.1 & 8.4, record 269 & 272.

10 See, for example, LSSA AA para 17.50, record 363.

11 LSSA AA para 8.16, record 276.

12. The Applicant submits that the Respondents' contentions in this regard are without legal foundation and that the distinction between reserved and non-reserved work is not only legally justified, but is in fact mandated and entrenched by the relevant statutory and regulatory provisions (as identified above and addressed in further detail below).

13. These submissions are structured as follows:

13.1. First, we explain the Applicant's model;

13.2. Second, we consider the distinction between reserved work and non-reserved work;

13.3. Third, the Applicant's compliance with each of the relevant statutory and other provisions addressed in the Applicant's notice of motion and the LSSA's notice of counter-application will be considered;

13.4. Fifth, we deal generally with the questions of public policy raised in the Respondents' affidavits.

13.5. Finally, we consider the Respondents' points *in limine*.

**THE APPLICANT'S MODEL**

14. As stated above, the Applicant is a newly-established company which intends providing administrative services routinely performed in the course of property transfers that fall outside the ambit of reserved work.[12]

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[12] FA para 31, record 20.

15. The Applicant's business model derives from an analysis of the various steps involved in the property transfer process, and the allocation of those steps between the Applicant, on the one hand, and a conveyancing attorney, on the other.[13]

16. As will be seen below, this allocation is based on, and is consistent with, the relevant statutory provisions that requiring certain (but not all) of the steps in the property transfer process to be performed by a conveyancer or an attorney (i.e. the reserved work). The model marks a departure from past and current prevailing practice under which all the steps are performed by a conveyancer (despite the fact that not all such steps are reserved by law for performance by a conveyancer or attorney).[14]

17. The focus of the model is on:

    17.1. the performance of non-reserved administrative services and steps, including obtaining certificates and documents from regulatory bodies, such as municipalities and SARS, and from other parties involved in the transaction, such as electrical, beetle and plumbing experts; and

    17.2. managing the interactions between the multiple parties involved in any property transfer process.[15]

18. The above functions are often performed by conveyancing secretaries and are not performed by attorneys themselves.[16]

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13 FA para 11, record 12.

14 *Ibid*.

15 FA para 10, record 11.

19. As is explained in the founding affidavit, the Applicant's model does not seek to detract from the expert services offered by attorneys. Rather, it seeks to provide efficient support to such services, with conveyancers continuing to take full responsibility for the reserved work, thereby contributing to the predictability and improvement of the transfer process.[17]

20. With non-reserved work being performed by the Applicant (rather than by a conveyancing secretary under the supervision of a conveyancer), the Applicant contends that the conveyancer will be better placed to focus on the expert tasks that require his or her attention.[18]

21. Attached to the founding affidavit (as annexure FA4A)[19] is a schedule setting out each of the steps involved in a typical property transfer of a single property between two individuals. The schedule:

    21.1. includes both reserved work, on the one hand (highlighted in yellow), and tasks which the Applicant intends to perform (i.e. non-reserved work), on the other; and

    21.2. illustrates the interaction between the conveyancing attorney, the Applicant, the seller, the purchaser and other parties involved in the conveyancing process.[20]

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16 FA para 10, record 11.

17 FA para 13, record 12 – 13.

18 *Ibid*.

19 Record 106 – 118.

20 FA para 32, record 21.

22. Under the Applicant's proposed model:

22.1. A dual mandate (the "**seller's dual mandate**") will be given by the seller (should he or she elect to do so) pursuant to which:

22.1.1. The Applicant will be appointed by the seller under an "administration services agreement" to perform the non-reserved administrative services in regard to a property transfer; and

22.1.2. The seller will, separately, select a practising attorney and conveyancer of choice to perform the agreed reserved work under a "legal services mandate";[21]

22.2. The FSB's regulation of the Applicant ensures financial regulation for consumer protection against loss of funds;[22]

22.3. The four Law Societies will continue to regulate the professional conduct and quality of the work of the conveyancers performing the reserved work, and (as discussed in detail below) the conveyancer concerned continues to take professional responsibility for the correctness of the facts contained in a deed or other document prepared for the purposes of registration or filing in a deeds registry.[23]

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21 FA para 34.1, record 21.

22 FA para 34.2, record 22.

23 FA para 34.2, record 22.

23. The Applicant's intention is to be associated with a panel of conveyancing attorneys who will perform the legal services the Applicant accepts and acknowledges may only be performed by a practising attorney and/or conveyancer.[24]

24. Attorneys will conclude a "parallel mandate management agreements" ("**PMMAs**") with the Applicant regulating the interaction between the Applicant and those attorneys in regard to the execution of sellers' dual mandates. A template PMMA is attached to annexure FA2 to the founding affidavit.[25] The agreement provides, *inter alia*, that the Applicant and the attorneys will independently negotiate and agree their fees with consumers and that no fees or charges will be payable by the Applicant to attorneys or *vice versa*.[26] Attorneys will, however, provide a proposed schedule of maximum fees to the Applicant before concluding a PMMA and the attorneys will not be able to charge fees in excess of those set out in the schedule furnished to the Applicant.[27]

25. The Applicant will also conclude "introduction agreements" with estate agencies (but not with individual estate agents),[28] under which the Applicant will remunerate agencies "*that bring [the Applicant] and its services to the attention of home sellers and buyers (and that subsequently appoint [the*

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24 FA para 27.1.2, record 17 – 18.

25 Record 77 – 104.

26 Clause 6.1 of the PMMA, record 79.

27 Clause 6.2 of the PMMA, record 79.

28 A template introduction agreement is attached to the PMMA annexed to the founding affidavit, record 95 – 104.

*Applicant]), provided that the Agency conducts itself strictly in accordance with [the] Agreement*."[29]

26. Under the introduction agreements, estate agents warrant and undertake that they will "*only provide to the consumer neutral and objective information with regard to Proxi as an alternative option to the other available options*" strictly in accordance with the introduction agreement and the script it prescribes.[30] Agents are also required to inform customers of the alternatives of appointing conveyancers that offer the conveyancing firms services presently offered by conveyancers (and also of appointing other companies that provide services similar to the Applicant).

27. In terms of the introduction agreement, agents also undertake that they will not "*at any time and in any way, whether directly or indirectly solicit or attempt to solicit*" appointments for the Applicant or its panel conveyancers, and that individual agents will not be remunerated or rewarded in connection with the Applicant's appointment.[31]

28. The template mandate and the offer to purchase attached to the introduction agreement inform the seller of the right to appoint the service provider of his or her choosing to attend to the transfer, and that he or she is not obliged to appoint a particular conveyancer or service provider.[32]

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29 Clause 2.2 of the introduction agreement, record 95.

30 Clause 6.1 of the introduction agreement, record 96.

31 Clause 6.3 of the introduction agreement, record 97.

32 Record 100 & 101.

29. As indicated, the Applicant will not undertake or perform any reserved work in regard to the property transfers. More particularly, the Applicant will not:[33]

29.1. draw up or prepare or cause to be drawn up or prepared "*any agreement, deed or writing relating to immovable property or to any right in or to immovable property*"', as envisaged in section 83(8)(a)(i) of the Attorneys Act, the provisions of which are addressed in greater detail below;

29.2. prepare any "*deed of transfer, mortgage bond or certificate of title or any certificate of registration of whatever nature*", as envisaged in section 15 of the Deeds Registries Act (the provisions of which are also addressed below).

30. Nor will the Applicant "*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 envisaged in section 33(3) of the LPA.[34]

31. As required by section 15 of the Deeds Registries Act and by section 83(8)(a)(i) of the Attorneys Act, the prescribed documents will continue to be "*prepared by a conveyancer*" and/or a "*practising practitioner*".[35]

32. Moreover, under the model, the practising attorney and conveyancer who accepts the legal services instruction will continue to incur professional

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33 FA para 35, record 22.

34 FA para 36, record 23.

35 FA para 37, record 23.

responsibility for the prescribed documents prepared by him or her, and will be required to adhere to the provisions of sections 15 and 15A of the Deeds Registries Act.[36]

33. The Applicant's compliance with the above provisions is addressed in detail below.

34. The Applicant and the attorneys on the Applicant's panel will operate in parallel in carrying out their respective tasks on a custom-built, partitioned conveyancing software platform.[37]

35. The Applicant will capture data relating to buyer, seller and property into the software capture fields. The captured data will be stored in a database until needed by the panel attorney when preparing reserved work documents. The software platform will prevent the Applicant from being able to access the reserved work document templates or using the data it has captured to prepare reserved work documents. Only the panel attorneys will be able to access the reserved work transfer document templates and populate them using the data captured by the Applicant, should they so choose.[38]

36. The platform will contain a full audit trail of who performed what task. It will thus be possible to verify that the Applicant has performed only administrative, non-reserved work.[39]

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36 FA para 38, record 23.

37 FA para 39, record 23.

38 FA para 39, record 24.

39 *Ibid*.

37. Should a panel attorney, in the course of preparing the reserved work documents, find errors in the data captured by the Applicant, the panel attorney will have access to the database to correct any such errors before the data is used to populate the reserved work document templates selected by the panel attorney for a particular transfer.[40]

38. Accordingly, consumers will continue to have the benefit of their transactions being subject to scrutiny by a practising attorney and conveyancer appointed by him or her, the professional conduct of such attorney and conveyancer in turn being governed in the ordinary way by the provisions of the Deeds Registries Act, the Attorneys Act, the LPA, the Consolidated Rules and remaining subject to the jurisdiction and control of the LSSA and the four Law Societies (and, in due course, by the regulatory regime under the LPA).[41]

39. Annexure 4B to the founding affidavit[42] sets out, in contradistinction to the reserved work, only the administrative, non-reserved services the Applicant proposes carrying out in a typical transfer process involving the sale by private treaty of a freehold property.

40. We develop the submission below that none of the administrative services to be carried out by the Applicant involves the drawing up of any prescribed document reserved to a conveyancer under section 15 of the Deeds Registries Act or section 83(8)(a)(i) of the Attorneys Act, or the preparation of any certificates under section 15A of the Deeds Registries Act.

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40 *Ibid*.

41 FA para 40, record 24 – 25.

42 Record 119 – 136.

41. Thus, under the model:

41.1. The Applicant does not prepare any deeds, documents or certificates that are required to be prepared or signed by a conveyancer as part of the reserved work. The Applicant merely makes available to the conveyancer certain information, the conveyancer then being left to prepare the prescribed documents and prescribed certificates;

41.2. The conveyancer – using his or her own templates or precedents and acting personally or through persons under his or her direct supervision – prepares all such prescribed documents and prescribed certificates from beginning to end, and remains solely responsible for the preparation and signature of the preparation certificates thereon, and for the legal liability and responsibility flowing therefrom.

42. In addition, a key element of the Applicant's model is its management of funds for home buyers and sellers pursuant to investment mandates.[43]

43. The Applicant's model envisages that the Applicant is to be authorised by consumers, by way of written investment mandates, to open and operate specific-purpose bank accounts on their behalf.[44]

44. As the Applicant will hold an investment mandate, the Applicant will be regulated under the Financial Advisors and Intermediary Services Act, 37 of

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43 FA para 69, record 37.

44 FA para 70, record 38.

2002 (the "**FAIS Act**") and, as has already been mentioned, is subject to the authority of the FSB.[45]

45. In order to ensure that consumers' funds are protected, the Applicant will, in addition to being regulated by the FBS and the FAIS Act:[46]

45.1. operate the consumer's special purpose investment account in the consumer's own name, thereby avoiding any insolvency risk that might arise by virtue of insolvency on the part of the Applicant; and

45.2. hold comprehensive insurance cover including:

45.2.1. professional indemnity cover for losses occasioned by errors made in carrying out the Applicant's administrative tasks;

45.2.2. fidelity risk cover covering all forms of loss caused through the Applicant's dealing with the consumers' funds; and

45.2.3. directors' and officers' liability cover necessary to protect the consumer.

46. The insurance cover held by the Applicant, as well as the other aspects in respect of which consumers are protected under the Applicant's model, are addressed in greater detail below.

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45 FA para 71, record 38.

46 FA para 72, record 38.

**RESERVED WORK VS NON-RESERVED WORK: THE RESPONDENTS' FLAWED CONTENTION THAT THIS DISTINCTION IS ARTIFICIAL AND HAS NO BASIS IN LAW**

47. The LSSA correctly identifies the distinction drawn by the Applicant between reserved work and non-reserved work as the "*crux*" of the Applicant's case.[47]

48. As noted above, the LSSA contends, however, that the distinction between reserved work and non-reserved work is "*artificial, self-created and self-serving*" and that it "*has no basis in law*". The Minister similarly states that the distinction between reserved and unreserved work is "*self-created*" and that the concepts "*carry no legitimate statutory basis*".[48]

49. The LSSA maintains that:

49.1. *all* work "*whatever the nature thereof*" associated with immovable property transactions and transfers, "*indivisibly and inseparably*" forms part of conveyancing practice;[49]

49.2. much of what conveyancers do can be tracked back to long-established "*usage, custom and practice"*, established over many centuries or, in the phrase repeatedly employed by the First Respondent, "*since time immemorial*";[50]

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47 LSSA AA paras 8 & 17.59, record 271 & 365.

48 Minister's AA paras 3.1 and 3.2, record 785.

49 See, for example, LSSA AA para 17.50, record 363.

50 LSSA AA paras 8.12, 10.26 & 17.50, record 274, 284 & 364.

49.3. the Deeds Registries Act has incorporated only some of the usage, custom and practice applied by conveyancers and, as such, it is not a complete codification of every facet of conveyancing usage, custom and practice;[51]

49.4. It would be unwise and practically impossible to legislate for every conveyancing procedure;[52]

49.5. *all* the steps involved in a typical transfer of immovable property transaction, as summarised by the Applicant have, "*by usage, custom and practice over centuries*", become work that is performed by conveyancers and should continue to be performed *exclusively* by conveyancers in future;[53]

49.6. the usage, custom and practice are long-established, are reasonable, have been uniformly observed and are certain.[54]

50. The LSSA's contentions in this regard (which entail, in short, an *exclusive and entire* entitlement by conveyancers to perform *all* work "*associated"* with immovable property transfers) would appear to boil down to the submission that, because conveyancers have historically attended to all the steps involved in a typical transfer (and because this historical practice is, in the LSSA's submission, reasonable, certain and uniformly observed):

50.1. conveyancers should continue to carry out such work; and

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51 LSSA AA para 8.13, record 274.

52 LSSA AA para 8.16, record 275.

53 LSSA AA para 10.26, record 284.

54 LSSA AA para 10.31, record 286.

50.2. there is no basis for the Applicant's distinction between reserved work and unreserved work.

***Custom as a source of law***

51. The LSSA would appear to rely for its contentions on the decision of the Appellate Division in *Van Breda v Jacobs*,[55] in which the Court – with reference to *Voet*[56] – held that for a custom to be valid, it must be:

> "*an ancient or long-established one, must be reasonable, must have been uniformly observed, and … the custom must be proved to be certain.*"[57]

52. The appropriateness of the *Van Breda* test for the existence of custom as a source of law in the post-constitutional era was considered by the Constitutional Court in *Shilubana v Nwamitwa*.[58]

53. In that case, the Constitutional Court considered, in particular, the appropriateness of the test in *Van Breda* to determine the existence of a norm of indigenous customary law under the Constitution (the case concerned the authority of a traditional community to develop their customs and traditions to promote gender equality in the succession of traditional leadership).[59] The Court held that "*the* Van Breda *test cannot be applied to customary law, where the development of living law is at issue*".[60]

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55 1921 AD 330.

56 Voet, 1.3.27-35.

57 At 334.

58 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).

59 *Shilubana supra* at para [1].

60 *Shilubana supra* at para [56].

54. The Court, however, expressly declined to express an opinion on the appropriateness of the *Van Breda* test in cases other than indigenous customary law.[61]

55. Significantly, the Court held that, whereas customary law is an independent and original source of law, custom is not. The Court held that "*custom no longer serves as an original source of law capable of independent development, but survives merely as a useful accessory*" to fill in normative gaps in the common law.[62]

56. It is submitted that custom (as distinct from customary law), to the extent that it survives as a source of law, has significantly diminished significance in our post-constitutional dispensation.

57. Under the Constitution:

> "*[t]here is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.*"[63]

58. All law depends for its validity on the Constitution.[64] Whilst the Constitution expressly preserves "*the existence of any other rights or freedoms that are recognised or conferred by the common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights]*",[65] it makes no

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61 *Shilubana supra* at para [52].

62 *Shilubana supra* at para [54].

63 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (2000 (2) SA 674 (CC) para [44].

64 *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para [51].

65 Section 39(3) of the Constitution.

reference to the preservation of custom (as distinct from customary law). Indigenous customary law has a privileged position under section 211 of the Constitution, which provides (in the context of provisions dealing with traditional leadership) that "*[t]he courts must apply customary law when that law is applicable*". Custom, on the other hand, enjoys no such protection or recognition.

59. It is consequently submitted that custom no longer serves as an independent source of law as it did before the advent of the Constitution. To the extent that it survives as a source of law at all, as noted above, it serves as no more than a "*useful accessory*" to fill in normative gaps in the common law.[66] Contrary to the LSSA's contentions, custom cannot, we submit, serve to establish the entire normative basis upon which the conveyancing profession in South Africa operates. In particular, it cannot sensibly found the overarching (unlegislated) prohibition for which the LSSA contends, viz that no one other than a conveyancer may perform any step in the conveyancing process.

60. Even if custom had enjoyed its pre-constitutional recognition as an independent source of law, and even if the test in *Van Breda* had still applied (which, as noted above, was expressly left open by the Constitutional Court in *Shilubana*), the Respondents in any event face what we submit to be insuperable hurdles in satisfying the test in the present case. In this regard:

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66 *Shilubana supra* at para [54].

60.1. First, even under the common law, the use of custom as a source of law was a "*rare occurrence*":[67]

> "*Today hardly any rules exist in the shape of customs alone; practically all the universal customs have been adopted and superseded by legislation, or have been recognized by judicial decisions, with the consequence that they now appear in different form*."[68]

60.2. It is submitted that the Respondents cannot sensibly contend that the regulatory basis for the conveyancing profession is to be found amongst the rare instances of custom that have not been adopted and succeeded by legislation or judicial pronouncements.

60.3. In any event, as will be addressed below, the Legislature has already intervened in this area of the law to determine which aspects of the conveyancing process are to be reserved for conveyancers. The Legislature having done so, it is not open to the Respondents to contend (as they do) that aspects of conveyancing practice that are not legislatively reserved to conveyancers remain so reserved by custom.

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67 Du Bois et al (eds) *Wille's Principles of South African Law* (9 ed) at 105.

68 *Ibid*. Even under the pre-constitutional era, it was "*fairly obvious that [custom] only has very minor importance in the sphere of the creation of new law*." Van Niekerk "Some Thoughts on Custom as a Formative Source of South African Law" LXXV *SALJ* 279 at 279.

60.4. Second, as discussed below, the Respondents have not satisfied any of the four elements of the test set out in *Van Breda*. Significantly, in this regard:

60.4.1. The onus of satisfying the requirements of the test in *Van Breda* rests upon the party asserting the existence of the custom;[69]

60.4.2. The existence of the custom must be "*clearly proved*" and it must be "*proved beyond reasonable doubt that the alleged custom does in fact exist*".[70] The evidence provided must be "*clear, convincing and consistent*".[71]

60.5. It is submitted that the Respondents have not overcome the substantial evidentiary hurdles they face to discharge their onus of establishing that they have satisfied the requirements of the *Van Breda* test by way of clear, convincing and consistent evidence. We address each of the elements of the test in *Van Breda* (namely, that the custom must be reasonable, long-established, uniformly observed and certain) in what follows.

Custom not reasonable

61. The requirement of reasonableness is "*very important and is always carefully scrutinised by the court*".[72] A custom cannot be reasonable if it is

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69 *Van Breda supra* at 333; *Golden Cape Fruits (Pty) Ltd* 1973 (2) SA 642 (C) at 646A.

70 *Van Breda supra* at 333.

71 *Golden Cape Fruits supra* at 646H.

72 *Wille's Principles of South African Law supra* at 106.

contrary to a statute.[73] The requirement of reasonableness must also now be applied in a way that is compliant with the Constitution, which entrenches, in s22 of the Bill of Rights, the right to choose one's trade, occupation or profession freely. (The second sentence of s22 provides that the practice of a trade, occupation or profession "*may be regulated by law*".) [74]

62. We submit that, taking into account all of the considerations addressed in the affidavits and as discussed below, a custom that requires all steps in the conveyancing process to be carried out by conveyancers is not rational, let alone reasonable and constitutional.

63. This submission is re-enforced by the fact that, as noted above, a custom cannot be reasonable if it is contrary to a statute. Where the Legislature has elected by statute to reserve certain aspects of the conveyancing process to conveyancers (as it has done), it is submitted that a custom that purports to reserve other aspects of the that process to conveyancers is inconsistent with statute and therefore unreasonable on this ground too - particularly given, first, the right to freedom of trade enshrined in s22 of the Bill of Rights and, second, the twin objectives of efficiency and competitiveness in the modern South African commercial environment (as recognised for example in the preamble to the Competition Act 89 of 1998).[75]

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73 *Ibid*.

74 *Shilubana supra* at para [52].

75 Which stipulates as objectives of the Act, the achievement of a "*more effective and efficient economy*" and the creation of an "*efficient, competitive economic environment*".

64. As noted above, the LSSA submits that it would be unwise and practically impossible to legislate for every conveyancing procedure.[76] Implicit in this submission is a contention that the Legislature would have reserved the entire conveyancing process to conveyancers had it been practically possible to do so. This submission is met by the simple proposition that, had the Legislature intended to reserve the entire conveyancing process to conveyancers, it could have done so on a broad and all-encompassing basis using words to this effect. It did not do so. Instead, it elected to reserve particular, defined, specialised tasks to conveyancers.

65. For the above reasons, we submit that the custom on which the Respondents rely fails to satisfy the *Van Breda* requirement of reasonableness.

Custom not long-established

66. As noted above, the LSSA contends that the much of what conveyancers do can be tracked back to long-established custom that has existed "*since time immemorial*".[77]

67. The length of time a custom must have existed in order for it to satisfy the requirements of *Van Breda* is ultimately left to the determination of the court,[78] but the *Van Breda* case speaks of the requirement under Roman Dutch law that the custom must be "*ancient or long-established*" and, under

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76 LSSA AA para 8.16, record 275.

77 LSSA AA paras 8.12, 10.26 & 17.50, record 274, 284 & 364.

78 *Van Breda supra* at 334; *Catering Equipment Centre v Friesland Hotel* 1967 (4) SA 336 (OPD) at 338G.

English law, that the custom must have been in existence "*from a time preceding the memory of man*".[79]

68. A fundamental flaw in the LSSA's opposition is that its allegation that conveyancers have attended to all steps involved in conveyancing transactions "*since time immemorial*" is not borne out – but is indeed undermined – by the evidence adduced by the LSSA itself. Thus, on the LSSA's own showing, until 1844, the Deeds Office itself drafted and compiled deeds.[80] It was only after 1844 that advocates were authorised to do so. Under the 1918 Deeds Registries Act, these tasks were reserved to conveyancers, who are the "*modern day successors of advocates who were permitted to do conveyancing in 1844*".[81]

69. On the LSSA's own version, therefore, the reservation of work to conveyancers occurred for the first time under the Deeds Registries Act in 1918. Before that, conveyancing was carried out by advocates and, before them, by the Deeds Office itself.

70. The Applicant accordingly disputes that the modern conveyancing practice has existed "*over centuries*" or "*since time immemorial*" as alleged by the LSSA and, consequently, that it has satisfied the *Van Breda* requirement that a custom be long-established.

71. In any event, as the Constitutional Court held in *Shilubana*, the continued validity of a rule of custom "*is rooted in and depends on its unbroken*

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79 *Van Breda supra* at 334.

80 LSSA AA para 10.11, record 281.

81 LSSA AA para 10.16, record 282.

*antiquity*".[82] The rule must have been "*consistently applied in the past*".[83] The Court stated succinctly that "*change annihilates custom as a source of law*."[84] The Respondents rely on a custom that has evolved since the 19th century, conveyancing first having been carried out by the Deeds Office, then by advocates and then by conveyancers. The evolution on which they rely is antithetical to the very essence of custom as a source of law, which requires the custom to be consistent.

Custom not uniformly observed

72. This requirement in *Van Breda* that a custom be uniformly observed has been explained thus:[85]

> "*By uniform observance it is meant that the custom must have been invariably complied with by the public or by the class of persons to whom it applies, and that they realised that obedience to the custom was obligatory and not merely optional, permitting them to obey or not as they wished*."

73. The current practice under which conveyancers (or, more often, the secretaries employed by them) perform all the steps in the conveyancing process is no more than a practice.

74. It is submitted that it has never been uniformly regarded as an obligatory rule that prevents persons other than conveyancers from carrying out

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82 *Shilubana supra* at para [54].

83 *Shilubana supra* at para [55].

84 *Shilubana supra* at para [54].

85 *Wille's Principles of South African Law supra* at 107.

aspects of the conveyancing process (other than, of course, those aspects of the conveyancing process reserved to conveyancers by law).

75. Indeed, the very fact that many of the steps in the conveyancing process are carried out by staff employed by a conveyancer or conveyancing firm, rather than by qualified conveyancers, demonstrates that there is no uniformity in compliance with the purported custom on which the LSSA relies.

No certainty

76. The requirement of certainty relates to the proof required to establish the custom.[86] As noted above, the custom must be "*clearly proved*" and it must be "*proved beyond reasonable doubt that the alleged custom does in fact exist*".[87]

77. It is submitted that "proof" advanced by the Respondents as to the existence of the custom on which they rely – being no more than the statutory reservation of conveyancing work to conveyancers under the 1918 Deeds Registries Act and the broad and generalised allegation that *all* the steps involved in a typical transfer of immovable property transaction, as summarised by the Applicant have, "*by usage, custom and practice over centuries*", become work that is performed by conveyancers[88] – does not begin to satisfy the requirement of certainty set out in *Van Breda*.

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86 *Wille's Principles of South African Law supra* at 107.

87 *Van Breda supra* at 333.

88 LSSA AA para 10.26, record 284.

***Conclusions in respect of* Van Breda *test***

78. For the above reasons:

78.1. custom has not retained its pre-constitutional status as an independent source of law, and

78.2. the Respondents have in any event not satisfied the requirements of the Van Breda test.

***Applicant's distinction between reserved and non-reserved work is mandated by regulatory framework***

79. As will be apparent from the discussion below, it is not the LSSA's case that the Applicant's model does or would contravene or fall foul of any of the express provisions of any of the legislative enactments in relation to which relief is sought (as identified in the notice of motion and founding affidavit).[89]

80. The principal thrust of the LSSA's case is, instead, that all steps involved in the transfer of immovable property have, *"by usage, custom and practice over centuries*", become work that is performed by conveyancers and "*should*" continue to be performed *exclusively* by conveyancers in future.[90]

81. The Applicant submits that the content of the applicable statutory and regulatory regime (and not the LSSA's opinion as to what "should" and

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89 See, for example, FA para 16, record 14, read with the LSSA's response thereto, LSSA AA para 17.35, record 360; FA para 35, record 22 – 23, read with the LSSA's response thereto, LSSA AA paras 17.59 & 17.60, record 365 – 366; as well as the ambit of the relief sought in the counter-application (which makes no reference to any of the legislative enactments on which the Applicant relies).

90 LSSA AA para 10.26, record 284.

"should not" be permitted) determines whether or not a category of work is reserved to a particular profession.

82. Unlike the LSSA, whose submissions rely not on the content of the law, but on "*usage, custom and practice*" (and the opinions expressed by it in relation to the supposed need for all parts of the conveyancing process "*to be preserved for the conveyancing profession*"), the Applicant has in its papers identified the relevant express statutory and regulatory provisions that reserve work to conveyancers, and demonstrated that its model does not contravene any of them (a position that the LSSA does not place in dispute).

83. The Applicant consequently submits that the distinction between reserved and non-reserved work is not only legally justified, but is in fact mandated and entrenched by the statutory and regulatory provisions it has identified and addressed.

84. Significantly, our courts have not hesitated to draw the distinction on which the Applicant relies between reserved work and non-reserved work (and have indeed used precisely that terminology).

85. The case of *Cape Law Society v Hoole*[91] is illustrative in this regard. It concerned an arrangement between the respondent (an attorney) an estate agent (O.W.T.) in terms of which:

> "*[T]he respondent would prepare documents [to effect transfer of property sold by O.W.T] in respect of which … only a qualified person is entitled to charge, and he would attend to the registration of transfer in*

[91] 1975 (2) SA 323 (C).

> *the Deeds Registry. The work is hereinafter referred to as the 'reserved work'. It was also agreed that O.W.T. would undertake certain work, generally undertaken by a conveyancer but not specifically reserved for a conveyancer, (hereinafter referred to as the 'unreserved work'), and that O.W.T. would be remunerated by the respondent for its services in this regard….*
>
> *The result was that the respondent would be doing the 'reserved work' and O.W.T. the 'unreserved work' and O.W.T. would pay respondent one-half of the fees which respondent would have been able to charge under the tariff if he had done all the work."*[92]

86. One of the issues to be determined was whether the estate agent (O.W.T.) performed work which only a conveyancer was qualified to do and received remuneration for that work. The court concluded that, on the facts, "*O.W.T. did not do any work which only a conveyancer was in law qualified to do, and the remuneration it received was not for performing that work*" and thus that the relevant prohibition was not breached.[93]

87. *Hoole* is significant in the following three respects:

87.1. First, it shows that the court had no hesitation distinguishing between reserved and unreserved work, and labelling that work as such;

87.2. Second, the court accepted that unreserved work includes work "*generally undertaken by a conveyancer but not specifically reserved for a conveyancer*";

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92 At 324H - 325D.

93 At 327 H.

87.3. Third, the distinction between reserved and unreserved work is defined by law, not by custom.

88. At the heart of the LSSA's approach is an impermissible attempt to convert a question of law (whether or not the model falls foul of or contravenes any law) into a question of policy (whether or not all work forming part of the conveyancing process "should" be reserved to the conveyancing profession – i.e. irrespective of the fact that only certain identified components of the conveyancing process are currently so reserved in terms of the applicable legislative enactments).

89. In its papers, the LSSA purports to pronounce in this regard (in explicitly normative terms) on what "*should*" and "*should not*" be permitted – when these are plainly matters of policy not susceptible to determination by a court at all. The LSSA's inability to point not to a contended norm or value, but to an obligation *sourced in law,* is striking.

90. The LSSA's attempt, in the context of these proceedings, to arrogate to itself the power to determine the content of both policy and law in the relevant respects commenced with its statement in its letter of 2 June 2016 that "*the full conveyancing process is reserved work*".[94]

91. The quoted statement begs the question: by whom was the full conveyancing process supposedly reserved to attorneys? The answer, as it appears from the LSSA's papers, is that the First Respondent seemingly

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94 Annexure FA3, record 105.

regards itself as having authoritatively "reserved" the entire conveyancing process to its membership (when plainly it has no such power to do so).

92. This is of a piece with the First Respondent's frequent repetition in its papers[95] of its own "*view that all work forming part of the conveyancing process need* [sic] *to be preserved for the conveyancing profession*" (i.e. regardless of whether or not the relevant legislation in fact precludes the performance thereof by parties other than conveyancers).

93. In summary, then, the main features of the LSSA's answering papers are these:

93.1. first, an absence of any averment that the model does or would contravene any express provision of any of the legislative enactments in relation to which relief is sought (as identified in the notice of motion and founding affidavit);

93.2. second, a detailed description of the current *de facto* position in relation to conveyancing;

93.3. third, an assertion that the current *de facto* position has obtained "*since time immemorial*" (the factual accuracy of which the Applicant disputes for the reasons set out above);

93.4. fourth, an expression of opinion by the First Respondent that the current *de facto* position should not be allowed to change since, in the First Respondent's view, "*all work forming part of the*

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95 For example, LSSA AA para 17.9, record 353.

*conveyancing process need* (sic) *to be preserved for the conveyancing profession*";

93.5. finally, an attempt to elevate its own opinion, as regards the supposed need to protect the entire conveyancing process, to the status of actual legal protection - when there is in truth no such legal protection in place.

94. A further difficulty inherent in the LSSA's submission is that the reservation of elements of the transfer process to conveyancers is firstly not in respect of the entire process, and secondly not a consequence of the natural development of conveyancing practice as the LSSA suggests. It is instead the result of an historical transplant, into South African law, of an English law statutory provision that was expressly intended to grant solicitors a monopoly in respect of *legal* work.

95. In this regard, attached to the Applicant's replying affidavit is an article published by the Legal Services Institute[96] which outlines the history of reserved legal services in England.[97] It explains that, under the 1804 Stamp Act,[98] solicitors were granted a monopoly on certain aspects of conveyancing work as compensation for increased taxes imposed on solicitors. Section 14 of the 1804 Stamp Act provided as follows:

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96 Previously the Legal Services Policy Institute, established by the College of Law of England and Wales (now the University of Law).

97 "The Regulation of Legal Services: Reserved Legal Activities – History and Rational" August 2010. See also "Breaking the Maze – Simplifying Legal Services Regulation" September 2013, published and submitted to the Ministry of Justice by the Legal Services Consumer Panel (established under the Legal Services Act, 2007) at p 29.

98 Stamp Act 1804 (UK) (44 Geo III c 98).

> "*[E]very Person who shall, for or in Expectation of any Fee, Gain or Reward, directly or indirectly, draw or prepare any Conveyance of, or Deed relating to, any Real or Personal Estate, or any Proceedings in Law or Equity, other than and except Serjeants at Law, Barristers, Solicitors, Attornies, Notaries, Proctors, Agents or Procurators, having obtained regular Certificates, and Special Pleaders, Draftsmen in Equity, and Conveyancers ... shall forfeit and pay for every such Offence the Sum of fifty Pounds*."

96. The Ordinances to which the LSSA refers (and thereafter the Attorneys Act and the 1918 and 1937 Deeds Registries Acts) transplanted the reservation of such work to South Africa. Section 83(8)(a)(i) of the Attorneys Act (the provisions of which are discussed below) replicates in large measure section 14 of the Stamp Act insofar as it penalises anyone other than a practising practitioner "*who for or in expectation of any fee, gain or reward, direct or indirect … draws up or prepares … any agreement, deed or writing relating to immovable property*". In other words, *legal* work in property transfers.

97. Similar developments occurred in Australia, also in the nineteenth century. In New South Wales, for example, conveyancing remained unregulated until 1847, when the Attorneys' Bills and Conveyancing Act 1847 (NSW) gave the exclusive right to undertake conveyancing work to attorneys and solicitors, barristers and "certified conveyancers". A similar scheme was maintained in Victoria and Queensland into the 1930s.[99]

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[99] Byrne and Mortensen "The Queensland Solicitors' Conveyancing Reservation: Past and Future Development – Part 1" 2009 Vol 28(2) *University of Queensland Law Journal* 251 at 253.

98. It is consequently submitted that the history of the development of reserved work in South Africa does not show that all elements of the transfer process "*indivisibly and inseparably*" form part of conveyancing practice, as the LSSA submits.[100]

99. We submit that the language used and approach adopted in the LSSA's answering affidavit bear the hallmarks of an era in which protectionism and monopolies to secure the position of attorneys and others were acceptable, and indeed the norm. For example, the LSSA roundly condemns the Applicant as being an "*entrepreneur that is trying to erode and infiltrate the legal profession*".[101] In similar vein, the First Respondent deplores the relief sought by the Applicant herein as having the potential to "*open up the conveyancing profession to the Applicant and like-minded entrepreneurs*".[102] (The LSSA's unmistakable suggestion that the label "entrepreneur" carries some pejorative meaning is, it is respectfully submitted, a clear indication that the LSSA and its membership are yet to embrace the age of efficiency and competition.)

100. The LSSA contends that the definition of "*reserved work*" – or even words to that effect – are not used in what it terms the "*subject legislation*" (the legislation to which the Applicant refers in its founding affidavit) and that the only logical inference to be drawn from this fact is that the Legislature never

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100 LSSA AA para 17.50, record 363.

101 LSSA AA para 5.14, record 267.

102 LSSA AA para 6.2, record 268.

intended to divide the functions performed by a conveyancer between reserved and non-reserved work.[103]

101. It is submitted that the LSSA's contention is plainly incorrect. It does not follow that, because the legislation does not refer to "*reserved work*" or use a similar term, it does not circumscribe a category of work as being in effect reserved to conveyancers. To the extent that the legislation prohibits anyone other than conveyancers from performing a category of work, it reserves that work to conveyancers.

102. While the LSSA devotes considerable attention to matters of terminology in its papers – contending that the expressions "*reserved*" and "non-reserved" work are without legal foundation and essentially meaningless – the LSSA itself used those very phrases after the Applicant had placed the details of the model before the LSSA and sought the latter's comment in that regard, the LSSA asserting in its letter of response of 2 June 2016 that "*the full conveyancing process is reserved work*".[104]

103. We accordingly submit that there is no merit in the Respondents' contention that the distinction between reserved work and non-reserved work is "*artificial, self-created and self-serving*" and that it "*has no basis in law*". On the contrary, the distinction is created by, and flows as a necessary consequence from, the relevant legislative provisions.

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103 LSSA AA para 8.5, record 272.

104 Annexure FA3, record 105.

**APPLICANT'S COMPLIANCE WITH PROVISIONS ADDRESSED IN NOTICE OF MOTION AND NOTICE OF COUNTER-APPLICATION**

***Deeds Registries Act and DRA Regulations***

104. The framework governing the reservation of certain conveyancing work to conveyancers is prescribed primarily by the Deeds Registries Act and the DRA Regulations. As noted above, the Applicant seeks an order that its model would not contravene sections 15 and 15A of the DRA or regulations 43(1), 44(1) and 44A of the DRA Regulations.

105. We set out below the relevant provisions of the DRA and regulations, before addressing the Applicant's compliance therewith, as well as the Respondents' countervailing submissions with respect to those provisions.

Relevant provisions

106. Section 15 of the Deeds Registries Act reads as follows:

> "*Except in so far as may be otherwise provided in any other law, 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.*"

107. Section 15 of the Deeds Registries Act consequently provides that the Registrar of Deeds will not execute or register any "*deed of transfer, mortgage bond or certificate of registration*" unless it has been "*prepared by a conveyancer*".

108. Section 20 of the Deeds Registries Act provides that deeds of transfer shall be "*prepared*" in the forms prescribed by law or regulation.

109. Section 15A of the Act provides in relevant part as follows:

> "*(1) 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.*
>
> *…*
>
> *(3) A registrar shall accept, during the course of his examination of a deed or other document in accordance with the provisions of this Act, that the facts referred to in subsection (1) in connection with the registration or filing of a deed or other document in respect of which a certificate referred to in subsection (1) … has been signed, have for the purposes of such examination been conclusively proved … .*"

110. Section 15A consequently provides that any conveyancer who prepares a deed or document for registration and who signs a "prescribed certificate" on such deed or document (colloquially known as a "preparation certificate") accepts responsibility – to the extent prescribed by regulation – for the accuracy of those relevant facts mentioned in the deed or document which are prescribed by regulation.

111. DRA Regulations 43(1), 44 and 45 are the regulations contemplated by the aforesaid provisions, which prescribe the form of "preparation certificates", the facts for which a conveyancer accepts responsibility and the extent of

such responsibility. They also extend the scope of documents that are required to be prepared by conveyancers.

112. DRA Regulation 43(1) provides as follows:

> "*Every deed of transfer, certificate conferring title to immovable property, deed of cession referred to in section 32 of the Act or mortgage bond shall be prepared by a conveyancer, who shall make and sign a certificate in the undermentioned form in the upper right hand corner on the first page of the document concerned:*
>
> *Prepared by me*
>
> *.....*
>
> *CONVEYANCER*
>
> *.....*
>
> *(State surname and initials in block letters.)"*

113. DRA Regulation 43(1) consequently requires the documents listed in that regulation (most significantly, a deed of transfer, certificate conferring title and a mortgage bond) to be "*prepared*" by a conveyancer, who must sign the so-called preparation certificate at the upper right-hand corner of the first page of the document.

114. DRA Regulation 44(1) extends similar requirements to powers of attorney, certain applications contemplated by the Act and agreements of partition contemplated under section 26 of the Act. It provides as follows:

> "*Subject to the provisions of subregulation (3), any power of attorney, application or consent required for the performance of an act of registration in a Deeds Registry and any agreement of partition referred to in section 26 of the Act executed after the coming into operation of this regulation and tendered for registration or filing of record in a Deeds Registry, shall be prepared by a practising attorney (not necessarily*

*practising in the province in which such Deeds Registry is situate), notary or conveyancer, who shall make and sign a certificate in the undermentioned form in the upper right hand corner on the first page of the document concerned …"*

115. Regulation 44A sets out the facts stated in a deed or document the correctness for which a conveyancer accepts responsibility under section 15A. It reads as follows:

"*The person signing the preparation certificates prescribed by regulations 43 and 44(1) … accepts, in terms of section 15A(1) and (2) of the Act, to the extent provided for in this regulation, responsibility for the correctness of the undermentioned facts stated in the deeds or documents concerned or which are relevant in connection with the registration or filing thereof, namely:*

*(a) that all copies of the deeds or documents intended for execution and/or registration are identical at the date of lodgment;*

*(b) that, in the case of a deed of transfer or certificate of title to land, all the applicable conditions of title contained in or endorsed upon the owner's copy of the title deed, together with any applicable proclaimed township conditions have been correctly brought forward in that deed of transfer or certificate of title to land;*

*(c) that, in the case of a document referred to in regulation 44(1) being signed by any person in his capacity as a principal or representative appointed or recognised as such under or in terms of any act or court order including but not limited to an executor, trustee, tutor, curator, liquidator or judicial manager from perusal of the documents evidencing such appointment exhibited to him, such person has in fact been appointed in that capacity and is acting therein in accordance with the powers granted to him and that any security required has been furnished to the Master;*

*(d) that, to the best of his knowledge and belief and after due enquiry has been made-*

*(i) (aa) the names, identity number or date of birth and marital status of any natural person being a party to a deed or document and in the case of any other person or a trust, its name and registered number, if any, are correctly reflected in that deed or document;*

*(bb) .....*

*(ii) in the case of a document referred to in regulation 44(1)-*

*(aa) subject to the provisions of regulation 65, the necessary authority has been obtained for the signing of such document in a representative capacity on behalf of a company, close corporation, church, association, society, trust or other body of persons or an institution whether created by statute or otherwise;*

*(bb) the transaction as disclosed therein is authorized by and in accordance with the constitution, regulations, or founding statement or trust instrument of a trust, as the case may be, of any church, association, close corporation, society, trust, or other body of persons, or any institution (whether created by statute or otherwise) other than a company, except a share block company as defined in the Share Blocks Control Act, 1980 (Act 59 of 1980), being a party to such document;*

*(cc) .....*

*(e) that, in the case where a conveyancer is signing the preparation certificate on a deed of transfer, certificate of title conferring title to immovable property or a mortgage bond, he shall accept responsibility that the particulars in the deed mentioned in paragraph (d) (i), have been brought forward correctly from the special power of attorney or application relating thereto.*"

116. Regulation 44A thus sets out a circumscribed list of facts the correctness for which a conveyancer accepts responsibility by signing a preparation certificate contemplated by DRA Regulations 43 or 44(1).

Applicant's compliance

117. Under the Applicant's model, it will not prepare any of the documents referred to in section 15 of the Deeds Registries Act or DRA Regulations 43 or 44 (the "**prescribed documents**").[105]

118. The Respondents accept that the Applicant will not prepare the prescribed documents, although the Seventh Respondent (the "**CLS**") contends that this court cannot determine the Applicant's compliance with the relevant statutory provisions until the Applicant's software platform is designed and implemented.[106] The Applicant disputes the CLS's contentions in this regard, which are addressed in further detail below.

119. While the Respondents accept that the Applicant will not prepare the prescribed documents:

119.1. The LSSA contends that the legislative history of the prescribed provisions supports its submission that the Legislature never intended to create a division between reserved work and non-reserved work[107] and that the Deeds Registries Act "*contains no basis upon which conveyancing work can be divided*" between reserved work and non-reserved work;[108]

119.2. The LSSA and the CLS both contend that the legislative structure of the Deeds Act and the DRA Regulations and the practice that

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105 Annexure FA4, steps 22 to 25, record 111 – 113.

106 CLS AA para 14.4 and 14.5, record 661 – 661.

107 LSSA AA paras 12.1 & 12.22, record 312 & 322.

108 LSSA AA para 12.31, record 330.

emanates from it requires conveyancers to prepare and/or documents in addition to the prescribed documents, in particular transfer duty receipts and municipal clearance certificates.[109] The LSSA submits that the preparation and/or procurement of such additional documents must be implied by the aforesaid legislation.[110] The CLS contends that these additional documents must be prepared by a conveyancer principally because he or she accepts responsibility for the correctness of facts contained therein under Regulation 44A[111] and also for practical reasons.[112]

120. We deal first with the LSSA's contentions concerning the legislative history of the prescribed provisions, before turning to the Respondents' contention that conveyancers must attend to the preparation and/or procurement of documents in addition to the prescribed documents.

LSSA's contentions pertaining the legislative history of the prescribed provisions

121. The LSSA refers to the legislative history of sections 15 and 15A of the Deeds Registries Act and DRA Regulations 43, 44 and 44A to support its contention that the purpose of the legislation was not to distinguish reserved work from non-reserved work, but rather to deal with practical difficulties experienced by Deeds Registries. In this regard:

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109 LSSA AA paras 10.32 – 10.68, record 286 to 303. CLS paras 104 – 128, record 698 – 707.

110 LSSA AA para 10.32, record 286.

111 For example, CLS AA paras 115 & 127, record 702 & 706.

112 For example, CLS AA paras 108 & 109, record 699.

121.1. The LSSA refers to the promulgation of the first DRA Regulations in 1938, which required corporate entities to submit their constitutions to the Registrar in order to prove that the relevant property transaction was duly authorised.[113] The resultant large volume of documents allegedly gave rise to space constraints at the Deeds Registries and overburdened the Registrars who had to examine those documents.[114]

121.2. This gave rise to section 15A which, in its originally proposed form, would have required conveyancers to certify the accuracy of certain facts, including that the relevant property transaction was properly authorised by a corporate entity's constitutional documents.[115] After some back and forth between the profession and the Registrar of Deeds, section 15A was promulgated in its current form, which imposes upon a conveyancer who signs a preparation certificate on a document the responsibility for the accuracy of such facts mentioned in the document as may be prescribed by regulation.[116]

121.3. After the promulgation of section 15A, it became necessary to prescribe by regulation the types of documents that are to contain a preparation certificate signed by a conveyancer and also the

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113 LSSA AA para 12.12, record 317 – 318.

114 LSSA AA para 12.14, record 318 – 319.

115 LSSA AA para 12.15, record 319 – 320.

116 LSSA AA paras 12.16 – 12.20, record 321 – 322.

facts the accuracy for which the conveyancer would accept responsibility.[117]

121.4. This, the LSSA contends, was achieved by the promulgation of DRA Regulations 43, 44 and 44A.[118]

121.5. The LSSA concludes that "*the history of sections 15 and 15A of the DRA and regulations 43, 44 and 44A of the DRA Regulations clearly reveal the main motivation behind the introduction thereof was to rid the Deeds Office of constitutions … It never served the purpose of differentiating between documents that must be prepared by conveyancers as so-called 'reserved work' and other documents that need to be submitted …*"[119]

122. The Applicant submits, for the following reasons, that the LSSA's account of the legislative history of the provisions outlined above does not support its conclusion:

122.1. The LSSA's account (that the above provisions were introduced for practical reasons to relieve the difficulties arising from the filing of constitutional documents) explains only the introduction of section 15A and DRA Regulation 44A. Those are the only two provisions that pertain to a conveyancer's acceptance of responsibility for facts pertaining to the due authorisation of transactions under a corporate entity's constitutional documents.

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117 LSSA para 12.24, record 323.

118 LSSA para 12.25, record 323.

119 LSSA para 12.29, record 329.

122.2. The legislative history outlined above does not explain why section 15 (the principal provision delineating reserved work) was introduced. Section 15 has nothing to do with resolving the practical difficulties confronted by Deeds Registries. In any event, the legislative history outlined by the LSAA could never explain the reason for section 15 as this section was introduced by the 1937 DRA (in substantially the same form in which it currently appears) before the space constraints pertaining to the filing of constitutional documents (occasioned, it will be recalled, by the 1938 DRA Regulations) even arose.

122.3. The legislative history outlined above also does not explain the introduction of DRA Regulations 43(1) and 44 which, as explained above, expand the category of documents only conveyancers are permitted to prepare. Again, these regulations have nothing to do with resolving the practical difficulties confronted by Deeds Registrars.

122.4. Moreover, the only two provisions that are (at least in part) conceivably explained by the LSSA's historical account – namely section 15A and DRA Regulation 44A – do not distinguish between reserved work and non-reserved work. This distinction is achieved primarily by section 15 and DRA Regulations 43 and 44 (the reason for the introduction of which, as noted above, is not explained by the LSSA's historical account pertaining to the difficulties confronted by the Deeds Registries).

123. It is consequently submitted that the LSSA's historical account does not begin to explain why section 15 and DRA Regulations 43 and 44 (the principal provisions distinguishing reserved work from non-reserved work) were introduced.

124. Moreover, even if these provisions were introduced for the practical reasons for which the LSSA claims they were introduced, the historical reasons for the introduction of these provisions does not alter the simple fact that they prescribe, in clear and unambiguous terms, particular tasks that may only be performed by conveyancers. In our submission, they (together with the other legislative provisions on which the Applicant relies) distinguish between reserved and non-reserved work. The legislative history (even if it were relevant, which the Applicant submits it is not) does not alter the clear legislative effect.

Respondents' contention that conveyancers must attend to the preparation and/or procurement of documents in addition to the prescribed documents

125. As noted above, the LSSA and the CLS both contend that the legislative structure of the Deeds Act and the DRA Regulations and the practice that emanates from it requires conveyancers to prepare and/or documents in addition to the prescribed documents, including transfer duty receipts and municipal clearance certificates.[120]

126. The CLS relies for its contentions on Regulation 15A, under which a conveyancer who prepares a deed or other document "*for the purposes of*

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[120] LSSA AA paras 10.32 – 10.68, record 286 to 303. CLS paras 104 – 128, record 698 – 707.

*registration or filing*" and who signs a preparation certificate on that document, accepts responsibility for the facts contained in therein.

127. The CLS contends that, in addition to the documents to be registered, Regulation 15A also includes documents that must be prepared by a conveyancer for the purposes of "filing" them in the Deed Office.[121] The CLS refers specifically to:[122]

127.1. transfer duty receipts required under the Transfer Duty Act, 40 of 1940;

127.2. rates clearance certificates required by section 118 of the Local Government: Municipal Systems Act, 32 of 2000; and

127.3. a certificate issued in terms of section 15B(3) of the Sectional Titles Act, 95 of 1986.

128. The CLS contends that, because the conveyancer will play no role in drawing upon or preparing the above certificates and receipts (as the Applicant will be responsible for procuring them and passes them on to the conveyancer for filing), the conveyancer will be acting unlawfully by taking responsibility (under section 15A and DRA Regulation 44A) for the authenticity and reliability of the contents of those certificates and receipts.[123] This, in turn, supports the CLS's contention that conveyancers, rather than the Applicant, must be responsible for procuring and/or preparing those certificates and receipts.

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121 CLS AA para 69, record 683.

122 CLS AA para 70 record 683 – 684.

123 CLS AA para 127, record 706.

129. The CLS's contentions are, we submit, based on a misreading of section 15A of the DRA. Section 15A does not require conveyancers to accept responsibility for the accuracy of the above certificates and receipts. On the contrary, section 15A provides that a conveyancer "*who prepares a deed or other document*" and "*who signs a prescribed certificate on such deed or document*" accepts responsibility "*by virtue of such signing*" the accuracy of "*those facts … which are prescribed by regulation*". A conveyancer accepts responsibility under section 15A only for the accuracy of prescribed facts in documents on which he or she has signed a preparation certificate.

130. The certificates and receipts mentioned above (rates clearance certificates, transfer duty receipts and sectional title certificates) are consequently not documents for the accuracy of which a conveyancer accepts responsibility under section 15A of the DRA. This is for the following reasons:

130.1. First, none of those certificates and receipts are documents on which a conveyancer signs a "prescribed certificate" (i.e. a preparation certificate);

130.2. Second, to the extent that a conveyancer does not prepare the relevant certificate or receipt (because it is either prepared by the relevant authority or by the Applicant), section 15A does not apply as it imposes liability for the correctness of a deed or document only on the "*conveyancer who prepares [the] deed or document*";

130.3. Third, the facts set out in the above certificates and receipts for which the CLS contends a conveyancer accepts responsibility

(primarily the accuracy of the facts pertaining to outstanding rates and levies and the payment of duties) are not facts prescribed by regulation (in this case Regulation 44A). As set out above, the facts prescribed by Regulation 44A relate primarily to matters such as title conditions, the identity of parties to deeds and whether or not the property transaction has been properly authorised.

131. It is consequently submitted that the CLS's reliance on section 15A and DRA Regulation 44A to support its contention that all the above certificates and receipts must be prepared by a conveyancer is misplaced.

132. In addition to relying on section 15A and DRA Regulation 44A, the CLS and the LSSA also point to practical considerations that they contend make it necessary for conveyancers to prepare and/or procure the aforesaid certificates and receipts.

132.1. In regard to transfer duty receipts, the CLS contends that only attorneys are authorised to connect to the SARS eFiling system and, thus, only they are able to print transfer duty receipts and to certify that they accurately reflect the information on that system.[124] The LSSA also refers to an agreement concluded between itself and SARS in terms of which conveyancers are to sign a declaration on a transfer duty receipt confirming that it is a

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[124] CLS AA paras 108 – 113, record 699 – 701.

true copy of the document drawn from the SARS eFiling website.[125]

132.2. The LSSA raises similar supposed practical difficulties in respect of rates clearance certificates. It refers to municipalities that have not yet introduced a system for the production of such certificates with an "advanced electronic signature". Chief Deeds Registrar Circular CRC 8 of 2014[126] requires a conveyancer to certify that a rates clearance certificate issued by such a municipality is a printout of the original certificate.[127]

133. The Applicant has in its replying affidavit explained at length why none of these supposed practical difficulties is genuinely inimical to the implementation of its model:

133.1. In respect of the rates clearance certificates, for example, nothing prevents panel conveyancers from obtaining the printout and certifying it in the manner contemplated by the Registrar's circular.[128]

133.2. In respect of transfer duty receipts, the Applicant disputes that only attorneys are able to access the SARS eFiling system.[129] In event, even if this were so, the current arrangements are merely the result of the fact that, until now, conveyancers have attended

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125 LSSA para 10.46, record 292.

126 Reproduced as annexure A16, record 534.

127 LSSA AA para 10.63, record 301.

128 Applicant's RA, para 164, record 927.

129 Applicant's RA para 147.3, record 921.

to procuring transfer duty receipts. Nothing in law precludes the conclusion of suitable arrangements with SARS to accommodate the Applicant in future.[130] Until those arrangements are concluded, the Applicant would be prepared for its panel conveyancers to calculate, call for and make payment of transfer duties and to sign transfer duty receipts until the Applicant is registered as an eFiling user to SARS' satisfaction.[131]

134. More importantly, however, the above difficulties are not legal impediments which impact on the lawfulness of the Applicant's model or on the Applicant's compliance with the relevant legislative provisions referred to in the notice of motion and notice of counter-application. They are practical and systems-related impediments that will need to be overcome practically.

135. It is consequently submitted that the practical hurdles identified by the CLS and the LSSA are not legally cognisable grounds for their stance that – as a matter of law – attorneys (and only attorneys) may attend to the preparation or procurement of the rates clearance certificates, transfer duty receipts and sectional title certificates.

136. Lastly, the LSSA contends, again with reference to legislative history, that "*it was always the intention of the legislator to provide that the supporting documents accompanying a deed of transfer had to be procured and lodged by a conveyancer*"[132] and that the where such documents are not specifically mentioned in the relevant legislation, the obligation of a

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130 Applicant's RA paras 147.2 & 147.5, record 921 & 922.

131 Applicant's RA para 147.6 & 147.5, record 922.

132 LSSA AA para 12.8, record 315.

conveyancer to draft, procure and/or lodge them must be implied into such legislation.[133]

137. It is submitted that, even if the relevant legislative history supported the LSSA contentions (which the Applicant submits they manifestly do not) and even if the legislator intended that all the supporting documents to which the LSSA refers were to be prepared by conveyancers (for which the LSSA furnishes no factual support), the fact remains that DRA and the DRA Regulations stipulate which documents are to be prepared by conveyancers and those documents do not include the supporting documents to which the LSSA refers. The LSSA concedes as much by resorting to the contention that the conveyancer's obligation to prepare must be implied. It is submitted that the LSSA provides no legal basis for implying such an obligation, and that no such basis exists.

Conclusions in respect of sections 15 and 15A and DRA Regulations 43, 44 and 44A.

138. For the above reasons, the Applicant submits that its model does not contravene sections 15 and 15A or DRA Regulations 43, 44 and 44A.

139. Those provisions expressly identify the documents that are to be prepared by conveyancers (and thus prescribe the preparation of those documents are reserved work).

140. There is no dispute that the Applicant's model will result in the Applicant's preparation of those documents identified by the above provisions. The

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[133] LSSA AA para 10.32, record 286.

dispute – insofar as it relates to those provisions – concerns whether any other documents (in particular transfer duty receipts, rates clearance certificates and sectional title certificates) are implicated by those provisions. For the reasons set out above, it is submitted that they are not.

***Section 83 of the Attorneys Act***

141. Section 83(8)(a)(i) of the Attorneys Act provides as follows:

> "*(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 to 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 immovable property or to 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."*

142. The Applicant contends that, under its model, it will not draw up or prepare (or cause to be drawn up or prepared) any of the documents referred to in that section.[134]

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[134] FA para 35.1, record 22.

143. The LSSA contends that all the documents and supporting documents forming party of any set of documents that is lodged with the Registrar of Deeds constitutes a "*deed*" or "*writing*" relating to immovable property contemplated by section 83(8)(a)(i) and, therefore, that should the Applicant attend to the preparation of such documents, it will be guilty of an offence.[135]

144. The CLS similarly contends that the reference to "*writing*" in section 83(8)(a)(i) extends the genus of documents that no one other than a practising practitioner may draw up or prepare beyond the documents listed in section 15 of the DRA and DRA Regulations 43(1) and 44.[136]

145. The CLS further contends that:

145.1. The Legislature, in enacting the provision in very wide terms, was concerned to ensure that everything entailed in "*drawing u*p" and "*preparing*" and also in "*causing to draw up and prepare*" reserved documents may only be performed by an appropriately qualified professional who would also be subject to the rules of conduct and standards of ethical behaviour of that profession;[137]

145.2. Preparing a reserved document is something different from drawing up a reserved document, otherwise the use of both terms would be tautologous. It contends that drawing up a document is anterior to the preparation of a document in the sense of being

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135 LSSA AA paras 13.4 & 13.5, record 332.

136 CLA AA para 68, record 682 – 683.

137 CLA AA para 75, record 686.

further removed from the finalisation of the document.[138] It submits that this is apparent from DRA Regulations 43(1), 43(2) and 44(1), which require the conveyancer who prepares a document to sign the preparation certificate and to initial all alterations and each page thereof;[139]

145.3. The anterior steps involved in "drawing up" a document go beyond populating data into a *pro forma* reserved work document and include the process of obtaining the information required to be contained in the reserved documents and checking and verifying the information therein reflected (which tasks will – in breach of section 83(8)(a)(i), so the CLS contends – be performed by the Applicant under its model);[140]

145.4. Where the Applicant uploads data to its database in order for it to be inserted by the conveyancer into template reserved work documents, it will be causing those documents to be drawn up or prepared in contravention of section 83(8)(a)(i).[141]

146. In summary, therefore, the Respondents' submissions are that:

146.1. the supporting documents that are to be prepared by the Applicant constitute deeds or writing contemplated by section 83(8)(a)(i) (and therefore that the Applicant will be in breach of the section if it prepares them); and

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138 CLS AA para 75, record 687.

139 *Ibid*.

140 CLS AA para 78, record 687 – 688.

141 CLS AA para 79, record 688.

146.2. in respect of the reserved documents that are to be prepared by conveyancers under the Applicants model, the Applicant will be involved in the anterior steps of drawing them up, and will cause them to be prepared or drawn up, in each case in breach of section 83(8)(a)(i)).

147. For the reasons set out below, it is submitted that the Applicant's model does not contravene the Attorneys Act.

148. Before addressing the Applicant's submissions in this regard, it should be noted that section 33(3) of the Legal Practice Act (which is intended to come into effect on 1 August 2018)[142] does away with the reservation of work currently provided for in section 83(8)(a)(i) of the Attorneys Act. Section 33(3) of the LPA (which is addressed in greater detail below) instead reserves only the following areas of work to legal practitioners: (a) rights of appearance; (b) the drawing up and execution of instruments or documents for use in court proceedings; and (c) work "*which in terms of any other law*" may only be done by an advocate, attorney, conveyancer or notary. Consequently, the areas of work reserved to conveyancers are significantly more narrowly circumscribed under the LPA than they are under the Attorneys Act.

149. Section 33(3) of the LPA comes on the heels of the finding by the Competition Commission in 2011 that the "*protect[ion] of the legal profession*" through the reservation of work was anti-competitive. In its

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142 See the LSSA's publication of the latest developments pertaining to the LPA at http://www.lssa.org.za/legal-practitioners/advisories/misc/legal-practice-act-28-of-2014/misc/legal-practice-act

findings in response to the First Respondent's application for an exemption from the provisions of Chapter 2 of the Competition Act,[143] the Competition Commission held, *inter alia*, that the reservation of work "*has the effect of harming competition, in that, it prevents other competent service providers from providing legal services to the public*" and is likely to harm consumer welfare because it reduces product choice and could result in higher fees.

150. We now turn to consider the Respondents' contentions outlined above, namely that:

150.1. the supporting documents to be prepared by the Applicant under its model constitute "*deeds*" or "*writings*" relating to immovable property contemplated by section 83(8)(a)(i);

150.2. the Applicant will be drawing up reserved documents or causing them to be drawn up.

Deeds and writings

151. It is submitted that, in the context of s83(8)(a)(i), where the word "*writing*" is used in association with "*agreement*", "*deed*", "*contracts of lease*", "*conditions of sale*" and "*brokers' notes*", it connotes a formal document of a contractual nature or having legal consequences. While the phrase has not been considered by our courts in the context of section 83 of the Attorneys Act, in the English case of *Re Drax's Will*,[144] Swinfen Eady J had to construe a will requiring a beneficiary to use certain hereditaments (title and

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143 Published in Government Gazette No. 34051 of 4 March 2011.

144 *Re Drax's Will* 94 LT 611.

arms) "*in all deeds and writings to which she should be a party or which she should sign*". He held that "writing" did not mean every letter or visiting card but writings of a formal character, i.e. legal instruments.[145]

152. It is submitted that section 83(8)(a)(i) could never be interpreted to include within its ambit any written document of whatsoever nature "*relating to immovable property*". This would lead to the absurd consequence that an advertisement for the sale of a property in a newspaper would need to be prepared by a conveyancer, so too would a quotation for repair work to be carried out on any immovable property.

153. A restrictive interpretation is further mandated by the common law principle (which applies "*with added force under the Constitution*")[146] that penalty provisions are to be interpreted restrictively.

154. It is consequently submitted that section 83(8)(a)(i) does not extend beyond formal documents of a contractual nature or having legal consequences, such as deeds of transfer. The section does not extend to the documents the Applicant will be responsible for preparing or procuring, including transfer duty receipts, rates clearance certificates, letters of enquiry or accounts.

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145 At 613.

146 *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) at para [129].

Drawing up, preparing or causing to be drawn up or prepared

155. The opening phrase of section 83(8) of the Attorneys Act – "*Any person ... who ... draws up or prepares or causes to be drawn up or prepared...* " – has not been considered by our courts.

156. Prohibitions of this kind are, however, to be found in other jurisdictions and have given rise to reported judgments, some of which are considered in what follows.

157. In *Green v Hoyle*,[147] Widgery CJ said that the words "*draw or prepare*" used in the English statute in question meant "*the use of the intellect to compose the documents, the use of the brain to select the correct words, to put them in the correct sequence so that the document expresses the intention of the parties*."[148] He held that a person who was paid to assemble information which was passed on to a conveyancer to enable the latter to draft the deed could not be said to have prepared or drawn up the deed, even indirectly.

158. In his concurring judgment, O'Connor J drew a distinction between "*the use of the pen*" and "*the mind that guides the pen*". The drawing up or preparing of a document required both. The former element might be indirect, as when a lawyer dictates a document to his or her typist. He said that "*it is the mind that makes the document that is the true drawer or preparer of the document*". A person who furnishes the material from which the document is drawn up (which, in the present case, would be the

147 *Green and Ashford v Hoyle* [1976] 2 All ER 633 (QB).

148 At 639d-e.

Applicant, who provides the relevant information to the conveyancer) does not draw up the document at all.[149]

159. Goff J reached the same result, but expressed the view that the person who took responsibility as towards the lay client for the document was the person who should be regarded as having drawn up or prepared the document.[150]

160. A similar prohibition is encountered in various states in Australia. *Barristers' Board v Palm Management Pty Ltd*[151] concerned the Western Australian prohibition, which was substantially the same as the one considered in the above English case. Brinsden J held that work of a "*merely clerical kind*", such as inserting names and particulars in precedents drawn up by another, did not amount to preparing or drawing up the document. In that case, both the company and an employee (one Nettleton) had been charged with contravening the prohibition. The reference to the clerical insertion of particulars was in the context of finding that Nettleton (who had done the insertions) had not contravened the prohibition. However, the precedents being those of the company (his employer), the company itself was found to have contravened the prohibition.[152] It is submitted that this case is analogous to the Applicant's model insofar as the conveyancer is responsible for preparing the precedents, whereas the Applicant performs the clerical task of procuring

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149 At 639g-j.

150 At 640e.

151 *Barristers' Board v Palm Management Pty Ltd* [1984] WAR 101.

152 At 108-109.

the information to be inserted therein. The important distinction between the facts in the *Barristers' Board* case and the Applicant's model, however, is that whereas the company in *Barristers' Board* was not a legal practitioner, the conveyancer under the Applicant's model will be.

161. The next important Australian case is *Law Society of New South Wales v Ramalca Pty Ltd*,[153] a judgment of the Court of Appeal of New South Wales. The prohibition in New South Wales was wider than in Western Australia, in that it covered the direct or indirect drawing up, "*filling up*" or preparing of certain documents. The case concerned a scheme which was attempting to achieve something similar to the Applicant's model, namely separating out reserved and non-reserved work in the context of conveyancing.

162. The important factual distinction between the scheme in *Ramalca* and the Applicant's model, however, is that in *Ramalca*, the company (a non-professional entity) actually undertook to the client to provide a complete service. The client's only contract was with the company. The company in turn engaged a barrister to do the reserved work. Although the barrister used his own professional judgment, he was working in essence for the company. The court was satisfied that the company was thus (through the barrister) causing the deeds to be drawn up, and was itself to be regarded in law as preparing or drawing them.

163. It needs to be noted that *Ramalca* was not concerned with the distinction between preparatory drafting done by one party and the assumption of

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153 *Law Society of New South Wales v Ramalca Pty Ltd and Another* (1988) 12 (NSWLR) 34.

responsibility by another party. In *Ramalca*, the barrister himself drew up the documents, using facts set out in instruction sheets prepared by the company. The reason why the company was convicted was because the company itself for reward contractually undertook to the clients to bring about the drawing up of deeds. This is not the effect of the Applicant's model, under which the customer contracts directly with a panel conveyancer and mandates the conveyancer to prepare the reserved documents.

164. The Western Australian prohibition was again considered in *Her Majesty's Attorney-General v Quill Wills Ltd*.[154] This case concerned a charge against a franchisor which franchised a business for assisting clients to make wills. The franchisor supplied a data bank of standard clauses from which the franchisees' clients could choose in composing their wills. The defendant argued that the franchisee's role was purely mechanical, and that the selection of clauses was made by the client. The franchisees were expressly prohibited from giving legal advice.

165. Ipp J rejected this defence. He adopted Goff J's test in Green concerning assumption of responsibility:[155]

> "*I regard the criterion as appropriate particularly where an instrument has been mechanically produced by a person, without any application of his own intellect, but by using material created by the intellectual activity of another. Where, in such circumstances, the producer of the instrument adopts, endorses and identifies himself with the material created by the other person, and assumes responsibility for it, the*

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154 *Her Majesty's Attorney-General v Quill Wills Ltd and Others* [1990] 3 WAR 500.

155 At 513.

> *producer, in my opinion, directly or indirectly draws or prepares the instrument within the meaning of s77.*"

166. The evidence was that the standard clauses had been prepared by legal practitioners. However, the franchisees adopted, endorsed and identified themselves with the preparation and drawing up of the clauses, they accepted responsibility for them as towards their clients, and they were paid for the whole service.[156]

167. *Cornall v Nagle*[157] concerned a similar prohibition in the state of Victoria. The relevant statute again referred to the drawing, "*filling up*" or preparing of certain documents. Phillips J discussed some earlier authority. In one of these cases (decided under the Victoria statute) a company was found to have offended the prohibition where it charged its clients for the preparation of standard hire purchase assignments in circumstances where the original deed of assignment had been prepared by the company's solicitors and the company simply made copies and inserted the relevant particulars. Phillips J referred to other states where clerical work of this kind was found not to be proscribed, and said that this might be justified because of the absence in these jurisdictions of the additional phrase "filling up".[158]

168. In the event, Phillips J thought it was a "*sufficient test*" for purposes of the *Cornall* case that the defendant had taken responsibility for the finished product.[159] This should not be read as an approval by the judge of the

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156 At 514.

157 *Cornall v Nagle* [1995] 2 VR 188.

158 At 204-205.

159 At 205.

responsibility test as the sole criterion. The assumption of responsibility, if proved, would be sufficient to convict the person who assumed responsibility (assuming such person not to be a qualified practitioner). If the defendant did not assume responsibility, it might still be necessary to ascertain whether he nevertheless did acts covered by the phrase "*drawing, filling up or preparing*". The *Cornall* case does not really provide further guidance as to the circumstances (if any) where such a finding might be made in the absence of an assumption of responsibility.

169. In *Queensland Law Society Inc and Another v PA Sande*,[160] the court followed *Ramalca* in circumstances where, as in that case, there had been an attempt to delegate the reserved work but where the defendant had undertaken as towards the lay client to provide the overall service. The court again adopted the test of assumption of responsibility. However, in one particular instance where the defendant had merely corrected a misspelt name in a document prepared by a practitioner, his actions were found to have been purely clerical.

170. In *The Legal Practice Board v Adams*,[161] the court accepted the distinction between mechanical and clerical tasks on the one hand, and exercising one's mind as to the appropriate form of words to accommodate the particular case.[162] This case concerned the preparation of documents for purposes of litigation, and the defendant was convicted.

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160 *Queensland Law Society Inc and Another v PA Sande* [1997] QSC 57.

161 *The Legal Practice Board v Adams* [2001] WASC 78.

162 Para 30.

171. In *The Legal Practice Board v Said*,[163] the court reviewed the earlier decisions referred to above.[164] *Said* involved the preparation of documents for use in litigation. In respect of three affidavits the defendant had simply typed up handwritten drafts prepared by the witnesses, correcting spelling errors and making provision for attestation. It was held that this was purely clerical.[165] In respect of the other documents, the defendant was found to have been the sole or primary author and to have taken responsibility for the documents.[166]

172. The Applicant's model is clearly distinguishable from *Ramalca* and *Sande*, in that – as noted above – the external conveyancer will not be doing work for, nor will he or she be remunerated by, the Applicant. The external conveyancer will have a separate mandate from the seller and will be remunerated by the seller. The Applicant does not contractually offer to provide the whole service (including the preparation of conveyancing documents). The Applicant acts as a conduit for getting information from the client to the external conveyancer, but it is the client who, by giving the mandate to the conveyancer, causes the relevant deeds to be drawn up. (The client is not remunerated for doing so and there is obviously no contravention by the client.) Where a seller engages a conveyancer to prepare a deed, and then pays an intermediary to deliver information to the conveyancer, it is submitted that it cannot be said that the intermediary (in this case, the Applicant) is causing the deed to be drawn up.

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163 *The Legal Practice Board v Said* [2002] WASC 35.

164 Paras 14-18.

165 Para 56.

166 Para 59.

173. Accordingly, where, as in the present case, the Applicant simply procures information and delivers it to the conveyancer (by uploading it to the Applicant's database), and the conveyancers then produces the reserved documents using his or her own precedents, there would not be a contravention of s83(8)(a).

174. Moreover, the test of assumption of responsibility addressed in the cases above would favour a conclusion that the Applicant would not be contravening s83(8)(a). The responsibility envisaged by that test is not responsibility as towards the Deeds Office or other state registry but responsibility towards the lay client. In *Ramalca*, the barrister physically prepared the deeds, but the company assumed responsibility towards the lay clients. The company was found to have prepared the deeds. Under the Applicant's model, however, the conveyancer both produces the reserved documents (albeit using information provided by the Applicant) and assumes responsibility in law for their preparation.

175. Such a conclusion is, we submit, in accordance with legal policy. Provided a practitioner approves and assumes responsibility for the document, professional expertise will be brought to bear on the document in its final form and there will be a practitioner over whom a regulatory body can exercise disciplinary jurisdiction if the client is harmed by a departure from professional standards.

176. It is consequently submitted that the authorities discussed above support the Applicant's contention that it will not be preparing or drawing up reserved documents. The reserved documents will be templates prepared

by panel conveyancers, which will be populated by conveyancers using information provided by the Applicant. The Applicant's functions will be clerical, whereas the conveyancers will apply their intellect to compose the documents and assume responsibility for them.

177. It is further submitted that the Applicant will not cause the reserved documents to be drawn up or prepared. It is the client, through its mandate with the conveyancer, who causes the document to be drawn up or prepared.

178. Finally, in connection with the CLS's contention that the phrases "*drawing up*" and "*preparing*" in section 83(8)(a) must mean something different (otherwise the use of both terms in that section would be tautologous) and that the drawing up of a document relates to all the preliminary steps in the production of a document (including the process of obtaining the information required to be contained in the reserved documents and checking and verifying the information therein reflected), whereas the preparation of a document entails only the final signature of a preparation certificate,[167] the Applicant submits that these contentions are unsustainable for the following reasons:

178.1. First, the scheme of the DRA Regulations makes it clear that the preparation of a document is not merely the final signature and execution of a document. In this regard, DRA Regulations 20 – 44A (headed "*Preparation of Deeds and Documents and Qualification of Persons*") cover not only the final signature and

[167] CLS AA para 75, record 687.

execution of deeds and documents, but also the compilation of deeds and documents;

178.2. Second, in respect of the CLS's contention that the use of the words "*draw up*" and "*prepare*" would be tautologous unless they have a different meaning, the Applicant contends that in, as those terms are used in section 83(8)(a) "*draw up*" and "*prepare*" refer to the same process, but in respect of different documents, hence the use of two different terms. One draws up a contract, but - as set out in the heading to the DRA Regulations 20 to 44A - one prepares a deed to be lodged with the Registrar.

179. It is consequently submitted that under the model, the Applicant will not prepare, draw up or cause to be prepared or drawn up any reserved documents in contravention of section 83(8)(a)(i).

Conclusions in respect of section 83(8)(a)(i)

180. For all of the above reasons, the Applicant submits that its model will not contravene section 83(8)(a)(i) of the Attorneys Act, in particular because:

180.1. the supporting documents it will prepare and/or procure are not "*agreement[s], deed[s] or writing[s] relating to immovable property*" as contemplated by that section;

180.2. it will not prepare, draw up or cause to be prepared or drawn up any reserved documents: they will be prepared and drawn up by conveyancers, and those documents will be caused to be drawn up by clients, not the Applicant.

***Section 33(3) of the Legal Practice Act***

181. Section 33(3) of the LPA (which, as noted above, is anticipated to come into effect on 1 August 2018 and will replace section 83(8) of the Attorneys Act) provides as follows:

> "*(3) 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*."

182. Thus, unlike section 83(8) of the Attorneys Act, which contains a self-standing prohibition on the preparation or drawing up of conveyancing documents, section 33(3) prohibits persons other than practitioners from performing acts which "*in terms of any other law*" may only be done by practitioners. The section thus depends for its efficacy on prohibitions contained in other laws.

183. The CLS contends that the inclusion of the phrase "*directly or indirectly*" in section 33(3) of the LPA conveys an intention to reserve for practising practitioners an even wider ambit of functions than those covered by section 83(8) of the Attorneys Act.[168]

184. It is submitted that the CLS's contention is plainly unsustainable:

184.1. section 33(3) has an obviously narrower ambit that section 83(8) of the Attorneys in that it is no longer a self-standing prohibition, but relies on the contravention of any other law;

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168 CLS AA para 76, record 686.

184.2. section 33(3) is deliberately narrower in ambit because it is aimed at addressing the anti-competitive effect of the reservation of work to practitioners (as dealt with above).

185. The Applicant consequently submits that, because the Applicant's model does not result in non-practitioners performing acts which "*in terms of any other law*" may only be done by practitioners (for the reasons set out elsewhere in these submissions), the Applicant's model does not contravene section 33(3) of the LPA.

186. The above submissions have addressed all of the legislative provisions upon which this Court is requested to pronounce in terms of the Applicant's notice of motion. It has been shown, we submit, that these do not constitute a bar to the relief sought.

187. We now turn to consider the provisions on which the Respondents rely (in the counter-application).

***Paragraph 7 of the Estate Agent's Code***

188. Paragraph 7 of the Estate Agent's Code[169] provides as follows:

> "*7. PROHIBITION AGAINST UNDUE INFLUENCE*
>
> *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 –*

[169] A copy of which is attached the LSSA's affidavit as annexure A17, record 538 – 545.

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

*…*"

189. The LSSA contends that an estate agent, motivated by the prospects of receiving an introductory commission for each signed dual mandate concluded between a seller and a panel conveyancer, will "*solicit, encourage, persuade or influence*" the seller to use the services of a particular conveyancer in breach paragraph 7 of the Estate Agent's code. The CLS similarly contends that the Applicant's model will breach this rule.[170]

190. As noted in paragraphs 25 to 28 above, the introduction agreement concluded between the Applicant and individual estate agencies requires estate agents to provide sellers with neutral factual information about the Applicant's services and those of the panel attorneys. This takes place at the time of discussing the mandate and/or when the offer to purchase is presented to the seller. The introduction agreements expressly provide that agents may not "*at any time and in any way, whether directly or indirectly solicit or attempt to solicit*" appointments for the Applicant or its panel conveyancers.[171]

191. The estate agent will give the seller an opportunity to make his or her own choice between (a) appointing a firm of attorneys to perform the full range of transfer-related services; or (b) appointing a commercial conveyancing service provider (which need not be the Applicant) and a firm of

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170 CLS AA para 50, record 676.

171 Clause 6.3 of the introduction agreement, record 97.

attorneys.[172] The two alternative options available to the seller are to be included in both the mandate concluded by the seller with the agent and in the offer to purchase.[173] If a seller chooses the latter, only then will the agent introduce the Applicant and a range of panel attorneys.

192. Under the introduction agreement, therefore, agents are not permitted to "*solicit, encourage, persuade or influence*" a seller (they provide neutral, objective information to a seller), nor do they recommend to any "*particular attorney, conveyancer or firm of attorneys*". The meaning of "solicitation" is discussed in further detail below.

193. It is consequently submitted that the Applicant's model will not result in a breach of paragraph 7 of the Code. To the extent that an agent does solicit work for a particular conveyancer or encourage or persuade a seller to use a particular conveyancer without cause, this will be a breach of the introduction agreement that is not countenanced by the Applicant's model. (Compare para [22] of the judgment in *Law Society of the Cape of Good Hope v MacPherson and Others*[174] where it was held, in relation to the previous Rule 14.6 of the rules of the Law Society of the Cape of Good Hope, that for the agreement, arrangement or scheme of operation in question to fall foul of the Rule 14.6 prohibition, the prohibited result must be "*consonant with what is envisaged by the terms of the agreement, arrangement or scheme of operation*". In the present case, solicitation by estate agencies is not consonant with the terms of the Applicant's proposed

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172 Applicant's RA para 245, record 888.

173 Record 100 & 101.

174 [2009] ZAWCHC 154 (15 October 2009).

introduction agreement: on the contrary, it is *prohibited* by it, and constitutes a breach thereof.)

194. There is, we submit, therefore no basis for holding that the Applicant's model itself breaches the Code.

***Consolidated Rule 43.1***

195. Rule 43.1 of the Consolidated Rules provides as follows:

> "*A member shall not, directly or indirectly, enter into any express or tacit agreement 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 in kind; but this prohibition shall not in any way limit bona fide and proper marketing activities by fulltime employees of the member*."

196. The CLS refers to the script which forms annexure "C" to the introduction agreement (to which agents are required strictly to adhere), which requires the agency to make known the services of the Applicant and requires the agent to state:

> "*If you would like to appoint [the Applicant] then you can select any one of the attorneys presented below that work with [the Applicant] to complete your transfer.*"[175]

197. The CLS contends that the agent will, consequently, in contravention of Consolidated Rule 43.1, not only market the Applicant, but will also market the attorneys selected by and working with the Applicant and that this marketing is part of the service in exchange for which the agency receives

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175 CLS AA para 40, record 673, with reference to record 102.

payment from the Applicant.[176] The CLS contends that attorneys on the Applicant's panel "*will have both [the Applicant] and estate agents soliciting professional work for them for reward.*"[177]

198. The LSSA similarly contends that a conveyancer that has no business relationship with a prospective seller would, by concluding a PMMA with the Applicant, be appointed by a prospective seller who is completely foreign to his/her firm and that conduct would "*undoubtedly constitute a contravention*" of Rule 43.1.[178]

199. As noted above, the introduction agreement expressly requires agents to give neutral factual information (it specifies, by way of the prescribed script, exactly what an agent is permitted to say) and, moreover, expressly provides that agents may not "*at any time and in any way, whether directly or indirectly solicit or attempt to solicit*" appointments for the Applicant or its panel conveyancers.[179]

200. In addition, even if the commercial structure of the Applicant's model were such as to make it attractive for agents to solicit work for panel conveyancers, we submit that the model would not fall foul of Rule 43 because its terms exclude solicitation by:

200.1. demarcating what the Applicant and estate agents may say in their interactions with clients;

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176 CLS AA para 40, record 673.

177 CLS AA para 42, record 674.

178 LSSA AA para 14.14, record 338.

179 Clause 6.3 of the introduction agreement, record 97.

200.2. the express prohibition against solicitation in the introduction agreement;

200.3. the absence of any financial benefit for individual agents where the seller elects to use a panel attorney (payments are made by the Applicant to estate agencies rather than individual agents).

201. Moreover, Consolidated Rule 43.1 applies where an unqualified person solicits work for a conveyancer "*for reward*". There can be no contravention where the unqualified person (in this case the individual agent) is not rewarded for soliciting.

202. In addition to the aforegoing, we submit that, were an estate agency, in breach of the introduction agreement, to incentivise individual agents to solicit work for the Applicant, this would also not have the consequence that the introduction or agreement or the Applicant's model would contravene Rule 43.1.

203. While there would, on the aforementioned hypothesis, be solicitation for reward, this cannot be said to have resulted (directly or indirectly) from the introduction agreement itself in contravention of Rule 43.1, particularly since the provisions of the introduction agreement prohibit soliciting. For a scheme to be regarded as having the result precluded by Rule 43 (securing work for a practitioner through solicitation by an unqualified person for reward), the result must be a consequence of the terms of the arrangement

itself. As the Full Bench in *Law Society of the Cape of the Good Hope v McPherson* held:[180]

> "*The introduction of the phrase 'or potential result' in Rule 14.6.1 [the forerunner to Rule 43] was self-evidently intended to obviate the need on the part of the Law Society to show that professional work was actually solicited by an unqualified person for an attorney and to categorise also the mere entering into of any agreement, arrangement or scheme of operation aimed at securing professional work by an unqualified person as unprofessional, dishonourable or unworthy conduct, irrespective of whether such work was actually secured or solicited as a result, but subject to the caveat that such potential result is consonant with what is envisaged by the terms of the agreement, arrangement of scheme of operation.*" [emphasis added]

204. The court thus held that the broadening of the Rule did not bring each and every conceivable result arising from the arrangement in question within the proscription, but only those which were compatible with the terms of the scheme itself.

205. In the hypothetical scenario identified above, the solicitation for reward would have resulted not from the introduction agreement, but from a breach thereof. Consequently, it could not be said that the agreement or the model contravenes Rule 43.1.

206. The meaning of the word "solicit" encompasses a fairly broad range of conduct that varies in degree. In *Law Society, Cape of Good Hope v Berrangé*,[181] the court held as follows:[182]

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180 *Supra,* at para [22].

181 *Law Society, Cape of Good Hope v Berrangé* 2005 (5) SA 160 (C).

182 At 165C-D.

> "*The word 'solicit' bears its ordinary dictionary meaning of 'seek assiduously to obtain business, a favour, ask earnestly or persistently for, request, invite' (the New Shorter Oxford English Dictionary Vol II at 2940) or to 'ask for or try to obtain (something) from someone' (Concise Oxford English Dictionary (2001) at 1366).*"

207. Even if it the provision of neutral information in the manner contemplated by the introduction agreement could be regarded as an invitation to the buyer or seller to do business with panel attorneys, it is submitted that this does not meet the threshold of "solicitation" in Rule 43.1, particularly when account is taken of the purpose of the Rule, which is twofold:

207.1. to preserve the independence and repute of the attorneys' profession;[183]

207.2. to preserve the lay client's freedom of choice.[184]

208. Interpreting the rule so as to include within the proscription the furnishing to sellers of neutral information by estate agents in the manner contemplated by the introduction agreements could hardly be regarded as serving to guard against any undesirable erosion of the independence or repute of the profession.

209. As regards the client's freedom of choice, it is submitted that this would be enhanced, not undermined, were sellers and buyers to be made aware that

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183 *Moore v Haupt* 1913 CPD 1036 at 1043; *Lake v Law Society, Zimbabwe* 1987 (2) SA 459 (ZHC) at 478F; *Incorporated Law Society v Hubbard* 1904 TS 168 at 172.

184 Lewis *Legal Ethics* 39 – 40.

by availing themselves of the model they could receive a competent service at a lower price.

210. In *McPherson*, the marketing agreement which the Law Society attacked under the predecessor to Rule 43 (Cape Rule 14.6.1) included a provision in clause 1 thereof that the estate agency would, *inter alia*, display and distribute the firm of attorneys' information brochures on property and conveyancing-related topics and would, where possible, incorporate the firm's name in directories and marketing material distributed by the agency to its clients. (This would entail that the agency would communicate information concerning the firm to the agency's clients.) While rejecting an argument that "soliciting" should be narrowly interpreted as limited to "touting", the court agreed that the word did not encompass approved advertising practices.[185] It is noteworthy that the provisions of the marketing agreement in clause 1 thereof (including those mentioned above) were not held by the court to contravene the rule. The court's finding against the respondent attorneys was based on its analysis of the provisions of clause 2 of the marketing agreement relating to the remuneration payable by the firm to the agency; the court found that there was to be payment for services over and above those specified in clause 1 and that the consideration in question was intended to depend on the number of transactions referred by the agency to the firm.[186]

211. The Applicant accordingly submits that the provision of neutral information by estate agents to buyers and sellers concerning the Applicant's model

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185 At para [14].

186 Paras [20] and [21].

would not amount to soliciting for purposes of the Rule 43, properly interpreted, particularly since the introduction agreement specifically prohibits solicitation. This conclusion is fortified, we submit, by the fact that the panel will contain a number of firms and that the neutral information provided by the agents will not be directed at the engagement of a specific attorney or firm.

212. It is consequently submitted that the Applicant's model and the agreements contemplated by it will not contravene Consolidated Rule 43.1.

Sharing / splitting of fees

213. The LSSA also contends that the remuneration arrangements contemplated by the model, under which panel attorneys are remunerated for the reserved work (subject to the fee cap furnished to the Applicant prior to their appointment, as discussed above) and the Applicant is paid for its administrative services, constitutes a fee-sharing arrangement that is precluded by Rule 43.[187]

214. It is submitted that Rule 43 is not concerned with the fee-sharing/splitting arrangements of which the LSSA complains. Such arrangements are, however, addressed in Consolidated Rule 31.1, which the CLS contends is contravened by the model.[188] We accordingly address in what follows, the alleged contravention of Rule 31.1.

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187 LSSA AA paras 15.24 and 15.24, record 343- 344.

188 CLS AA paras 48 & 49, record 675 – 676.

215. Consolidated Rule 31.1 provides as follows:

> "*31.1 No member shall make over, share or divide with any person other than a practitioner ... either by way of partnership, commission or allowance or in any other manner, any portion whatsoever of his or her professional fees, and no member shall, directly or indirectly, enter into any express or tacit agreement, arrangement or scheme of operation the result or potential result of which is that a person who is not a practitioner, ... , will enjoy, share or participate in his or her professional fees, whether by way of partnership, commission or allowance or in any other manner.*
>
> *31.2 Any deed, document, or writing signed or attested by a practitioner, in his or her capacity as such, shall be considered to have been prepared and drawn by him or her, and all fees charged in connection with; or relating to, the preparation, drawing or execution of any such deed, document or writing, shall be considered fees earned by him or her within the meaning of rule 31.1.*"

216. Under the Applicant's model, conveyancers do not make over, share or divide with the Applicant (or any other person) any portion of their professional fees. They are separately remunerated by clients for the reserved work they perform.

217. It is noteworthy that the CLS does not allege that the Applicant's model in fact contravenes Rule 31.1. Rather, it states that: "*Should the conveyancing attorney sacrifice a portion of the professional fee he or she would ordinarily be entitled to charge for reserved work to the Applicant for*

*performing administrative support functions, the attorney would be In breach of his professional rules of conduct*."[189] [emphasis added]

218. Thus, on the CLS's own version, it is only if – hypothetically – the conveyancing attorney were to sacrifice a portion of his or her professional fee that the Rule would be contravened. The Applicant's model does not provide for such a sacrifice. Rather, the fees charged by the Applicant and by the conveyancers are the fees each of them are prepared to receive for rendering their respective services. Panel attorneys will charge their own fees, subject to a cap. They will not share any part of that fee with the Applicant.

219. The decision in *Cape Law Society v Hoole*[190] referred to above dealt with a prohibited fee-sharing arrangement. The reasoning in *Hoole* must, however, be viewed in the context of the legal regime which then prevailed, in terms of which there was a tariff of conveyancing fees which covered both reserved and unreserved work and in accordance with which conveyancers were obliged to charge. The arrangement between Hoole and OWT was that OWT would perform the unreserved work and that Hoole would remunerate OWT (the non-qualified person) for such work by paying OWT 50% of the tariff fee (though OWT as agent collected 100% of the tariff fee from the client, deducted its 50% and remitted the balance to Hoole). The court said that the real objection to the arrangement (i.e. the feature which caused it to offend the fee-sharing prohibition) was the way in

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189 CLS AA para 49, record 676.

190 1975 (2) SA 323 (CPD).

which OWT's remuneration was determined, namely as a percentage of the fees payable to the conveyancer.[191]

220. In those circumstances, it is easy to appreciate why the arrangement was found to be a sharing by Hoole of his professional fees with OWT. The present circumstances are quite different. There is no longer a published tariff in accordance with which conveyancers are obliged to charge. A conveyancer may and indeed should independently determine his or her own fee for the work he or she does. He or she can do so at a flat rate or a sliding scale of his or her own devising. In the present case, each panel attorney will determine the fee at which he or she is willing to perform the reserved work. The Applicant will determine the fee at which it is willing to perform the unreserved work. The Applicant's fee will not be determined as a percentage of what the attorney will be charging or of what the attorney could or would charge if he or she were doing all the work.

221. The Applicant accordingly submits that the model will not result in a fee-sharing arrangement and will not contravene Consolidated Rule 31.1.

***Consolidated Rule 48***

222. Rule 48 of the Consolidated Rules provides as follows:

> "***Naming in deed of alienation***
>
> *48. A member may not act in terms of a deed of alienation of immovable property in which the member's name or the name of the member's firm has been printed or duplicated as transferring attorney. This prohibition will not, however, apply for separate written instructions given to the*

191 At 326D-E.

*member prior to the signature of the deed of alienation or to an agreement prepared by the member on instruction from that client.*"

223. The LSSA contends that for the model to operate, it will be necessary for the relevant estate agent to approach a prospective seller and to convince that seller to nominate a particular conveyancer (a conveyancer that is on the Applicant's panel).[192] The LSSA maintains that, in doing so, the participating conveyancer will "*no doubt*" contravene Rule 48.[193]

224. The Applicant submits that there is no merit in the LSSA's contentions for the following two reasons:

224.1. First, as a matter of fact, the agent will not "*convince a seller to nominate a particular conveyancer*." As noted above, the introduction agreement prohibits solicitation. The LSSA's allegation is speculative and unsubstantiated;

224.2. Second, and more pertinently for purposes of Consolidated Rule 48, under the Applicant's model the conveyancer's name will not be printed or duplicated on the sale agreement as contemplated by Rule 48.

225. The LSSA's assertion that panel conveyancers will contravene the provisions of Consolidated Rule 48 is no more than speculation, as reflected by its statement that the participating conveyancer will "*no doubt*" contravene Rule 48. Significantly, the CLS does not even contend that the Applicant's model contravenes Rule 48.

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192 LSSA AA para 15.29, record 346.

193 *Ibid*.

226. It is consequently submitted that there is no merit in the LSSA's contention that the Applicant's model will contravene Consolidated Rule 48.

***Consolidated Rule 49.8***

227. Consolidated 49.8 provides as follows:

> "*49. A member shall:*
>
> *…*
>
> *49.8 not act for or in association with any organisation or persons, not being a practising practitioner, whose business or part of whose business it is to solicit the instructions for the practitioner;*"

228. The LSSA alleges (without providing any reasons for its contention) that the Applicant's model will constitute a contravention of Rule 49.8.[194]

229. For the reasons outlined above, it is submitted that it is not the Applicant's or the agent's business to solicit instructions for conveyancers. The Applicant's introduction agreement expressly prohibits any such solicitation.

230. It is consequently submitted that the Applicant's model does not contravene Consolidated Rule 49.8.

***Consolidated Rule 49.17***

231. Consolidated 49.17 provides that a member shall not:

> "*49.17 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, solicit for, professional work in an improper or unprofessional manner or by*

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194 LSSA AA para 15.15, record 339.

*unfair means, all of which for purposes of this rule will include, but not be limited to:*

*49.17.1 the payment of money, or the offering of any financial reward or other inducement of any kind whatsoever, directly or indirectly, to any person, in return for the referral of professional work; or*

*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.*

*For the purposes of rule 49.17 'professional work', in addition to work which may by law or regulation promulgated under any law be performed only by a practitioner, means such other work as is properly or commonly performed by or associated with the practice of a practitioner.*"

232. The LSSA contends that the Applicant's model will result in a contravention of Rule 49.17.[195] Again, the CLS does not allege a contravention of this Rule.

233. Rule 49.17 applies where a practitioner him- or herself, personally or through the agency of another, procures or seeks to procure or to solicit professional work in an improper or unprofessional manner or by unfair means.

234. It is submitted that, under the Applicant's model, conveyancers themselves will clearly not procure, seek to procure or solicit professional work. Moreover, for the reasons set out above, the conveyancers will also not, through the agency of the Applicant or the estate agents, procure, seek to procure or solicit such work. This is principally because the agents are

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195 LSSA AA para 15.26, record 344.

required to provide neutral information to consumers and they are precluded by the introduction agreements from soliciting.

235. It is consequently submitted that the Applicant's model will not contravene Rule 49.17.

***The contractual freedom and autonomy a seller enjoys under common law to appoint his or her own conveyancer***

236. The LSSA contends that the Applicant's model, "*which is dependent upon an estate agent convincing a prospective seller to make use of the services of the Applicant and the Applicant's panel conveyancer*" will "*disregard the common law principle that a seller is permitted to nominate his/her own conveyancer and has the right not to be intimidated by an estate agent into accepting the Applicant's conveyancer*."[196]

237. It is submitted that the LSSA's contentions in this regard are unsustainable for the following two reasons:

237.1. First, the Applicant's model is not dependent upon agents "*convincing*" prospective sellers to use the Applicant's services, nor does it contemplate our countenance the "*intimidation*" of sellers by agents;[197]

237.2. Second, the model does not impinge on a seller's right to nominate a conveyancer of his or her choice. As set out above, the model presents to the seller the option of using a conveyancer

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196 LSSA para 15.28, record 345.

197 Applicant's RA para 274, record 953.

for all conveyancing services or to use the Applicant's model. In addition, where a seller opts to use the services of the Applicant and a panel conveyancer, the model leaves it open to the seller to select a panel conveyancer of his or her choice.

***Section 11(1) of the Consumer Protection Act***

238. The LSSA contends that the Applicant's model will, for the same reasons set out in paragraph 236 above, contravene the provisions of section 11 (1) of the CPA, which is aimed at prohibiting direct marketing. Section 11(1) provides as follows:

> "*11. Right to restrict unwanted direct marketing. -*
>
> *(1) The right of every person to privacy includes the right to-*
>
> *(a) refuse to accept;*
>
> *(b) require another person to discontinue; or*
>
> *(c) in the case of an approach other than in person, to pre-emptively block,*
>
> *any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing.*"

239. Section 11(1) of the CPA does not impose any prohibition that could be contravened by the model. It confers upon consumers the right to refuse direct marketing communications or approaches.

240. Even if the Applicant's model did involve direct marketing (which it is submitted it does not), section 11(2) enables a consumer – "*to facilitate the realisation of each consumer's right to privacy*" – to demand that the person responsible for initiating the communication desist from initiating any further

communication. Nothing in the Applicant's model deprives a consumer of this right.

241. It is consequently submitted that the Applicant's model does not contravene section 11(1) of the CPA, particularly since that section does not create any prohibition.

***Sections 4(1)(a) and 4(1)(b) of the Competition Act***

242. Section 4(1) of the Competition Act provides as follows:

> "*4. Restrictive horizontal practices prohibited -*
>
> *(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-*
>
> *(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect; or*
>
> *(b) it involves any of the following restrictive horizontal practices:*
>
> *(i) directly or indirectly fixing a purchase or selling price or any other trading condition;*
>
> *(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or*
>
> *(iii) collusive tendering.*"

243. The LSSA contends that conveyancers must sign a PMMA with the Applicant under which they will "*have to agree to set [a] price for the 'agreed reserved work' and will not be able to deviate therefrom*" and that

this will constitute a contravention of section 4(1)(b)(i) of the Competition Act.[198]

244. The LSSA refers to clause 6.2 of the PMMA, which it contends is a "*price-fixing clause*".[199] Under clause 6.2 of the PMMA, as quoted in the LSSA's affidavit, however, panel attorneys simply acknowledge that the fees charged by them[200] may be less than, but may not be more than, the maximum fees quoted by the panel attorneys to the Applicant, and that they will not charge a mark-up on third party charges of software providers.

245. The Applicant submits that there is no merit in the LSSA's submissions for the following reasons:

245.1. First, the PMMA does not contain a "*price-fixing clause*" as alleged by the LSSA. The clause on which the LSSA relies provides for a cap above which conveyancers may not charge. Moreover, the structure of the tender will be such that it incentivises participating attorneys to tender a lower fee cap;[201]

245.2. Second, to the extent that the LSSA contends that the agreement between the Applicant and the conveyancer constitutes an agreement between parties in a horizontal arrangement as contemplated in section 4(1) of the Competition Act, the Applicant is not in a horizontal relationship with conveyancers (a horizontal relationship is defined in section 1(1) of the Act as a relationship

198 LSSA AA paras 15.32 and 15.33, record 348.

199 LSSA AA para 15.32, record 348

200 *Ibid*.

201 Applicant's RA para 285, record 955.

between competitors, and the Applicant and conveyancers are not competitors);

245.3. The LSSA does not appear to suggest that there is any agreement between conveyancers (who are in a horizontal arrangement), but to the extent that its submissions do contain such a suggestion, the Applicant denies that such an agreement exists.[202] There is no arrangement or agreement between conveyancers under the model and, even if any such arrangement or agreement did exist, it does not fix prices, divide markets or involve collusive tendering;[203]

245.4. The maximum fee will appear in the tender invitation to conveyancers.[204] Accordingly, the tender process will not facilitate the conclusion of an agreement or engagement in a concerted practice which involves price-fixing by the panel. It will be a competitive tender process that is open to all conveyancers and which allocates additional tender points, on a sliding scale, for attorneys that set their fee cap below the maximum fee prescribed by the Applicant.[205]

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202 Applicant's RA para 286.3, record 955 – 956.

203 *Ibid*.

204 Applicant's RA para 286.4, record 956.

205 *Ibid*.

246. It bears emphasis that, under the Applicant's proposed tender arrangements, points are awarded for lower prices quoted by conveyancers, thus encouraging price competition.[206]

247. It is ironic that the LSSA should contend in the present matter that the Applicant's model contravenes the Competition Act, when the Competition Commission has already found – as noted above – that the "*protect[ion] of the legal profession*" through the reservation of work is anti-competitive.

248. The LSSA also contends that the Applicant's model "*holds the potential of conveyancers who are not prepared to sign PMMA with the Applicant ... losing out of [sic] their fair share of the traditional conveyancing market*" and that such conduct will constitute a contravention of section 4(1)(a) of the Competition Act.[207]

249. The Applicant submits that, as is the case with respect to section 4(1)(b) of the Act, the Applicant has also failed to establish a sustainable basis for its contention that the model contravenes section 4(1)(a) of the Competition Act:

249.1. Under the Applicant's model, sellers will continue to be able to appoint conveyancers as they currently do. More importantly, there is nothing that entitles conveyancers as of right – and without the need to compete with other participants in the market – to "*their fair share of the traditional conveyancing market*";

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206 Applicant's RA para 287, record 956, as explained in annexure FA2 to the founding affidavit, record 53ff.

207 LSSA AA para 15.37, record 349.

249.2. The LSSA has established no basis whatsoever for its contention that the model contravenes section 4(1)(a) of the Competition Act. As set out above, the provisions of that section prohibit certain restrictive horizontal practices that have "*the effect of substantially preventing, or lessening, competition in a market*". The Applicant submits that the model is intended to, and will, have precisely the opposite effect to that proscribed, in that it will lead to increased competition (which is precisely what the LSSA and its membership are seeking to avoid).

250. In any event, it is respectfully submitted that any determination that the model contravenes the Competition Act (i.e. as sought in prayers 1.8 and 1.9 of the LSSA notice of counter-application) falls within the jurisdiction of the Competition Tribunal, and not this Court.

251. In this regard, sections 65(1) and (2) of the Competition Act provide as follows:

> "*65. Civil actions and jurisdiction*
>
> *(1) Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.*
>
> *(2) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and –*
>
> *(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or*

> *(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that –*
>
> *(i) the issue has not been raised in a frivolous or vexatious manner; and*
>
> *(ii) the resolution of that issue is required to determine the final outcome of the action*."

252. The Respondents have not (notwithstanding moreover the ample opportunity available to them to do so) referred any issue to the Competition Tribunal or the Competition Commission.

253. It is consequently submitted that the Respondents have established no basis for a declaration that the Applicant's model contravenes the Competition Act.

***Conclusions in respect of Applicant's compliance with relevant statutory and other provisions***

254. For the reasons set out above, the Applicant submits that its model complies in all respects with, and does not contravene, any of the statutory provisions on which it relies in its notice of motion and on which the LSSA relies for its relief in its counter-application.

255. On this basis, the main application should be upheld and the counter-application dismissed.

256. In addition to the statutory and other provisions addressed above, however, the Respondents, particularly the Minister and the Fund, also refer to questions of policy and the protection of the public, which they contend

militate against granting the relief sought by the Applicant (and in favour of the relief sought by the LSSA in its counterapplication).

257. The Applicant submits that the resolution of the present dispute does not require this Court to engage in the questions of policy in which the Respondents wish this Court to become embroiled. Indeed, it is respectfully submitted this Court is an inappropriate forum in which to resolve the questions of policy raised in the Respondents' affidavits - a task which properly falls to the legislature, not the courts.

258. For the sake of completeness – and given the relative novelty of the model – we nevertheless address in what follows certain of the Respondents' contentions relating to questions of policy and the protection of the public.

## QUESTIONS OF PUBLIC POLICY

### *Viability of the Fund*

259. The Fund contends that the Applicant's model threatens its financial sustainability for the following two reasons:[208]

259.1. First, the Fund contends that the Applicant's scheme will compete with the Funds for its primary income stream, being interest earned on trust accounts in terms of section 78 of the Attorneys Act, which interest, so the Fund maintains, is to be employed for the public benefit;[209]

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208 See, for example, Fund AA para 7, record 198 – 199.

209 Fund AA para 7.1, record 198 – 199.

259.2. Second, by attending to aspects of the transfer process, the Applicant increases the risk and thus the potential liability of the Fund, without making adequate provision to protect members of the public.[210]

260. In respect of the first of the above reasons, the Fund asserts that a major source of its income is interest paid on trust funds.[211] In support of its assertion, the Fund states the following:

260.1. Based on its claims experience, "*it is estimated*" that conveyancing transactions represent 70% of all moneys held in trust;[212]

260.2. A "*reliable estimate*" of the value of conveyancing related trust money invested in terms of section 78(1) of the Attorneys Act is R13.1 billion and, in terms of section 78(2)(a) is R1.6 billion;[213]

260.3. "*On the assumption*" that the Applicant will redirect 70% of the moneys held in trust, which accrue interest at an average rate of return of 3%, the financial threat to the Applicant "*could be as much as*" R400 million per annum.[214]

261. The Fund concludes that the Applicant will make the Fund "*compete for investment income it is entitled to*" under the Attorneys Act,[215] which income

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210 Fund AA para 7.2, record 199.

211 Fund AA para 27, record 205.

212 *Ibid*.

213 *Ibid*.

214 Fund AA para 27, record 205.

215 Fund AA para 36, *record 207*.

the Fund "*employs exclusively to satisfy its statutory obligations that are in the public interest*".[216]

262. The Applicant submits that the Fund's contentions are fundamentally flawed for the following related reasons:

262.1. First, the Funds contentions rest on its mistaken apprehension that it is "*entitled*" under the Attorneys Act to all interest income earned all funds deposited in every conveyancing transaction. The Funds is not entitled, under the Attorneys Act or otherwise, to all such interest. It is entitled only to such interest as may be earned on funds that are deposited in attorneys' trust accounts under section 78 of the Attorneys Act. Where funds are not so deposited, the Fund is not entitled to any interest. Whilst under the present arrangements, parties to a conveyancing transaction usually deposit funds in attorneys' trust accounts, there is nothing that obliges them to do so. To the extent that parties are not obliged to deposit funds in attorneys' trust accounts, the Fund is not entitled to the interest on those funds;

262.2. Second, even if the Fund were entitled to the interest on all conveyancing transaction deposits, the Fund has not established the extent of the loss it says it stands to suffer. As set out above, the Fund's assessment of its loss – which its says "*could be as much as*" R400 million – is based exclusively on unverified and unsubstantiated estimates and assumptions as well as misleading

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216 *Ibid*.

calculations.[217] There is, for example, no substantiation for the Fund's estimate that 70% of conveyancing deposits will be diverted from conveyancers' trust accounts under the Applicant's model;

262.3. Third, the Fund's allegation that it uses the interest it earns to satisfy its obligations in the public interest is, it would appear, misleading. It is evident from the Fund's publicly available financial statements that the vast majority of the Fund's income is used to support the legal profession (and hence not for the benefit of the public in general). In 2016, for example, of the fund's R570 million expenditure, nearly R270 million was spent on professional indemnity cover for practitioners, R74.47 million was used for training and publications for the profession, R61 million went to refunding practitioners' bank charges and R58 million was spent on audit fee refunds paid to practitioners.[218]

263. Under the Applicant's model, the income earned on conveyancing deposits is paid to consumers,[219] whereas, under the present dispensation, interest earned on trust deposits is not paid to consumers, but is instead diverted to the Fund, which uses it to provide support to the attorneys' profession. It is submitted that this arrangement is in the narrow interest of the profession, not in the interests of the public.

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217 Described in Applicant's RA paras 501 – 504, record 1000 – 1001.

218 Applicant's RA para 492, record 998.

219 RA para 500, record 1000.

264. The Applicant submits that the second of the Fund's reasons that its viability is threatened by the Applicant's model (namely that the Applicant's model increases the potential liability of the Fund) is equally flawed. In this regard:

264.1. As far as the Fund's own liability is concerned, the fact that no trust accounts will be used self-evidently removes the possibility for theft from trust accounts to take place and therefore diminishes Fund's liability;

264.2. As far as the Attorneys Insurance Indemnity Fund ("**AIIF**") is concerned, as matters stand conveyancing transactions, together with RAF claims, account for the bulk of the claims paid out by the AIIF. The Applicant's model will shift some of the liability for the conveyancing process to the Applicant and its insurers and will thus reduce the potential liability for the AIIF.[220]

265. For the above reasons, the Applicant submits that, even if the financial viability of the Fund were a relevant consideration in the determination of the present dispute, the Fund has not established that its viability would be threatened, nor has it established that it requires the interest on conveyancing deposits to serve the public interest.

***Protection of client funds and insurance***

266. Most of the Respondents contend that the Applicant's model does not adequately protect consumers in respect of the loss of funds, both in

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[220] RA para 478, record 994.

respect of the insurance arrangements contemplated by the Applicant's model and by its banking arrangements and financial regulation.[221] They contend that the Applicant's offering is inferior to the insurance arrangements provided by the Fund and the protection afforded by attorneys' trust fund arrangements.

267. The Applicant's regulatory supervision, as well as its insurance and banking arrangements are comprehensively addressed in the Applicant's replying affidavit. The Applicant addresses in detail, for example, the minimum insurance requirements prescribed by the FSB,[222] and the protection afforded to clients under its banking arrangements, which include accounts held in client's own names to protect them from the Applicant's insolvency.[223]

268. The Applicant also addresses the regulatory regime under which it will be governed, which includes oversight by the FSB and regulation under the FAIS Act. It will also be regulated by the Protection of Personal Information Act 4 of 2013 and the Companies Act, 71 of 2008.[224] In this respect, the Applicant is regulated in a similar manner to many other institutions with whom members of the public regularly entrust their funds, such as insurance companies, fund managers and medical aid schemes.[225] The CLS, in particular, appears to suggest that the FSB, which regulates fund

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221 For example, LSSA AA paras 17.120, record 381; Fund AA paras 56 & 68, record 213 & 215 – 216; CLS AA para 152, record 720 – 721.

222 Applicant's RA para 761 – 762, record 1058.

223 Applicant's RA paras 756 – 758, record 1057.

224 RA para 847, record 1074.

225 RA para 764, record 1059.

managers, insurance companies, medical aid schemes and pension funds, is an ineffective Regulator.[226] It is submitted that there is no basis for the CLS's contentions in this regard.

269. It is consequently submitted that the Respondents have provided no sustainable grounds for their contention that the protection afforded to members of the public under the Applicant's model will be inferior to that provided under the current arrangements. The Respondents' contentions are, we submit, based on unsubstantiated speculation and conjecture.

270. More importantly, however, even if the Applicant were not able to guarantee the security of client funds to the same degree as attorney trust funds, its inability to do so would not render the Applicant's model unlawful.

***Regulatory environment***

271. The Minister refers to the alleged complexity of the regulation of the attorneys' profession and alludes to the fact that the profession is in a state of flux.[227] He refers to the recent promulgation of the LPA, Parliament's oversight over the legislative process and to the establishment of the National Forum (the Fourteenth Respondent).[228] The Minister contends that, as a result of the complexity of the matter and the changes in the profession, this Court ought to exercise caution and exhibit deference in its approach to the matter. He states that the Minister, through the relevant

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226 CLS AA para 151 and 152.2, record 719 – 720.

227 Minister AA para 4, record 786 - 788.

228 Minister AA paras 4.2 – 4.4, record 787.

parliamentary portfolio committee, is mandated to deliberate on issues of this nature (suggesting this Court is not).[229]

272. The Applicant disputes that this application is as complex as the Respondents have made it out to be. At its heart, this application concerns the Applicant's compliance with a regulatory regime that has already been established by the Legislature.

273. The deliberations concerning the Legal Practice Act have already taken place and that Act has been adopted. The Legislature has accordingly already made its policy choices concerning the reservation of work to conveyancers. It has determined that section 83(8)(a)(i) of the Attorneys Act will shortly be repealed and be replaced by section 33(3) of the LPA, which is far more permissive and less protectionist than the provision it replaces.

274. It is submitted that the approach adopted by the Minister and by the Respondents in general is inconsistent with the opening up and deregulation of the profession contemplated by the LPA, which incorporates the policy choices that have already been made.

275. As foreshadowed above, in determining this matter, the Court need not (and, we respectfully submit, should not) go any further than interpreting the existing provisions of the relevant legislation. That is squarely its function.

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229 Minister AA para 4.5, record 787 - 788.

***Applicant's model is in the public interest***

276. The Applicant submits that, in contrast to the unsustainable arguments advanced by the Respondents in support of their contention that the Applicant's model will not serve the public, the simple and undeniable fundamental premise underlying the model is the deregulation of the conveyancing profession and the breaking of a monopoly. It is submitted that this is manifestly in the public interest.

277. The Respondents have introduced an unnecessary degree of complexity to this matter, principally in regard to their arguments concerning the public interest. The Applicant submits that, shorn of their unnecessary complexity, the Respondents' contentions boil down to the protection of the monopoly enjoyed by the profession and the benefits that flow from it. Far from being in the public interest, the Respondents seek to advance the narrow commercial interests of a small section of the public.

**RESPONDENTS' POINTS *IN LIMINE***

278. The Respondents have raised several points *in limine*, none of which, in the Applicant's respectful submission, has merit. Each of them is addressed briefly in what follows.

***Alleged Non-Joinder***

279. Despite having engaged in lengthy correspondence with the Applicant over a period of six months concerning the question of joinder and the subsequent joinder of the Sixth to Fourteenth Respondents at the insistence of the LSSA in an effort to avoid unnecessary disputes about

non-joinder,[230] (and despite the LSSA despite having obtained an opinion in February 2017 that the Sixth to Fourteenth Respondents – and no-one other – needed to be joined)[231] the LSSA for the first time in its answering affidavit contended that the following further parties ought also to have been joined:[232]

279.1. SARS;

279.2. all municipalities, or at least the South African Local Government Association;

279.3. the Minister of Co-operative Governance and Traditional Affairs;

279.4. the Estate Agents Affairs Board;

279.5. the Black Women Conveyancers Association;

279.6. the Competition Commission;

279.7. the FSB;

279.8. the National Credit Regulator; and

279.9. the Financial Intelligence Centre.

280. The Ninth Respondent similarly contends that the NCA, SARS and the Competition Commission "*to name but a few*" have not been joined.[233]

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230 LSSA AA paras 3.2 to 3.7, record 250 – 251; Applicant's RA para 33, record 891.

231 Referred to in its letter of 27 February 2017, annexure A5, record 401 – 402.

232 LSSA AA para 3.9, record 251 -252.

233 Ninth Respondent's AA para 5.2, record 834.

281. It is submitted that the Sixth to Fourteenth Respondents need not have been joined (indeed, only the Seventh and Ninth Respondents who are, in any event, represented by the LSSA, have filed answering affidavits and participated in these proceedings) and that the joinder of the parties referred to in paragraph 279 is also not necessary.

282. In light of the circumstances outlined above, it is difficult to avoid the conclusion that the LSSA and the Ninth Respondent have raised this further issue of joinder as part of their ongoing strategy to put off the adjudication of this application (the LSSA's and Ninth Respondent's conveyancing membership having an obvious interest in doing so).

283. The LSSA's motives are revealed by its suggestion that "*all municipalities*" should be joined.[234] The LSSA's suggestion that each of the eight metropolitan municipalities, 44 district municipalities and 226 local municipalities in the country has a substantial interest in this application and ought to be joined is patently contrived, and again is calculated only to delay.[235]

284. Moreover, despite the LSSA suggestion that each of the parties listed in paragraph 279 has an interest in the relief sought, not one of them has been joined by the LSSA in its counter-application. Logically, the relief the LSSA seeks affects these parties as much as the relief sought by the Applicant, and yet the LSSA has elected not to join them. It is to be inferred

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234 LSSA AA para 3.9.2, record 251.

235 RA para 35, record 892.

from the LSSA's failure to join these parties shows that it does not genuinely understand them to have a substantial interest in this matter.

285. It is consequently submitted that there is no merit in the LSSA's submissions regarding non-joinder.

***CLS and Ninth Respondent's contentions that requirements for granting declaratory relief under section 21(1)(c) of the Superior Courts Act are not met***

286. The CLS contends that the requirements for the granting of a declaratory order in terms of section 21(1) of the Superior Courts Act 10 of 2013 (the "**Superior Courts Act**") are not met in this case.[236]

287. The CLS further contends that no considerations of public policy come into play that require this Court to exercise its discretion to grant the Applicant the declaratory relief it seeks.[237]

288. The Ninth Respondent also contends that declaratory relief is not competent.[238] Its contentions are substantially similar to those advanced by the CLS and, accordingly, the Applicant's submissions below apply equally to the Ninth Respondent.

289. Section 21(1)(c) of the Superior Courts Act provides as follows:

> "*(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable*

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236 CLS AA para 9, record 657.

237 CLS AA para 10, record 658.

238 Ninth Respondent's AA para 4, record 830 – 833.

*within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –*

*…*

*(c) in its discretion, and at the instance of any interested party, 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.*"

290. This Court has a discretion whether or not to grant relief in terms of section 21(1)(c) of the Superior Courts Act. The section provides for a two-stage inquiry, namely: (a) whether or not the applicant is a person interested in a right; and (b) if so, whether the case is a proper one for the exercise of the discretion conferred upon the court. In the exercise of its discretion, the court may decline to deal with the matter where there is no actual dispute, or where the question raised is hypothetical, abstract or academic.[239]

291. The CLS advances the following contentions in support of its submission that the requirements of a declaratory order have not been met:

291.1. That the declaratory order relates to an abstract question;[240]

291.2. That the Applicant has mischaracterised the disagreement between the parties;[241]

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239 *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at 213E-G; *Ex Parte Nell* 1963 (1) SA 754 (A) at 760B; *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others* [2011] 1 All SA 487 (SCA) paras [45] – [46].

240 CLA AA paras 11ff, record 658ff.

241 CLS AA paras 18ff, record 665ff.

291.3. There is no public interest in favour of granting the declaratory relief sought.[242]

292. We address each of these contentions in turn.

Contention that the declaratory order relates to an abstract question

293. The CLS contends that:

293.1. whether or not the Applicant's model falls foul of the law depends on how the model will work in practice;[243]

293.2. the Applicant has not yet performed any of the steps contemplated by its model upon which it requires this Court to pronounce;[244]

293.3. the Applicant's conveyancing software platform has not yet been built;[245]

293.4. the software platform is fundamental to the Applicant's model which the Applicant asks the Court to declare to be lawful, but it is impossible to know, before the software platform has been created and utilised, how it will actually work;[246]

293.5. the software platform will materially affect how the Applicant's business model will operate in practice[247] (the CLS refers, in particular, to the capturing of data by the Applicant, the provision

242 CLS AA paras 28ff, record 668ff.

243 CLS AA para 12, record 658.

244 *Ibid*.

245 CLS AA para 13, record 660.

246 CLS AA para 14, record 660.

247 *Ibid*.

of that data to conveyancers and the accessibility of that data to the Applicant);[248]

293.6. the Court is not in a position to pronounce on whether the application and utilisation of a software package that does not yet exist will contravene the law;[249]

293.7. A clear understanding of the reserved work document templates to which the Applicant refers, of how and by whom data is sourced and captured and how participating conveyancers will use this data where preparing reserved work documents "*is fundamental to this application, but is yet unknown*";[250]

293.8. The fact that the Applicant's software does not yet exist means that the present application is premature as it cannot be determined how the model will work in practice[251] (the CLS contends for example, that it cannot be determined whether the Applicant's model will result in the Applicant drawing up or causing to be drawn up reserved documents);[252]

293.9. Should this Court declare some or all of the steps listed in annexure FA4B to the founding affidavit to contravene the law, the Applicant would be forced to change the model and approach this Court for "*further advice*" on its revised model. Consequently, the

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248 CLS AA paras 14.1 – 14.3, record 660 – 661.

249 CLS AA para 14.4, record 661 – 662.

250 CLS AA para 14.4, record 662.

251 *Ibid*.

252 CLS AA para 14.6, record 663.

CLS submits, the declaratory order sought by the Applicant will have no concrete or tangible result.[253]

294. As noted in the Applicant's replying affidavit,[254] the Respondents appear not have appreciated the distinction between:

294.1. the model described in the founding affidavit, which separates reserved work from unreserved work - unreserved work being allocated to the Applicant, on the one hand, with reserved work being allocated to panel conveyancers, on the other, under separate mandates;

294.2. the typical transfer process, outlined in annexure FA4 to the founding affidavit,[255] which is used to illustrate the application of the model in practice; and

294.3. the Applicant's software, which will allow and facilitate the implementation and operation of the model in practice.

295. It is respectfully submitted that the CLS has overstated the importance of the software package and how it impacts on the Applicant's model and its lawfulness. Whilst the software platform is important for the practical implementation of the Applicant's model, the Applicant will need to give effect to, and implement, the model as set out in founding affidavit.[256] If it does not do so, then the Applicant will self-evidently not be conducting its

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253 CLS AA para 17, record 665.

254 Applicant's RA para 102, record 910.

255 Record 106ff.

256 Applicant's RA para 564, record 1013.

operations in accordance with the model considered and pronounced upon by this Court.

296. The software will certainly affect the implementation of the Applicant's business model.[257] As mentioned, however, the software does not constitute the model. The model can be implemented without the software package, but in a manner that nonetheless adheres to the principles set out in the founding affidavit, and in particular in annexure FA4B to the founding affidavit.[258] The model can likewise be implemented using the software package (as is ultimately intended), in which case it must (and will) likewise adhere to the principles set out in the founding affidavit.[259]

297. In addition, the software will not vary the principles by which the Applicant's model is governed, as illustrated in annexure FA4B to the founding affidavit,[260] and in relation to which the Applicant requests this Court's determination. (On the contrary, the software will be designed to function within the parameters of those principles.)

298. 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.[261] What this application assumes, as a matter of logic and necessity, is that those practical steps, including the development

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257 Applicant's RA para 565, record 1013 – 1014.

258 Record 119ff.

259 Applicant's RA, para 571, record 1015.

260 Record 119ff.

261 Applicant's RA para 569, record 1014.

and implementation of the software package, must give effect to, and be in line with, the model.

299. It is further submitted that the CLS's contentions concerning the importance of the model are animated in large part by its incorrect submissions (discussed above) concerning whether and the extent to which the Applicant will be engaged in the drawing up or the preparation of reserved documents, as contemplated by section 83(8)(a)(i) of the Attorneys Act. The CLS contends that it is important to understand how the software will operate in practice in order to assess whether the Applicant will be engaging in such conduct. The CLS's contentions in this regard are, however, based on what we submitted to be an overbroad interpretation of the prohibition in section 83(8)(a)(i) of the Attorneys Act and the documents and activities it covers. (We have dealt with this in some detail above.)

300. The Applicant consequently disputes that the application is premature. The software does not need to be developed before the Court is able to make a determination based on the model as set out in the founding affidavit.

301. The implementation of the model will have to conform with 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.

Contention that the Applicant has mischaracterised the disagreement between the parties

302. The CLS contends that:

302.1. the Applicant asserted in its founding affidavit that the single dispute between the parties was whether or not the model involves the performance by the Applicant of reserved work;[262]

302.2. the Applicant was well aware that the dispute extended beyond whether the Applicant would breach the relevant statutory and other provisions and, in particular, that it extended to whether conveyancers and estate agents would breach their obligations;[263]

302.3. the Applicant has "*deliberately crafted*" its relief to avoid a determination whether conveyancers would breach their obligations;[264]

302.4. should any conveyancers decide to participate in the Applicant's scheme, this may give rise to disciplinary proceedings against those conveyancers and a dispute between the relevant Law Society and that member;[265]

302.5. the fact that the Applicant's potential banking partners refuse to do business with the Applicant because of the perceived dispute

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262 CLS AA para 18, record 665.

263 CLS AA para 18, record 665 – 666.

264 CLS AA para 20, record 666.

265 CLS AA para 22, record 666.

between the Applicant and the Law Societies does not entitle the Applicant to a declaratory order;[266]

302.6. the Applicant seeks a declaratory order, in the form of a legal opinion, and, armed with this court's order, it hopes to induce some conveyancers to join its scheme;[267]

302.7. if the caution issued to conveyancers were the Applicant's real concern, the declaratory relief will not solve the problem. The Applicant should, instead, have sought an order pertaining to the lawfulness of the conduct of conveyancers who participate in the scheme;[268]

302.8. the application is an attempt "*to obtain a preliminary tactical advantage*" leaving further material issues to be dealt with at a later stage.[269]

303. It is submitted that there can be no question that, at the time this application was launched, the primary issue was whether the Applicant would be engaged in reserved work. The LSSA's correspondence that precipitated this application (its letter of 2 June 2016)[270] stated that "*the Council is of the view that the full conveyancing process is reserved work and should remain so, in the interests of the public*" and that the LSSA's CEO had "*thus been instructed to inform [the Applicant] that the Council cannot support the*

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266 CLS AA para 24, record 667.

267 CLS AA para 25, record 667.

268 CLS AA para 26, record 667.

269 CLS AA para 27, record 668.

270 Annexure FA3, record 105.

*proposed business model*". (The LSSA's attempts in its papers to distance itself from its own delineation of the dispute – and indeed from the very terminology used by it to delineate that dispute (i.e. "reserved work" vs "unreserved work") – suggests a changing of its case to meet the pinch of the shoe.)

304. Whilst certain of the LSSA's subsequent correspondence, for example its letter of 5 April 2016,[271] may indeed have referred to potential breaches of the rules of the attorneys' profession and the fiduciary duty of attorneys, by the time the application was launched, the issue in dispute had crystallised into whether the Applicant would be carrying out reserved work. This is re-enforced by the letters sent by the each of the four Law Societies to their members (after the LSSA's aforesaid letter of 2 June 2016), which informed members that the Council had taken a view that the entire conveyancing process is reserved work and that it should remain so.[272]

305. It is consequently submitted that, in the face of this correspondence, the Applicant correctly approached this Court to determine the question of whether its model involved the performance of reserved work.

306. The concern that the Respondents expressed regarding conveyancers' participation in the Applicant's proposal was that conveyancers would be participating in a scheme that was unlawful because the Applicant proposed to engage in reserved work.

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271 Annexure FA6, record 138.

272 Annexures FA12 – FA15, record 152 – 155.

307. The legality of the participation of estate agencies (together with all the attorneys' professional rules on which the Respondents now rely) were all strings added to the Respondents' bows in their answering affidavits.

308. In any event, the question of reserved work remains in issue to the extent explained above.

309. It is clear from the correspondence outlined above that the Applicant did not "*deliberately craft*" its relief to avoid a determination of whether participating conveyancers would breach their obligations, as the CLS contends. The dispute at the time the application was launched was whether the Applicant's scheme involved the Applicant performing reserved work. The Respondents adopted the view that conveyancers would be participating in a scheme that was unlawful for this reason.

310. The Applicant's assessment of the position was that if the Court determined that the Applicant's model did not involve the Applicant performing reserved work, this would resolve the concern that had been expressed by the Respondents regarding the legality of the model, and conveyancers' participation in it.[273] The Respondents have now shifted the goalposts as it were. (But the Respondents cannot have it both ways: If they are genuinely of the view that there is no longer any dispute in relation to whether or not the model involves the Applicant performing reserved work, then they should say so clearly and unambiguously (in which case the need for the determination of the main application would fall away). But the Respondents have not done so – in their papers or elsewhere. As a result,

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[273] Applicant's RA para 591, record 1018.

the dispute that actuated the launch of the application remains alive, and requires determination.)

311. Of course, the LSSA's counter-application now requires that the lawfulness of the model be tested against statutory provisions other than those set out in the notice of motion (in the main application).

312. It is submitted that the stance adopted by the Respondents, in particular the LSSA's declaration that it could not support the Applicant's model and the Respondents' threat to pursue disciplinary steps against their members, plainly gave rise to a dispute between the Applicant and the Respondents that could only be resolved by this Honourable Court. The Applicant did not approach this for a legal opinion or advice, but to resolve the real dispute between the Applicant and the Respondents.

Contention that there is no public interest in favour of granting the declaratory relief sought

313. The CLS contends that:

313.1. The relief sought in the notice of motion will not resolve the LSSA's or the CLS's concerns about the model, which extend to:

313.1.1. the alleged financial risk to the public;

313.1.2. alleged breaches of the rules of the attorneys' profession;

313.1.3. the allegation that the model which impinge on the fiduciary duty of attorneys;[274]

313.2. The Applicant has not sought a declaration that conveyancer will not contravene the law or their professional rules;

313.3. By asking the court to rule on whether the Applicant contravenes the laws to which it refers, the Applicant "*seeks to obscure the bigger picture*",[275] which emerges from a consideration of the PMMA and the introduction agreement, which the CLS contends (as addressed in detail above) result in a breach of several professional rules and statutory provisions by conveyancers and estate agents;[276]

313.4. The effect of the approach adopted by the Applicant is that "*the real and material public interest concerns do not arise for decision in the matter, which further militates against the court entertaining the application for a declaratory order*".[277]

314. It is submitted that the CLS's contentions concerning the public interest issues relevant to the granting of a declaratory order are, in substance, no different from its contentions pertaining to the Applicant's alleged mischaracterisation of the dispute, as addressed in paragraphs 302 to 312 above. Both contentions relate the Applicant's alleged attempt to obfuscate the "real issues" and to avoid a pronouncement on whether conveyancers

274 CLS AA para 29, record 668.

275 CLS AA para 33, record 669.

276 CLS AA paras 34 – 53, record 669 – 677.

277 CLS AA para 54, record 677.

will breach their professional rules and the statutory provisions applicable to them.

315. These considerations are addressed above. In sum, the issue to be determined at the time this application was launched was whether the Applicant would be engaging in reserved work. As is been explained above, this issue still requires determination. However, the issues have now expanded as a result of the scope of the Respondents' answering affidavits (in which the Respondents have raised disputes far more wide-ranging than those foreshadowed in the exchange of correspondence that preceded the launch of the application).

Conclusions in respect of declaratory order

316. It is consequently submitted that there is no question that a real and live dispute exists between the Applicants and the Respondents and that this Court's pronouncement will resolve that dispute. This Court's pronouncement will not be merely academic, nor will it be mere "advice".

317. It is further submitted that the public interest considerations outlined above weigh in favour of granting the declaratory order sought.

**COSTS**

318. The liability for the Law Societies for costs depends on the circumstances of each case. Ordinarily, in the context of disciplinary proceedings, the Law

Societies will not be ordered to pay costs where there are no special circumstances calling for such an order.[278]

319. These are, however, not disciplinary proceedings.

320. Moreover, in the present case, the basis of the Law Society's opposition is overtly protectionist; it is extra-legal (invoking usage, custom and practice); it misconstrues the freedom of trade or to practice a profession *as regulated by law* entrenched in section 22 of the Constitution; and it wrongly invokes a rooting of the usage or custom "*since time immemorial*". Perhaps most significantly, the Law Societies' opposition to this application is motivated by the financial interests of its members.

321. It is submitted that, in the circumstances, the Law Societies ought properly to pay the Applicant's costs.

322. The Applicant further submits that the costs of three counsel are justified, in particular by the number of active respondents and the ambit of the opposition they have chosen to advance.

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**CONCLUSION**

323. The Applicant accordingly submits that it is entitled to the order set out in its notice of motion, and that the LSSA's counter-application falls to be dismissed, in each case with costs, such costs to include the costs of three counsel.

**JJ Gauntlett SC QC**

**M Blumberg**

**G Quixley**

**Applicant's counsel**

**Chambers, Cape Town**

**14 November 2017**