

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

CASE NO: 74313/16

In the matter between:

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 LAW SOCIETY OF THE CAPE OF GOOD HOPE	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
BLACK CONVEYANCERS ASSOCIATION	Twelfth Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Thirteenth Respondent
NATIONAL FORUM ON THE LEGAL PROFESSION	Fourteenth Respondent

5TH RESPONDENT'S HEADS OF ARGUMENT – APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION AND OVERVIEW

- 1 The applicant (“Proxi”) seeks leave to appeal against the judgment and order of this Court refusing to grant it declaratory relief.
- 2 The fifth respondent contends that the application for leave to appeal must be dismissed, for the following reasons:
 - 2.1 There is no live dispute between the parties to the litigation. The Legal Practice Act 28 of 2014 has dissolved the provincial Law Societies and transferred their disciplinary functions to bodies established by a new Legal Practice Council. The applicants’ attempt to generate a dispute out of the Law Societies’ statement that they may discipline attorneys who participate in Proxi’s business model is therefore no longer sustainable.
 - 2.2 This Court correctly held that the relief sought in Proxi’s notice of motion is incompetent because it was vague and ambiguous.
 - 2.3 This Court correctly dismissed Proxi’s last minute attempt to amend its notice of motion, in reply in oral argument, on the ground that allowing the amendment would have caused irreparable prejudice to the respondents.
 - 2.4 There is no prospect of an appeal court overturning this Court’s opinion on the merits of Proxi’s application, because
 - 2.4.1 This Court’s views on the merits are *obiter dicta*; and

2.4.2 Proxi's appeal on the merits primarily relates to the correct interpretation of a section of the Attorneys Act 53 of 1979, which is no longer on the statute books.

3 I address each of these issues in turn.

NO LIVE DISPUTE

4 This Court held that Proxi failed to demonstrate that it has an interest in an existing, future or contingent right or obligation.¹ Proxi therefore failed to satisfy the first leg of the test for declaratory relief in *Cordiant Trading*.²

5 The reasons for this finding are:

5.1 It is common cause that Proxi has not yet implemented its model. Proxi has not developed the software on which it and its panel conveyancers attempt to perform their tasks.³

5.2 None of the Law Societies has prevented Proxi or its estate agents and conveyancers from implementing the model. The Law Society of South Africa merely advised Proxi that its council cannot support the proposed business model. The statutory provincial Law Societies warned their members that if conveyancers participate in the applicant's model disciplinary proceedings against those members will follow.⁴

¹ Judgment at para 78

² *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 6 SA 205 (SCA) at para 18.

³ Judgment of this Court para 71

⁴ Judgment of this Court para 72

- 6 Proxi contends that there is a live dispute. In support of this contention, it relies on one fact, namely the threat of disciplinary action by the Law Societies. It says that:
- 6.1 The threat of disciplinary proceedings by the Law Societies was intended to prevent attorneys from participating in the applicant's model.⁵
- 6.2 As a result of the Law Societies' attitude the applicant's potential banking product providers advised that they could not offer the banking products to Proxi.⁶
- 7 Proxi does not point to any dispute between the parties that affects its interests apart from the Law Societies' threat of disciplinary proceedings against attorneys.
- 8 The fact that the Law Societies have said that they *may* institute disciplinary proceedings against its members who participate in Proxi's model could not generate a dispute between the applicant and the Law Societies. At best, it *might* create a future dispute between the relevant society and its member. But even if it constituted a live dispute at the time that the application was launched, it no longer does.
- 9 This is because the Law Societies no longer have disciplinary jurisdiction over attorneys in South Africa.

⁵ Notice of appeal para 7.1

⁶ Notice of appeal para 7.2

9.1 With effect from 1 November 2018, the bulk of the sections of the Legal Practice Act 28 of 2014 (“LPA”) were brought into effect.⁷

9.2 The Attorneys Act 53 of 1979 was repealed in its entirety.⁸

9.3 This dissolves the four provincial law societies and replaces them with the Legal Practice Council.⁹

9.4 The Legal Practice Council now exercises jurisdiction over all legal practitioners.¹⁰

9.5 Chapter 4 of the LPA removes the function of disciplining attorneys from the Law Societies.

9.6 The function of disciplining attorneys is now the responsibility of the disciplinary bodies established by the Legal Practice Council.¹¹

10 As a consequence:

10.1 The 6th, 7th, 8th and 9th respondents no longer exist.

10.2 The first respondent has no disciplinary jurisdiction over attorneys and conveyancers.

⁷ Presidential proclamation no R.31 of 2018, published in Government Gazette No. 42003 on 29 October 2018

⁸ Section 119 of the LPA

⁹ See sections 118 and 119 of the LPA, read with the schedule of repealed laws, which repeals the Attorneys Act 53 of 1979

¹⁰ Sections 4 and 5(d) of the LPA

¹¹ Section 37 of the LPA

- 10.3 The relevant bodies which do have disciplinary jurisdiction over attorneys and conveyancers are not parties to the application. It is simply unknown what their attitude to Proxi's business model may be.
- 10.4 Section 83(8)(a) of the Attorneys Act (the interpretation of which forms the centrepiece of Proxi's case and its notice of appeal) has been repealed and is no longer on the statute books.
- 10.5 There is no live dispute between any of the parties to the litigation which merits the attention of an appeal court.
- 10.6 The matter has accordingly become even more abstract and hypothetical than it was at the time that this Court heard the application.
- 11 As a result, there will also be no practical effect or result arising from the decision Proxi intends to seek on appeal.
- 11.1 Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 provides:
- “When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.”*
- 11.2 The SCA has held that:
- “These provisions set a direct and positive test: whether the judgment or order will have a practical effect or result and not whether it might be of importance in a hypothetical future case. As a result, this court will not 'make determinations on issues that are otherwise moot merely because the parties believe that, although the decision or order will have no practical result between them, a practical result could be achieved in other respects'.”¹²*

¹² Absa Bank Ltd v Van Rensburg and Another 2014 (4) SA 626 (SCA) at para 7

12 I submit that the dissolution of the provincial Law Societies and taking over of their functions by the Legal Practice Council has two consequences:

12.1 First, there is no live dispute between any of the parties to this litigation. The Law Societies' statement that they may institute disciplinary proceedings against their members no longer constitutes any obstacle to Proxi's business model, since disciplinary regulation of attorneys is now the function of the Legal Practice Council, which has never expressed any view on Proxi's model.

12.2 Second, the declaratory relief that the applicant seeks will have no practical effect since it will not determine how the Legal Practice Council may decide any issue that may come before it as a result of Proxi implementing its model.

THE DEFECTS IN THE NOTICE OF MOTION

13 This Court held that the relief sought by Proxi was incompetent. Its reasons for this finding were that:

13.1 A court order must be framed unambiguously and be practical and enforceable. It must leave no doubt as to what the order requires to be done. As a result, if a court issues an ambiguous and unenforceable ineffective order, the court that issued it did not exercise its discretion properly.¹³

¹³ Judgment paras 54 to 55. These findings are not controversial. The Constitutional Court confirmed them in *Eke v Parsons* 2016 (3) SA 37 (CC), concurring judgment of Jafta J, paras 73-74; and *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) 2002 (5) SA 703 (CC) at paras 16-17.

13.2 Proxi asked this Court to declare that certain conduct would not breach various pieces of legislation. Prayer 1 of the notice of motion refers to this conduct in the following terms:

“the performance of the steps involved in the process of transfer of immovable property (‘the transfer process’) in accordance with the model described more fully in the founding affidavit, and pursuant to which the Applicant performs the steps in the transfer process identified in schedule ‘FA4B’ hereto.”

13.3 The applicant therefore seeks this court’s sanction for certain conduct which it intends to perform. That conduct is *“described more fully in the affidavit”*; and involves the performance of *“the steps in the transfer process identified in schedule ‘FA4B’”* to the founding affidavit.¹⁴

13.4 The prayer incorporates by reference parts of the founding affidavit which described the model. In order to know what this entails, therefore, persons affected by the order will have to consider and interpret the contents of the founding affidavit.¹⁵

13.5 The relief also incorporates by reference annexure “FA4B” of the founding affidavit. “FA4B” consists of 23 pages in the form of a table listing some 75 steps or functions that are alleged to be non-reserved work and 13 steps that are admitted to constitute reserved work. “FA4B” also includes various acronyms for technical terms which are not properly explained and includes a column headed “remarks” which contains comments, opinions, explanations of the process and cross

¹⁴ Judgment para 56

¹⁵ Judgment para 60

references to various other pieces of legislation and statutes as well as the applicant's understanding of those statutes.¹⁶

13.6 The court therefore held that *"the terms and the purpose of the order sought are not clear. There can be no clarity without first implementing the proposed model to determine whether it will fall foul of the listed legislation. I would dismiss the application on this ground alone."*¹⁷

14 In its notice of appeal, Proxi addresses these finding in a single allegation. It asserts only that *"the founding affidavit adequately and unambiguously describes the applicant's model with reference to annexure 'FA4B' thereto."*¹⁸

15 But this is incorrect. The relief sought in the notice of motion is not clear and ascertainable.

15.1 The order incorporates the founding affidavit by reference.

15.2 As a result, to determine whether any particular conduct falls foul of the court order, the reader of the order has to interpret Proxi's founding affidavit, a legal document that runs to 196 pages including annexures.

15.3 In doing so the reader must have particular regard to "FA4B", which sets out the steps in in a typical transfer process that Proxi proposes to perform.

¹⁶ Judgment paras 61 to 62

¹⁷ Judgment para 63

¹⁸ Notice of appeal para 3.6

- 15.4 An order which requires the reader to conduct a process of interpretation of a lengthy and complicated founding affidavit together with such an annexure invites future disputes over whether any particular conduct falls within the meaning of the declaratory order.
- 16 The order which is sought in the notice of motion is of critical importance. In *Carter v Hayworth*¹⁹ the SCA took a high court to task for failing to finally dispose of the issues before it by not having made an appropriate order. The SCA emphasised the importance of ensuring clarity in orders of court. It held that:
- 16.1 *"I do not think there is a part of a judgment that provides a stronger indication of finality than an order at the end."*
- 16.2 The order *"is the operative part of the judgment. It is what a losing party appeals against."*
- 16.3 *"[A] duty rests on a court to formulate a clear order. Similarly, there is a duty on the registrars to ensure that the order so issued is clear and corresponds with the judgment."*²⁰
- 16.4 For the same reasons, *"there can be an appeal only against a substantive order made by a court, not against the reasons for judgment"*.²¹

¹⁹ Carter v Hayworth 2009 (5) SA 446 (SCA)

²⁰ Carter v Hayworth para 12

²¹ Carter v Hayworth para 12

17 It is particularly important that a declaratory order be clear when an applicant seeks a declarator that certain conduct is not criminal. In *Clarke v Hurst*:²²

17.1 The applicant's husband had suffered a cardiac arrest and gone into a permanent vegetative state. The applicant sought a declarator that she would not be breaking any law by stopping assisted feeding of her husband.²³

17.2 The court held that:

*"The Court would only grant the order if on facts which are beyond dispute there is no reasonable possibility that the applicant, in acting on it, would commit a crime against the patient."*²⁴

17.3 The order that the Court granted in that matter was a model of clarity.²⁵

18 By contrast in this matter, the order that the applicant seeks can only be determined by conducting a complicated exercise in interpretation.

19 There is no reasonable prospect that a court of appeal will reach a different conclusion about the relief sought in the notice of motion.

THE APPLICATION TO AMEND

20 The applicant realised at the hearing of the matter that the relief it had sought in the notice of motion could not competently be granted. As a result, in reply

²² *Clarke v Hurst NO and Others* 1992 (4) SA 630 (D)

²³ *Clarke v Hurst* at 632

²⁴ *Clarke v Hurst* at 637A

²⁵ *Clarke v Hurst* at 660-661

in oral argument, it attempted to amend its relief and instead of incorporating by reference annexure “FA4B”, it asked this Court to sanction its business model on the basis of annexure “FA2”.²⁶

- 21 This Court dismissed the application to amend the notice of motion on the ground that the new draft order constituted “*a whole new case on the part of the applicant*”.²⁷ The respondents had not had an opportunity to address the relief sought in reliance on “FA2” which differed completely from that contained in “FA4B”. If the amendment was granted the respondents would suffer prejudice that could not be cured by an appropriate costs order.²⁸
- 22 Proxi seeks leave to appeal against this Court’s dismissal of its application to amend its notice of motion.²⁹ Proxi contends that the application to amend was brought merely to meet an unjustified complaint that the notice of motion was impermissibly vague.³⁰
- 23 It is accordingly not clear whether on appeal Proxi seeks to advance the case sought prior to the amendment or after the application for amendment.
- 24 Either way, there is no prospect of another court reaching a different conclusion.

²⁶ Judgment of this Court para 64

²⁷ Judgment of this Court para 65

²⁸ Judgment of this Court para 66

²⁹ Notice of appeal para 4

³⁰ Notice of appeal para 4.2.1

- 25 Amendments to pleadings must be effected in terms of Rule 28 of the Uniform Rules. The purpose of Rule 28 is “*to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done.*”³¹
- 26 To achieve this purpose, amendments will generally be permitted unless they would cause the other parties to the litigation such prejudice as cannot be cured by an appropriate costs order and, where appropriate, a postponement.³²
- 27 An amendment will not be allowed where it is not timeously raised to enable proper investigation and response.³³ For the same reason, it is not permissible for a party to make out a new case in reply. It amounts to trial by ambush and cannot be permitted.³⁴
- 28 The amendment sought by Proxi in oral argument in reply would have caused the respondents prejudice that could not be cured by a costs order or postponement. This is because:
- 28.1 The amendment goes to the heart of the relief which Proxi sought. In the initial founding affidavit Proxi sought judicial sanction for its conduct as explained in “FA4B”.

³¹ *Embling and another v Two Oceans Aquarium* CC 2000 (3) SA 691 (C) at 695A.

³² *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 9

³³ *Tengwa v Metrorail* 2002 (1) SA 739 (C) at 745-746

³⁴ *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC) at paras 27-28; *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) at para 43

- 28.2 In terms of the amendment the model was as set out in “FA2”.
- 28.3 “FA2” is a letter dated 1 March 2016 written by Proxi to the Law Societies.³⁵
- 28.4 “FA2” includes a series of numbered steps which explain or illustrate the typical steps proposed to be undertaken by Proxi in regard to a property transfer.³⁶ In certain respects these numbered steps resemble those set out in “FA4B”.
- 28.5 In addition to this numbered sequence of steps, “FA2” also includes for example a draft parallel mandate agreement which governs the legal duties and obligations as between the attorneys on Proxi’s panel and Proxi.³⁷
- 28.6 “FA2” includes an introduction agreement which is an example of the agreement between Proxi and an estate agency, in terms of which Proxi will remunerate estate agents that bring Proxi to the attention of home sellers and buyers.³⁸
- 28.7 “FA2” also includes wording that may be included in the agency’s standard sales mandate and offers to purchase.³⁹

³⁵ FA2 p 71

³⁶ FA2 pp 81 to 92

³⁷ FA2 pp 95 to 102

³⁸ “FA2” pp 113 to 117

³⁹ “FA2” pp 118 and 118

28.8 “FA2” includes an operating protocol for estate agencies designed by Proxi.⁴⁰

28.9 In terms of the amendment therefore, the Court is asked to give its stamp of authority to a new annexure, incorporated by reference into this Court’s order, which itself contains a series of contracts and agreements which are in draft form included as its own annexures.

28.10 None of this has been ventilated in the founding papers. Nor has it been answered by any of the respondents. The relief sought in terms of the amendment is fundamentally different from that which is sought in the founding affidavit.

29 If Proxi had sought the amendment properly in terms of Rule 28, it would have been possible for the respondents to address it by filing further affidavits and amending their heads of argument. Rule 28(8) provides:

“(8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30.”

30 The attempt to amend the notice of motion after oral argument deprived the respondents of their entitlement to make consequential amendments to their pleadings. This deprivation amounts to prejudice which cannot be cured by a costs order or a postponement.

⁴⁰ “FA2” pp 121 to 122

31 The lateness of the amendment is all the more incomprehensible because Proxi cannot claim to have been surprised by the objection to the relief that it originally sought in its notice of motion. The Attorneys Fidelity Fund squarely raised all of the objections concerning the vagueness and intelligibility of Proxi's relief in its heads of argument, which were filed on 30 November 2017, two months before the hearing of the application. There was ample time for Proxi to effect an amendment to its relief in the light of the objections raised by the Attorneys Fidelity Fund before the hearing of this matter.

32 In the notice of appeal Proxi suggests that this Court erred in dismissing his application for amendment because the proposed amendment was in substance no different from the relief sought in the original notice of motion.⁴¹

But Proxi is caught on the horns of a dilemma. Either:

32.1 Proxi's notice of amendment made no substantial difference to the original notice of motion in which case it was entirely unnecessary, and is irrelevant to the appeal; or

32.2 The amendment is required to cure some defect or omission in the notice of motion, in which case the respondents required reasonable notice of the notice of intention to amend, and an opportunity to address the consequences of the amendment in their answering affidavits and heads of argument. In that case the lateness of the application for amendment patently caused prejudice to the respondents which could not be cured by a postponement.

⁴¹ Notice of appeal para 4.2.3

MERITS

- 33 Despite having found that the relief is incompetent on the notice of motion and that this is not a proper case in which declaratory relief can be granted, this Court gave reasons as to why it would nonetheless have dismissed the application on the merits.⁴²
- 34 Proxi suggests that this court erred in dismissing the application based on the points in limine while also giving reasons that it would have dismissed the application on the merits.⁴³
- 35 There is no basis for this complaint. It is well established that even where a High Court dismisses an application on a single basis (as this Court did on the basis of the points in limine), "*it should also express its opinion on the other challenges.*"⁴⁴ This principle has been repeatedly affirmed by the SCA.⁴⁵
- 36 In any event, an appeal lies against the order of this Court and not against its reasons. As a result, it does not avail Proxi to demonstrate that it may have prospects of success on the merits, because this court's opinion concerning the merits are *obiter dicta*. In order to obtain leave to appeal, Proxi must show that another Court will make a different finding on the points in limine. For the reasons set out above, it has no prospect of doing so.

⁴² Judgment of this Court paras 29 - 53

⁴³ Notice of appeal para 1.1

⁴⁴ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) at paras 21-22

⁴⁵ *Minister of Home Affairs and Others v Somali Association of South Africa And Another* 2015 (3) SA 545 (SCA at para 18; *Maharaj and Others v M&G Centre of Investigative Journalism NPC and Others* 2018 (1) SA 471 (SCA) at para 26

37 Finally, even if another court was inclined to consider the applicant's case on the merits, the bulk of the notice of appeal on the merits takes issue with this Court's interpretation of section 83(8)(a) of the Attorneys Act 53 of 1979 ("the Attorneys Act").⁴⁶ But the Attorneys Act is no longer on the statute books.

PRAYER

38 The application for leave to appeal should be dismissed with costs.

NICK FERREIRA

Counsel for the AFF

Chambers, Sandton

⁴⁶ Notice of appeal, paragraphs 10-26

TABLE OF AUTHORITIES

- Absa Bank Ltd v Van Rensburg and Another 2014 (4) SA 626 (SCA)
- Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC)
- Carter v Hayworth 2009 (5) SA 446 (SCA)
- Clarke v Hurst NO and Others 1992 (4) SA 630 (D)
- Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 6 SA 205 (SCA)
- Eke v Parsons 2016 (3) SA 37 (CC)
- Embling and another v Two Oceans Aquarium CC 2000 (3) SA 691 (C)
- Maharaj and Others v M&G Centre of Investigative Journalism NPC and Others 2018 (1) SA 471 (SCA)
- Minister of Health and Others v Treatment Action Campaign and Others (No 1) 2002 (5) SA 703 (CC)
- Minister of Home Affairs and Others v Somali Association of South Africa And Another 2015 (3) SA 545 (SCA)
- Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others 2008 (2) SA 184 (SCA)
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- S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC)
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