

IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 74313/2016

IN THE MATTER BETWEEN:-

PROXI SMART SERVICES (PTY) LTD Applicant

AND

THE LAW SOCIETY OF SOUTH AFRICA 1st Respondent

THE CHIEF REGISTRAR OF DEEDS 2nd Respondent

ROGER DIXON 3rd Respondent

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT 4th Respondent

THE ATTORNEYS FIDELITY FUND 5th Respondent

THE LAW SOCIETY OF KWAZULU-NATAL 6th Respondent

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE 7th Respondent

THE LAW SOCIETY OF THE FREE STATE 8th Respondent

THE LAW SOCIETY OF THE NORTHERN
PROVINCES 9th Respondent

NATIONAL ASSOCIATION OF DEMOCRATIC
LAWYERS 10th Respondent

BLACK LAWYERS ASSOCIATION 11th Respondent

THE BLACK CONVEYANCERS ASSOCIATION 12th Respondent

MINISTER OF RURAL DEVELOPMENT AND LAND
REFORM 13th Respondent

THE NATIONAL FORUM ON THE LEGAL
PROFESSION 14th Respondent

1st RESPONDENT'S HEADS OF ARGUMENT

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1. **ABBREVIATIONS**

In these heads of argument, the following words and abbreviations will have the following meanings:

- 1.1 **“AA”:** Answering affidavit;
- 1.2 **“Act 10 of 1907”:** Incorporated Law Society of Natal Act, No. 10 of 1907;
- 1.3 **“Act 20 of 1916”:** Law Society (Cape of Good Hope) Private Act, No. 20 of 1916;
- 1.4 **“ALS”:** Association of Law Societies of the Republic of South Africa, a voluntary association established in 1938 by the four Provincial Statutory Law Societies;
- 1.5 **“Attorneys Act”:** Attorneys Act 53 of 1979;

- 1.6 **“BCA”**: Black Conveyancers Association, the 12th Respondent;
- 1.7 **“BetterLife”**: BetterLife Group;
- 1.8 **“BLA”**: Black Lawyers Association, the 11th Respondent;
- 1.9 **“*capita selecta* of legislation”**: The subject legislation as is defined hereunder;
- 1.10 **“CB”**: *“Certificate Book”*, being a register kept by each Deeds Registry containing the constitution of legal persons and other associations confirming authority to transfer properties and to grant mortgage bonds;
- 1.11 **“CLS”**: The Cape Law Society, the 7th Respondent;
- 1.12 **“Competition Act”**: Competition Act 89 of 1998;
- 1.13 **“Consolidated Rules”**: Rules adopted by each of the four Provincial Statutory Law Societies in terms of section 74 of the Attorneys Act, with effect from 1 March 2016;
- 1.14 **“counter-application”**: The counter-application brought by the LSSA;
- 1.15 **“CPA”**: Consumer Protection Act 68 of 2008;
- 1.16 **“CRC’s”**: Chief Registrar Circulars, issued in terms of section 2(1)(a) of the DRA, read with sections 2(1D) and 3(1)(z) thereof;

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- 1.17 **“custom”**: The custom that has developed in the conveyancing profession of a qualified conveyancer and/or personnel under his/her direct supervision, control and authority attending to all aspects and all administrative functions that ultimately culminate in the transfer of immovable property in a Deeds Registry, also referred to as custom, usage or practice in the LSSA’s answering affidavit;
- 1.18 **“DJP”**: The Honourable Deputy Judge-President of this Court;
- 1.19 **“DRA Regulations”**: Regulations in terms of the DRA, published in Government Notice 474 of 1963;
- 1.20 **“DRA”**: Deeds Registries Act 47 of 1937;
- 1.21 **“EAAA”**: Estate Agency Affairs Act 112 of 1976;
- 1.22 **“EAAB”**: Estate Agency Affairs Board;
- 1.23 **“ECTA”**: Electronic Communications and Transactions Act 25 of 2002;
- 1.24 **“FA”**: Founding affidavit;
- 1.25 **“FAISA”**: Financial Advisors and Intermediary Services Act 37 of 2002;
- 1.26 **“FICA”**: Financial Intelligence Centre Act 38 of 2001;
- 1.27 **“FSB”**: Financial Services Board;

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- 1.28 **“Fund”**: Attorneys’ Fidelity Fund, the 5th Respondent;
- 1.29 **“GLAA”**: General Law Amendment Act 57 of 1975;
- 1.30 **“HOA”**: Heads of argument;
- 1.31 **“IFRS”**: International Financial Reporting Standards;
- 1.32 **“IRSB”**: International Reporting Standards Board;
- 1.33 **“Land Survey Act”**: Land Survey Act 8 of 1997;
- 1.34 **“Law Societies’ Act”**: Law Societies’ Act 41 of 1975
- 1.35 **“LPA”**: Legal Practice Act 28 of 2014;
- 1.36 **“LPC”**: The South African Legal Practice Council established in terms of section 4 of the LPA as a body corporate with full legal capacity to exercise jurisdiction over all legal practitioners and candidate legal practitioners as contemplated therein;
- 1.37 **“LPFF”**: Legal Practitioners’ Fidelity Fund, the fund introduced by the LPA that will replace the 5th Respondent;
- 1.38 **“LSFS”**: Law Society of the Free State;
- 1.39 **“LSKZN”**: Law Society of KwaZulu-Natal;

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- 1.40 **“LSNP”**: Law Society of the Northern Provinces, the 9th Respondent;
- 1.41 **“LSSA”**: The Law Society of South Africa, a voluntary association with legal capacity, governed by a constitution, the 1st Respondent;
- 1.42 **“main application”**: The application brought by Proxi for a declarator that its model does not contravene the subject legislation;
- 1.43 **“Minister”**: The Minister of Justice and Constitutional Development, the 4th Respondent;
- 1.44 **“model”**: The business model proposed by Proxi forming the subject of the main application in terms of which Proxi intends performing the steps and functions defined in Annexure FA4B to Proxi’s papers;
- 1.45 **“NADEL”**: National Association of Democratic Lawyers, the 10th Respondent;
- 1.46 **“National Forum”**: National Forum on the Legal Profession established by section 96 of the LPA, the 14th;
- 1.47 **“Old Attorneys Act”**: Attorneys, Notaries and Conveyancers’ Admission Act 23 of 1934;
- 1.48 **“Old DRA”**: Deeds Registries Act 13 of 1918;
- 1.49 **“Ordinance 1 of 1905”**: Incorporated Law Society of the Transvaal Ordinance No. 1 (Private) of 1905

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- 1.50 **“Ordinance 9 of 1903”:** Incorporated Law Society of the Orange Free State Ordinance No. 9 of 1903;
- 1.51 **“PMMA”:** The parallel mandate management agreement concluded between Proxi and conveyancers in the form of Schedule 2 to Annexure “FA2” (pp 94 – 122);
- 1.52 **“practice”:** The practice that has developed in the conveyancing profession of a qualified conveyancer and/or personnel under his/her direct supervision, control and authority attending to all aspects and all administrative functions that ultimately culminate in the transfer of immovable property in a deeds registry, also referred to as custom, usage or practice in the LSSA’s answering affidavit;
- 1.53 **“practitioner”:** A person defined in section 1 of the Attorneys Act under the definition of *“practitioner”* as *“any attorney, notary or conveyancer ...”*, as well as a person included in the definition of *“conveyancer”* in section 1 of the LPA being *“any practising attorney who is admitted and enrolled to practise as a conveyancer in terms of this Act”*;
- 1.54 **“preparation certificate”:** A certificate prescribed by section 15A of the DRA, read with regulations 43(1) and 44(1) of the DRA Regulations;
- 1.55 **“prescribed documents”:** A definition created by Proxi as a reference to those documents expressly mentioned in the subject legislation;

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- 1.56 **“Provincial Council”:** A provincial council established in terms of section 23 of the LPA for each of the provinces in the Republic once Chapter II of the LPA comes into operation;
- 1.57 **“Provincial Statutory Law Societies”:** The Law Societies of the Northern Provinces, Cape of Good Hope, Free State and KwaZulu-Natal, recognised in the Attorneys Act;
- 1.58 **“Proxi”:** Proxi Smart Services (Pty) Ltd, the Applicant;
- 1.59 **“RA”:** Replying affidavit;
- 1.60 **“RC’s”:** Registrar’s Circulars issued by a Registrar of Deeds of a particular Deeds Registry;
- 1.61 **“RCR”:** Registrars Conference Resolutions made in terms of section 2(1)(a) of the DRA, read with section 2(1D) and 3(1)(z) thereof;
- 1.62 **“SALGA”:** South African Local Government Association;
- 1.63 **“SARS Act”:** South African Revenue Service Act 34 of 1997;
- 1.64 **“SARS”:** South African Revenue Service, established by section 28 of the SARS Act;

- 1.65 **“subject legislation”**: Section 83(8)(a)(i) of the Attorneys Act, section 33(3) of the LPA, section 15 and 15A of the DRA and Regulations 43(1), 44(1) and 44A of the DRA Regulations in respect of which Proxi seeks a declarator;
- 1.66 **“Superior Courts Act”**: Superior Courts Act 10 of 2013;
- 1.67 **“Survey Act”**: Survey Act 9 of 1927;
- 1.68 **“Systems Act”**: Local Government: Municipal Systems Act 32 of 2000;
- 1.69 **“TDA”**: Transfer Duty Act 40 of 1949;
- 1.70 **“usage”**: The usage that has developed in the conveyancing profession of a qualifying conveyancer and/or personnel under his/her direct supervision, control and authority, attending to all aspects and all administrative functions that ultimately culminate in the transfer of immovable property in a Deeds Registry, also referred to as custom, usage or practice in the LSSA’s answering affidavit.

2. **THE APPLICANT'S CASE**

2.1 Conveyancing work requires meticulous accuracy and care¹. Conveyancers should be fastidious in their work and take great care in the preparation of their documents².

2.2 Proxi, a newly established company, aims to implement a business model permitting it to perform most of the tasks and functions that are traditionally performed by conveyancers and their personnel when attending to the transfer of immovable property.

2.3 A significant feature of Proxi's model is its dependency upon estate agencies convincing prospective sellers, against payment of money by Proxi, to utilise the services of Proxi and its own conveyancers³. Law abiding conveyancers that respect the rules of their professional bodies simply cannot compete since they may not tout for conveyancing work.

2.4 Proxi makes application to this Court for an order declaring that its model does not contravene a *capita selecta* of legislation, which, according to Proxi, distinguishes between reserved work and non-reserved work.

¹ Incorporated Law Society, *Transvaal v Meyer & Another* 1981 (2) SA 962 (T) at 973

² *Margalit v Standard Bank of SA Limited & Another* 2013 (2) SA 466 (SCA), para 26

2.5 The LSSA elects to refer to the *capita selecta* of legislation as “*subject legislation*”, comprising of only :

2.5.1 Section 83(8)(a)(i) of the Attorneys Act;

2.5.2 Section 33(3) of the LPA;

2.5.3 Sections 15 and 15A of the DRA; and

2.5.4 Regulations 43(1), 44(1) and 44A of the DRA Regulations.

2.6 Proxi’s case is that the administrative and related services pertaining to property transfers that it intends performing are not reserved work for purposes of the subject legislation. It would therefore, according to Proxi, not be unlawful should Proxi perform such functions or tasks which are traditionally performed by conveyancers and their personnel.

2.7 The tasks and functions to be performed by Proxi are listed in Annexure “FA4B”⁴.

³ Annexure “FA2”, Record, p 79

⁴ Record, pp 6 – 23

2.8 Proxi claims that there is nothing in law preventing it from performing those tasks listed in Annexure “FA4B” since those tasks fall outside of those reserved for conveyancers in terms of the subject legislation.

2.9 Proxi elected to follow a narrow approach to the problem at hand, by arguing as follows:

2.9.1 first, it defines what it believes to be a comprehensive list of tasks and functions that are being performed during a “*typical*” transfer of an immovable property. Proxi lists those tasks and functions in Annexure “FA4A” to its founding affidavit;

2.9.2 second, it presents the Court with a further list of tasks and functions, attached as Annexure “FA4B” to its founding affidavit, claiming that those tasks and functions may be lawfully performed by Proxi, as the performance thereof would not offend the subject legislation since such tasks do not, according to Proxi, fall within the category of reserved work in the subject legislation;

2.9.3 third, it requests the Honourable Court to interpret the subject legislation with a view to distil therefrom a number of tasks and

functions that, according to Proxi, constitute reserved work for conveyancers;

2.9.4 fourth, it argues that if a particular task or function is not reserved in terms of the subject legislation, it would be lawful for Proxi to perform such task or function; and

2.9.5 fifth, it seeks to elevate its peculiar interpretation of the subject legislation into a declarator that would permit it to lawfully conduct those tasks and functions falling outside the ambit of Proxi's reserved work definition, i.e. the functions listed in annexure "FA4B".

3. **DEFENCES RAISED BY THE LSSA**

3.1 The LSSA has forewarned Proxi that its approach to the matter is too narrow⁵. The LSSA submits that all tasks currently being performed during the conveyancing process [i.e. those tasks defined in Annexure "FA4A" by Proxi⁶] are not exclusively defined and deliniated by the subject legislation, as Proxi would have it, but instead have over a long period of time resulted in a practice that has hardened into law, and for that reason, should only continue to

⁵ LSSA AA; Record, p 273, para 8.9; p 274, para 8.11; p 275, para 8.17; p 303, para 10.69

be performed by the conveyancing profession. The LSSA thus contends that the tasks a modern-day conveyancer and his/her personnel perform are not defined only by the subject legislation, but rather by long established practice.

3.2 Proxi seems to suggest that conveyancing practice is encapsulated in only one section of the Attorneys Act [i.e. section 83(8)(a)(i)], one section of the LPA [i.e. section 33(3)], two sections of the DRA [i.e. sections 15 and 15A] and three DRA Regulations [i.e. regulations 43(1), 44(1) and 44A].

3.3 Other defences raised by the LSSA to the main application include:

3.3.1 that the relief sought and the manner in which it is sought by Proxi is not competent⁷;

3.3.2 that the aim and purpose of the subject legislation are not to differentiate between reserved work and non-reserved work⁸;

3.3.3 that all tasks listed in Annexure “FA4A” currently being performed by the conveyancing profession, are implied in the

⁶ Record, pp 124 – 136

⁷ LSSA AA, Record, pp 350 – 351, para 16

⁸ LSSA AA, Record, pp 329, para 12.29

subject legislation⁹. These tasks are incapable of being separated therefrom¹⁰;

3.3.4 that performance of the tasks listed in Annexure “FA4B” would be unlawful for contravening:

3.3.4.1 paragraph 7 of the Code of Conduct for Estate Agents published by the Estate Agencies Affairs Board under section 8 of the EAAA;

3.3.4.2 rule 43.1 of the Consolidated Rules for the Attorneys’ Profession, published in accordance with section 74(4) of the Attorneys Act;

3.3.4.3 rule 48 of the Consolidated Rules;

3.3.4.4 rule 49.8 of the Consolidated Rules;

3.3.4.5 rule 49.17 of the Consolidated Rules;

3.3.4.6 the contractual freedom and autonomy a seller enjoys under our common law to appoint his/her own conveyancer;

⁹ LSSA AA, Record, p 286, para 10.32

3.3.4.7 section 11(1) of the CPA;

3.3.4.8 section 4(1)(a) of the Competition Act; and

3.3.4.9 section 4(1)(b) of the Competition Act¹¹.

3.4 The defences pertaining to the alleged unlawfulness of Proxi's model have been elevated to that of a counter-application by the LSSA¹².

3.5 With regard to the main application, the LSSA generally makes common cause with the other Respondents who have filed answering papers¹³. We will in these heads endeavour to traverse issues which might not otherwise be fully ventilated in heads already filed by other Respondents or heads expected to be filed on behalf of the other Respondents opposing this application.

4. **RELIEF NOT COMPETENT**

¹⁰ LSSA AA, Record, p 276, para 8.19

¹¹ See previous footnote

¹² Record, pp 224 - 227

¹³ Opposing Respondents are: Minister (Record, pp 783 – 822); Fund (Record, pp 190 – 217); CLS (Record, pp 650 – 780); and LSNP (Record, pp 821 – 870)

- 4.1 The LSSA, CLS and the Fund raised the issue that the granting of the declaratory relief is not legally competent.
- 4.2 The CLS has elevated this issue as a point *in limine*¹⁴.
- 4.3 We submit that this issue ought to result in a dismissal of the application.
- 4.4 The LSSA submits that the relief sought by Proxi, i.e. a declarator, is incompetent for the reasons mentioned below.
- 4.5 In view of the LSSA's defence that the long standing practice in terms of which a conveyancer attends to all steps and functions during the conveyancing process has hardened into law, it matters not whether the tasks Proxi intends performing fall foul of the provisions of the subject legislation or not. Even if the interpretation of the subject legislation contended for by Proxi is upheld, it is submitted that the current accepted practice, which hardened into law, will prevent Proxi from implementing its model.
- 4.6 Proxi's application will therefore not finally address the dispute between the LSSA and Proxi as to whether Proxi should be

¹⁴ CLS HOA, pp 3 – 13, paras 6 to 36

allowed to encroach upon this long established practice. In this regard the application does not comply with the requirements of section 21(1)(c) of the Superior Courts Act.

4.7 The declaratory relief is sought in connection with what Proxi terms a “*typical transfer of immovable property*”. The LSSA denies that the notion of a “*typical transfer*” exists¹⁵ in view of the fact that no two property transactions are the same when regard is had to the nature and extent of supporting documents that may be required to be lodged with a particular transfer.

4.8 The LSSA submits that the nature and extent of supporting documents that may be required to be lodged with any particular deed of transfer depend on many factors, including the type of transaction (sale, exchange, donation, expropriation, etc.), the nature of the land being transferred (whole, part or share, rural or urban) and the nature of the parties involved (living persons, deceased estates, incapacitated persons, juristic persons etc.)¹⁶. In effect, if Proxi’s relief is to be granted, Proxi will be required to approach the Court for each specific type of transaction to obtain the Court’s approval. This is impractical and untenable.

¹⁵ LSSA AA, Record, p 277, para 9.3

¹⁶ LSSA AA, Record, pp 276 – 277, para 9.2

- 4.9 The LSSA submits that even if a so-called “*typical transfer*” exists, which is denied, a plethora of legal and administrative problems can present itself, making it impossible in advance to determine which steps need to be taken during the transfer process.
- 4.10 The LSSA submits that in the event of an existing title deed of property containing certain restrictive conditions, further supporting documents will have to be submitted before transfer can be passed. If the land to be transferred consists of a newly created subdivision, further consents need to be obtained and submitted before registration can take place¹⁷.
- 4.11 In the event of a sectional title transfer or transfer from a deceased estate, the transfer will look completely different, as will the documents and forms that are required to pass transfer¹⁸.
- 4.12 All such consents and supporting documents are known to conveyancers, not to lay persons, such as Proxi. To do so requires specialised knowledge of over 400 statutes¹⁹.

¹⁷ LSSA AA, Record, p 277, para 9.5

¹⁸ LSSA AA, Record, p 277, para 9.5

¹⁹ LSSA AA, Record, p 282, para 10.16

- 4.13 All of the above factors inform that no such thing as a typical transfer in terms of which Proxi's model can be applied as a "*one-size-fits-all*" concept exists.
- 4.14 The issue raised by Proxi is thus hypothetical, academic and abstract. Courts often refuse to grant relief in the exercise of its discretion for declaratory relief in such an event²⁰.
- 4.15 Proxi's model has not been finalised. Its software program has not been fully developed nor has it disclosed its fee structure. Yet, it seeks the assistance of the Court in respect of such an incomplete attempt.
- 4.16 The LSSA also submits that the declarator is vague and imprecise, without describing the precise features of the model²¹.
- 4.17 It is trite that a Court exercising a declaratory jurisdiction will follow a two-step process. In this regard the process established by the Appellate Division in 1942 is still good law where it was held:

²⁰ Herbex (Pty) Ltd v Advertising Standards Authority 2016 (5) SA 557 (GJ), para 86; Reynecke v Incorporated General Insurances Limited 1974 (2) SA 84 (A) at 95C; Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA) at 213E – G; Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam & Another; Maphanga v Officer Commanding, South African Police Muder and Robbery Unit, Pietermaritzburg & Others 1995 (4) SA 1 (A) at 14C

²¹ LSSA AA, Record, p 350, para 16.1.2

“The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation’, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of discretion conferred on it.”²²

4.18 We submit that, when regard is had to the LSSA’s counter-application, which will be fully dealt with later in these heads, the unlawfulness of Proxi’s incomplete model ought to be a factor weighing against the granting of the declaratory relief sought by the Applicant.

5. **CONVEYANCING PRACTICE**

5.1 The LSSA has gone to great lengths to explain how the conveyancing profession originated and how it has evolved into the current practice in terms of which conveyancers and staff under their direct control, supervision and authority conduct all steps (including, but not limited to, the steps listed in Annexures “FA4A” and “FA4B”) of the conveyancing process, which steps ultimately result in the transfer of ownership in a deeds registry.

5.2 In this regard, the LSSA established that:

²² Durban City Council v Association of Building Societies 1942 AD 27 at 32

- 5.2.1 the spectrum of work attended to by a conveyancer is not exclusively defined by the subject legislation, but has evolved since 1652²³, *alternatively* since the advent of the Old DRA in 1980;
- 5.2.2 most of the component parts of the modern-day conveyancing practice are not codified or prescribed by legislation²⁴;
- 5.2.3 the tasks being performed by conveyancers are the result of long established practice²⁵;
- 5.2.4 the subject legislation is not a complete codification of every facet of conveyancing practice²⁶;
- 5.2.5 conveyancing practice has since 1938 been further influenced and developed by RCR's, and since 1940, by CRC's²⁷;
- 5.2.6 that the reason why conveyancing practice is not exclusively defined in any form of legislation, is to be found in the fact that

²³ LSSA AA, Record, pp 273 – 274, para 8.10

²⁴ LSSA AA, Record, pp 273 – 274, para 8.10

²⁵ LSSA AA, Record, p 274, para 8.12

²⁶ LSSA AA, Record, p 274, para 8.13

²⁷ LSSA AA, Record, p 274, para 8.14

such an attempt would be beyond the wit of the legislature²⁸ and would render the system of property registration, which is essentially flexible, to become rigid and unable to cope timeously with changing circumstances²⁹;

5.2.7 that the nature of conveyancing work has evolved over centuries, developing into its modern-day guise³⁰;

5.2.8 that the execution of a deed of transfer before a registrar of deeds is but the final step in the entire conveyancing process, a process that in itself is not defined anywhere in the subject legislation³¹ or, for that matter, in any other legislation - it is informed by practice;

5.2.9 that a Registrar of Deeds would not register a transfer of immovable property unless it is accompanied by a host of supporting documents, such supporting documents being prepared or sourced by the conveyancer and submitted by him/her for registration purposes³²; and

²⁸ LSSA AA, Record, p 274, para 8.15

²⁹ LSSA AA, Record, p 275, para 8.16

³⁰ LSSA AA, Record, p 278, para 10.1

³¹ LSSA AA, Record, p 283, para 10.20

³² LSSA AA, Record, p 283, para 10.21

5.2.10 that all 75 tasks listed in Annexure “FA4A” have always been part of conveyancing practice and should remain so³³.

6. **REASONS FOR THE PRACTICE HAVING DEVELOPED:**

6.1 “*Conveyancing*” is, as its name suggests, a conveying of ownership in land or rights in it, as well as the obligations arising from it, from one person to another, and the preparation of all deeds and documents which are proper for registration or for filing or recording in a deeds registry³⁴. It is not limited to a number of specific documents expressly mentioned in the subject legislation.

6.2 A conveyancer is thus a recognised and qualified practitioner, who is skilled in the knowledge of conveyancing – that branch of law which is concerned with the practice relating to the transfer or mortgage of real rights³⁵.

6.3 In what follows we will provide a brief history of the conveyancing profession, the attorneys profession and of Law Societies being institutions that shaped the practice.

³³ LSSA AA, Record, p 284, para 10.26

³⁴ LAWSA Second Edition, Vol. 14, Part 2, para 302

³⁵ *Land and Mining Title and Conveyancing in South Africa*, Nathan, Holmes & Craighead, Hortors Ltd, 1934, p 49

6.4 Prior to 1910, the conveyancing profession developed separately in the Provinces of Cape, Natal, Transvaal and the Orange Free State.

6.5 In the Cape Province, the conveyancing profession developed as follows:

6.5.1 In 1828, with the establishment of the Cape Supreme Court, it was considered necessary to appoint a Registrar of Deeds in charge of the deeds office to take over the functions of the two Commissioners of the former Court before whom deeds had hitherto been executed³⁶;

6.5.2 At first deeds were prepared by the Registrar and his staff, but by 1844 advocates were allowed under Ordinance 14 of 1844 to draw deeds, as were also such other persons whom the Governor considered fit to do so³⁷;

6.5.3 Later, Act 12 of 1858 introduced the conveyancing examination³⁸;

³⁶ LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258

³⁷ LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258

³⁸ LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258

6.5.4 Persons, other than advocates, desiring to practice as conveyancers, had to be examined and declared competent by three examiners appointed by the Supreme Court³⁹; and

6.5.5 From 1903 admission as conveyancers was limited to attorneys only, through the enactment of Act 11 of 1903⁴⁰.

6.6 In the Natal, the conveyancing profession developed as follows:

6.6.1 Initially the seller or his estate agent was empowered to prepare deeds without employing a conveyancer⁴¹;

6.6.2 From 1904, conveyancers required formal admission⁴² in terms of Act 23 of 1904⁴³; and

6.6.3 The pre-union position remained unchanged until 1926 when the future admission as a conveyancer in Natal of a person neither an advocate nor an attorney was prohibited⁴⁴.

³⁹ LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258 and Hahlo & Kahn *Union of SA: The Development of its Laws and Constitution*, pp 200 – 291, referred to in LAWSA

⁴⁰ LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258

⁴¹ LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258

⁴² LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258

⁴³ LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258; Hahlo & Kahn *Union of SA: The Development of its Laws and Constitution*, p 226, referred to in LAWSA

6.7 In the Transvaal, the conveyancing profession developed as follows:

6.7.1 A deeds registry was established and conveyancers admitted by the executive after passing an examination⁴⁵;

6.7.2 After the British annexation in 1900, conveyancers on the roll had to apply for readmission, and future applicants would have to pass examinations prescribed by the rules of Court⁴⁶.

6.8 In the Orange Free State, the rules regarding the admission to practice as a conveyancer were similar to those of the Transvaal⁴⁷.

6.9 The first national legislation to have recognised the conveyancing profession was that of the Old DRA, which, in section 13 thereof provided that *“save as is otherwise provided in any other law, no deed of transfer, or any certificate of title issued under this Act, or any mortgage bond shall be registered in any Deeds Registry,*

⁴⁴ LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258; Natal Conveyancers Act 24 of 1926

⁴⁵ Hahlo & Kahn *Union of SA: The Development of its Laws and Constitution*, p 231, referred to in LAWSA

⁴⁶ LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258; Hahlo & Kahn *Union of SA: The Development of its Laws and Constitution*, p 240, referred to in LAWSA

⁴⁷ LAWSA, Second Edition, Vol. 14, Part 2, para 301, p 258

*unless it has been prepared by a conveyancer, entitled to practise in the prescribed limits of the Deeds Registry*⁴⁸.

6.10 In 1934, national legislation was enacted to govern the administration of conveyancers. This was done in terms of the Old Attorneys Act. In terms of section 24 thereof, the Court could admit and enrol as a conveyancer any person provided that the person:

6.10.1 was an admitted attorney;

6.10.2 had not been struck from the roll or suspended and that no proceedings to that end are pending; and

6.10.3 passed the practical examination for conveyancers.

6.11 From 19 May 1934 onwards no person could be admitted and enrolled as an attorney, notary or conveyancers unless he/she complied with the provisions of the Old Attorneys Act⁴⁹.

⁴⁸ Section 13 of the Old DRA

⁴⁹ Section 3 of the Old Attorneys Act reads:

“3. **Application of Act –**

From and after the commencement of this Act no person shall, subject to the provisions of section thirty-four be admitted and enrolled as an attorney or as a notary or as a conveyancer unless and until he has complied with the provisions of this Act.”

- 6.12 During 1937, section 5 of the Old DRA was re-enacted in section 15 of the DRA. It determined that no deed of transfer, mortgage bond, certificate of title or registration of any kind named in the DRA may be attested, executed or registered by a registrar unless it has been prepared by a conveyancer practising in the province within which the registrar's registry is situated, or as otherwise provided in any law.
- 6.13 Since conveyancers come from the ranks of attorneys, it would be prudent to also have regard to the history of the attorney's profession.
- 6.14 The word "*attorney*" means one appointed to act for another and is derived from the French word "*attorné*" pp. of "*attorner*" meaning to "transfer, turn, assign or appoint"⁵⁰. We submit that the close relationship between conveyancers and attorneys is evident from this ancient description. So too are the functions performed by attorneys and conveyancers.

⁵⁰ *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths, 1968, p 3

- 6.15 Since 1652, and in conformity with Dutch practice, advocates, attorneys and notaries were admitted by the Council of Justice, being a judicial body⁵¹.
- 6.16 After the Anglo-Boer war, Incorporated Law Societies along the lines similar to those of the Incorporated Law Society of the Cape of Good Hope were formed in the Transvaal, the Orange Free State and Natal⁵².
- 6.17 After 1910, the colony and republics retained its own rules for the admission of attorneys⁵³.
- 6.18 The territories which became the Union of South Africa eventually all passed legislation separating the legal profession into two branches and prohibiting advocates from performing the function of an attorney and *vice versa*, thereby giving effect to the practice that the profession of an attorney and advocate were distinctly separate professions⁵⁴.

⁵¹ LAWSA, Second Edition, Vol. 14, Part 2, para 149, pp 157 – 158 and Hahlo & Kahn *Union of SA: The Development of its Laws and Constitution*, p 202 and authorities cited in footnote 14

⁵² LAWSA, Second Edition, Vol. 14, Part 2, para 150, p 159

⁵³ LAWSA, Second Edition, Vol. 14, Part 2, para 150, p 159

⁵⁴ LAWSA, Second Edition, Vol. 14, Part 2, para 150, p 159

- 6.19 The most important step towards placing the profession on a unitary basis was taken in the 1930's when the Old Attorneys Act was assented to⁵⁵.
- 6.20 Under the Attorneys Act, each statutory Law Society retained its autonomy in that they were allowed to prescribe rules and make determinations for their own regulation and the conduct of their own affairs⁵⁶.
- 6.21 Law Societies and their rules played a major part in the formation of conveyancing practice. It is therefore necessary to also reflect on the early history in respect of the establishment of Law Societies.
- 6.22 The first Law Society was established in 1883 in the Colony of the Cape of Good Hope in terms of the Incorporated Law Societies Act 27 of 1883⁵⁷. The Act was substituted by the Law Society (Cape of Good Hope) Private Act 20 of 1916, which perpetuated the Law Society of the Cape of Good Hope as was originally established⁵⁸. All members of the profession were members of the Society and it was governed by a council, the members of which were attorneys

⁵⁵ LAWSA, Second Edition, Vol. 14, Part 2, para 150, pp 159 - 160

⁵⁶ Section 74 of the Attorneys Act

⁵⁷ *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 777

⁵⁸ *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 777

and members of the Society⁵⁹. It was truly to be a statutory *custos morum* of the profession⁶⁰.

6.23 During the same period, Law Societies were established in the other Provinces: within the Transvaal under Volksraadbesluit 1307 of 27 August 1902, Proclamation 18 of 1902 and Ordinance 1 (Private) of 1905; in the Orange Free State in 1885 and incorporated by Ordinance 4 of 1885, and Ordinance 9 of 1903 (ORC), as amended by Act 6 of 1942; and in the Natal under Act 10 of 1907⁶¹.

6.24 Despite the enactment on 17 May 1934 of the Old Attorneys Act, the statutory Law Societies in the four Provinces remained in existence. It was not until the enactment of the Law Societies' Act⁶² in 1975 that the legislation governing Law Societies of the different Provinces were consolidated⁶³, which Act was subsequently repealed and its provisions re-enacted in the Attorneys Act.

6.25 We will now deal with some of the rules made by the Law Societies prior to the enactment of the Attorneys Act to show how these rules

⁵⁹ *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 777

⁶⁰ *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 777

⁶¹ *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 778

⁶² Law Societies' Act 41 of 1975

⁶³ *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 780

helped shape the practice and instilled consumer confidence in the conveyancing profession.

6.26 The now repealed Law Society (Cape of Good Hope) Private Act 20 of 1916 contained a list of acts or omissions which would constitute unprofessional, dishonourable or unworthy conduct in rule 42 of its rules and regulations⁶⁴. Notwithstanding its repeal, section 24(2)(a) of the Law Societies' Act 41 of 1975 has preserved all the rules, by-laws and regulations made under Act 20 of 1916⁶⁵. Thus all the rules and regulations made under Act 20 of 1916 have been incorporated in the second Schedule to Act 41 of 1975⁶⁶.

6.27 Act 20 of 1916, in section 47 thereof determined that the by-laws and regulations set out in the second Schedule thereto would constitute by-laws and regulations of the Law Society of Cape of Good Hope⁶⁷.

6.28 Section 48 of Act 20 of 1916 empowered the Law Society of the Cape of Good Hope to make rules, by-laws and regulations describing or prescribing the conduct which shall be deemed to be

⁶⁴ *Law Society of the Cape of Good Hope v Nel* 2010 (4) SA 274 (SCA) at 278

⁶⁵ *Law Society of the Cape of Good Hope v Nel* 2010 (4) SA 274 (SCA) at 278

⁶⁶ *Law Society of the Cape of Good Hope v Nel* 2010 (4) SA 274 (SCA) at 278

⁶⁷ Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 144

unworthy, unprofessional or dishonourable conduct by an attorney, notary, conveyancer or article clerk⁶⁸.

6.29 Rules preventing touting, withholding the payment of trust monies without lawful excuse, assisting, allowing or enabling an unqualified person to perform the work of an attorney, notary or conveyancer for remuneration, opening an office without continuous personal supervision of a practitioner, and so forth⁶⁹ were also adopted by the Law Society of the Cape of Good Hope.

6.30 Rule 42 of the rules and regulations made under section 47 of Act 20 of 1916 rendered certain conduct on the part of an attorney, notary or conveyancer unprofessional or dishonourable or unworthy, such as:

“(1) touting: for the purposes of this regulation touting, in addition to the generality of the meaning of the word ‘touting’ shall include the conduct of an attorney, notary or conveyancer who –

(a) accepts or agrees to accept or offers to accept the remuneration at less than the statutory or customary rate with the object of attracting business; or

(b) directly or indirectly holds himself out, or allows himself to be held out, has been prepared to do professional work at less than the scale of charges

⁶⁸ Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 144; *Law Society of the Cape of Good Hope v Nel* 2010 (4) SA 274 (SCA) at 278

⁶⁹ *Law Society of the Cape of Good Hope v Nel* 2010 (4) SA 274 (SCA) at 278

laid down by law, or generally recognised in the area where such attorney, notary or conveyancer practices⁷⁰;

...

- (4) *in any way assisting, allowing or enabling an unqualified person to charge, recover or receive any fee, or derive any remuneration for, in respect of or in connection with the preparation or execution of any document, or the performance of any professional work which only an attorney, notary or conveyancer, as the case may be, is qualified by law to prepare, sign, execute, attest or perform, or in any way conniving at any arrangement, agreement, or understanding whatsoever whereby any such fee or remuneration as aforesaid is, or shall be, charged, recovered or received, by any such unqualified person: Provided that nothing in this regulation contained shall be construed as preventing an enrolled agent from charging or recovering any fee or remuneration for work done or hereafter to be done by him which he could legally have charged or recovered in the like case prior to the promulgation of this Act⁷¹;*

...”

6.31 Rule 59 of the rules and regulations under section 47 of Act 20 of 1916 also contained the following provisions pertaining to bookkeeping practices. It determined as follows:

“59. Every practicing attorney, notary or conveyancer or firm of practicing attorneys, notaries or conveyancers shall extract a list of his or their trust account balances at intervals if not more than three calendar months. The

⁷⁰ Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 154

⁷¹ Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 154

*balance listed from each account shall also be noted in some permanent, prominent and clear manner in the ledger account from which such balances were extracted. The list of balances shall be kept for not less than five years from the date as at which such balances were extracted.*⁷²

6.32 Rule 60 of the rules and regulations made under Act 20 of 1916 obliged an accountant registered in terms of the Public Accountants and Auditors Act, No. 51 of 1951 to prepare a certificate stating, *inter alia*, that the relevant attorney has kept his books in such manner as to enable him to comply with the provisions of section 33(1) and (4) of Act 23 of 1934 and confirming that monies received by such an attorney on account of any person were deposited, regularly and promptly in the trust bank account kept by such attorney in terms of section 33(1) of Act No. 23 of 1934⁷³.

6.33 Section 27 of Act 10 of 1907 empowered the Natal Law Society to frame by-laws and regulations dealing with unprofessional or dishonourable or unworthy conduct by its members⁷⁴.

⁷² Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 165

⁷³ Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 165

⁷⁴ Section 27(a) of Act 10 of 1907 reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 183

- 6.34 Section 19 of the by-laws and regulations framed under section 27 of Act 10 of 1907 also introduced the provision of an accountant's certificate certifying that the books of an attorney has been kept in such a manner as to enable to compliance with the provisions of section 33(1) and (4) of Act 23 of 1934 and further that monies received by such an attorney on account have been deposited regularly and promptly in the trust banking account in accordance with the provisions of section 33(1) of Act No. 23 of 1934⁷⁵.
- 6.35 In the Orange Free State, the Incorporated Law Society of the Orange Free State Ordinance 9 of 1903 established the Incorporated Law Society of that province. Section 20 of Ordinance No. 9 of 1903 empowered the Free State Law Society to make rules and regulations as to unworthy, unprofessional or dishonourable conduct of its members⁷⁶.
- 6.36 In terms of the by-laws, rules and regulations made under section 20 of Ordinance 9 of 1903 the Free State Law Society adopted certain rules and by-laws governing unprofessional conduct which mirrored that of the Cape⁷⁷ directed at honourable and professional

⁷⁵ Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 200

⁷⁶ Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 217

⁷⁷ Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 227

conduct, good accounting practices, the prevention of the withholding of the payment of trust monies without lawful excuse⁷⁸ and the like.

6.37 The Transvaal Law Society was empowered, by virtue of section 37 of Ordinance 1 of 1905 to frame its own by-laws and regulations pertaining to conduct deemed to constitute unprofessional or dishonourable or unworthy conduct and to discipline its members⁷⁹.

6.38 The by-laws framed in accordance with the provisions of Ordinance No. 1 of 1905, in section 47 thereof determined that certain conduct would be unprofessional or dishonourable or unworthy including the failure to keep and, for at least five years, to retain and preserve proper books of account containing a full and accurate record of all financial transactions⁸⁰ and without lawful excuse delay the payment of trust monies after due demand⁸¹.

6.39 Despite the enactment of the Old Attorneys Act in 1934, the legislation creating the aforesaid four statutory provincial Law

⁷⁸ Section 43 of the by-law framed in accordance with the provisions of section 20 of Ordinance 9 of 1903; Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 227

⁷⁹ Section 37 of Ordinance 1 of 1905; Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 249

⁸⁰ Section 47(5) of the by-laws under Ordinance No. 1 of 1905; Reproduced in *The South African Attorneys Handbook*, Second Edition: Randell, Bax & Van Niekerk, Butterworths 1968, page 259

Societies was not repealed. Law Societies thereafter retained their powers to make by-laws, rules and regulations pertaining the conduct of members of the profession, including conveyancers.

6.40 It was not until 14 May 1975, with the enactment of the Law Societies' Act 41 of 1975, that the formally established Law Societies became governed by a consolidated Act. This Act repealed the Acts described above in terms of which the statutory Law Societies were formerly established. It, however, in section 24 thereof determined that any rule, by-law or regulation made under the provisions of a law repealed shall be deemed to be a rule made under the corresponding provisions of the Law Societies' Act and any provision of any law so repealed prescribing, or otherwise dealing with any matter which in terms of the Law Societies Act may be prescribed, shall notwithstanding the repeal of such law be deemed to be rule made in terms of the Law Societies' Act.

6.41 In terms of section 21 of the Law Societies' Act, the council of a particular Law Society retained the power to make rules as to conduct constituting unprofessional or dishonourable or conduct on the part of any practitioner or article clerk. These rules are binding within the province of a particular Law Society.

⁸¹ Section 47(6) of the by-laws enacted under Ordinance 1 of 1905

- 6.42 It is submitted that the by-laws, regulations and rules made by statutory Law Societies assisted in shaping the practice of a conveyancer attending to all functions during the conveyancing process of immovable property.
- 6.43 The enforcement by the statutory Law Societies of the rules against practitioners guilty of unprofessional conduct against clients dealing with, *inter alia*, property transactions, instilled further confidence in the office of the conveyancer attending to all aspects of a property transaction. Law Societies overlook and enforce the rules of professional conduct that conveyancers must honour to avoid a complaint being laid at a particular Law Society.
- 6.44 It was only with the enactment of the Attorneys Act in 1973 that Law Societies became governed by the very same Act that governed the attorneys and conveyancing profession.
- 6.45 The Attorneys Act contained various stipulations directed at consumer protection, overseen by Law Societies, which also helped shape the practice namely:

6.45.1 section 56 thereof which provides that the four provincial Law Societies in existence on the date of enactment of the Attorneys Act would continue to exist, but under different names, therefore obliging each practitioner to become a member of a Law Society⁸²;

6.45.2 the objects of Law Societies include, *inter alia*, the maintenance and enhancement of the prestige, status and dignity of the profession; regulating the exercise of the profession by upholding the integrity of practitioners; upholding and improving standards of professional conduct of practitioners, including the promotion of uniform practice and discipline among practitioners⁸³; permitting each Law Society to make rules as to conduct which shall constitute unprofessional or dishonourable or unworthy conduct⁸⁴ on the part of the practitioner.

6.46 The Attorneys Act also provided further measures directed at consumer protection, further assisting in establishing the practice, such as:

⁸² Section 57 of the Attorneys Act

⁸³ Section 58 of the Attorneys Act

⁸⁴ Section 74(1)(a) of the Attorneys Act

- 6.46.1 practitioners shall open and keep separate trust banking accounts and permitting practitioners to invest in a separate savings account or any money deposited in his or her trust banking account which is not immediately required for any purpose⁸⁵; and
- 6.46.2 permitting the opening of separate trust savings accounts for purposes of investing therein, on the instructions of any person, any money deposited in his or her trust account and over which the practitioner exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity⁸⁶.
- 6.47 The strict provisions in the Old Attorneys Act, as well as the Attorneys Act which were directed at proper bookkeeping, financial reporting, ethical standards and honourable conduct played a major part in instilling confidence in the minds of the public when making use of a conveyancer.
- 6.48 We highlight only some of the provisions contained in the Old Attorneys Act which were directed at consumer protection in this regard, namely:

⁸⁵ Sections 78(1) and (2)(a) of the Attorneys Act

⁸⁶ Section 78(2A) of the Attorneys Act

- 6.48.1 in terms of section 33(1) thereof, every practicing attorney, notary and conveyancer had to open and keep a separate trust account at a bank in the Republic wherein all monies held or received on account of any other person must be deposited;
- 6.48.2 section 33(2) permitted an attorney to open a trust savings account in respect of any monies deposited in trust which are not immediately required for any particular purpose;
- 6.48.3 section 33(4) thereof compelled all attorneys, notaries and conveyancers to keep proper books of account containing particulars and information of all monies received, held or paid by them for or on account of any person, and of any monies invested by him/her terms of sub-section (2) and of any interests on monies so invested which is paid over or credited to him; and
- 6.48.4 in terms of section 33(5) the council of the Law Society of the province in which an attorney, notary or conveyancer is practicing, may, inspect the books of any such practitioner.

- 6.49 Many an attorney was prosecuted for not observing the provisions of section 33 of the Old Attorneys Act⁸⁷.
- 6.50 The strict enforcement of the provisions of the Old Attorneys Act pertaining to proper accounting to clients helped to instil confidence in the minds of the public when dealing with immovable property. It aided in the development of a practice in terms of which a conveyancer would attend to and be responsible for, the entire conveyancing process.
- 6.51 It was not until 2016 that the respective Law Societies deemed it necessary to compile a set of consolidated rules governing all members of the profession, with the *proviso* that should a particular Law Society wish to retain its own rule or add a *proviso* to a rule contained in the Consolidated Rules, it would be permitted to do so.
- 6.52 The following Consolidated Rules assisted in instilling public confidence in the conveyancing profession and so helped to form the practice, namely:

⁸⁷ Law Society of the Cape of Good Hope v Pattle 1939 CPD 61; Incorporated Law Society v V E. 1954 (4) SA 155 (E); Transvaal Incorporated Law Society v K 1950 (4) SA 449 (T); Incorporated Law Society of the O.F.S v H 1952 (2) SA 263 (O); Incorporated Law Society v K 1944 TPD 468; Cape Law Society v Weinberg 1944 CPD 12; Incorporated Law Society v G 1953 (4) SA 150 (T); Incorporated Law Society of the Transvaal v Goldberg 1964 (4) SA 301 (T); Incorporated Law Society of the Cape of Good Hope v Visser 1965 (1) SA 523 (C)

- 6.52.1 the obligation imposed upon conveyancers to account to all parties, including a purchaser and seller, as contained in Rules 35.11 and 35.12 of the Consolidated Rules⁸⁸;
- 6.52.2 making provision for proper bookkeeping and preparation of financial statements - Consolidated Rule 35.5⁸⁹;

⁸⁸ LSSA AA, Record, pp 303 – 304, para 11.2. Consolidated Rules 35.11 and 35.12 read as follows:

“ACCOUNTING TO CLIENTS

35.11 *Every firm shall, within a reasonable time after the performance or earlier termination of any mandate, account to its client in writing and retain a copy of each such account for not less than 5 years; each account shall contain details of:*

35.11.1.1 *all amounts received by it in connection with the matter concerned, appropriately explained;*

35.11.1.2 *all disbursements and other payments made by it in connection with the matter;*

35.11.1.3 *all fees and other charges charged to or raised against the client and, where any fee represents an agreed fee, a statement that such fee was agreed upon and the amount so agreed;*

35.11.1.4 *the amount owing to or by the client.*

PAYMENT TO CLIENTS

35.12 *A firm shall, unless otherwise instructed, pay any amount due to a client within a reasonable time.”*

⁸⁹ LSSA AA, Record, p 305, para 11.4.1 Consolidated Rule 35.5 reads:

“Accounting Requirements – General

35.5 *A firm shall keep in an official language of the Republic such accounting records as are necessary to enable the firm to satisfy its obligations in terms of the Act, these rules and any other law with respect to the preparation of financial statements that present fairly and in accordance with an acceptable financial reporting framework in South Africa the state of affairs and business of the firm and to explain the transactions and financial position of the firm including, without derogation from the generality of this rule:*

6.52.3 the adoption of the IFRS (issued by the IRSB) as the framework for financial reporting by every practitioner - Consolidated Rule 35.6⁹⁰;

35.5.1 *records showing all assets and liabilities as required in terms of sections 78(4) and 78(6) of the Act;*

35.5.2 *records containing entries from day to day of all monies received and paid by it on its own account, as required by sections 78(4) and 78(6) of the Act;*

35.5.3 *records containing particulars and information of:*

35.5.3.1 *all monies received, held and paid by it for and on account of any person;*

35.5.3.2 *all monies invested by it in terms of section 78(2) or section 78(2A) of the Act;*

35.5.3.3 *any interest referred to in section 78(3) of the Act which is paid over or credited to it;*

35.5.3.4 *any interest credited to or in respect of any separate trust savings.”*

⁹⁰ LSSA AA, Record, p 305, para 11.4.2. Consolidated Rule 35.6 reads:

“Acceptable financial reporting framework

35.6 *For purposes of these rules:*

35.6.1 *acceptable financial reporting frameworks which are to be recognised and applied are:*

35.6.1.1 *“IFRS” being International Financial Reporting Standards as issued from time to time by the International Reporting Standards Board, or its successor body;*

35.6.1.2 *“IFRS for SMEs”, being IFRS for Small and Medium Enterprises.*

35.6.2 *In determining what is meant by “acceptable financial reporting frameworks” regard shall be had, inter alia, to any rulings of the Council published to members with respect to specific additional disclosures required to be made in the financial statements or trust account schedules.”*

- 6.52.4 the obligation in accounting records, to clearly distinguish between trust accounts and business account transactions - Consolidated Rule 35.7⁹¹;
- 6.52.5 the obligation to retain accounting records and all files and documents relating to matters dealt with by a practitioner on behalf of clients – Consolidated Rule 35.8⁹²;
- 6.52.6 the obligation to update accounting records monthly - Consolidated Rule 35.9⁹³;

⁹¹ LSSA AA, Record, p 305, para 11.4.3. Consolidated Rule 35.7 reads:

“Distinguishing between trust account and business account transactions

35.7 *The accounting records shall distinguish in readily discernible form between business account transactions and trust account transactions.”*

⁹² LSSA AA, Record, p 305, para 11.4.4. Consolidated Rule 35.8 reads:

“Retention of accounting records and files

35.8 *A firm shall retain its accounting records, and all files and documents relating to matters dealt with by the firm on behalf of clients:*

35.8.1 *for at least five years from the date of the last entry recorded in each particular book or other document of record or file;*

35.8.2 *save with the prior written consent of the Council, or when removed therefrom under other lawful authority, at no place other than its main office, a branch office or, in the case of electronic accounting records or files, the location at which such accounting records or files are ordinarily hosted; provided that:*

35.8.2.1 *in the case of electronic accounting records or files hosted offsite, such records or files shall always be reasonably secured and shall remain immediately accessible to authorised persons from the office of the firm, and to the Council; and*

35.8.2.2 *in the case of a branch office, only insofar as they relate to any part of its practice conducted at that branch office.”*

- 6.52.7 the obligation to keep trust monies separate from all other monies and prescribing conditions to the transfer of monies from a trust account to a business account – Consolidated Rule 35.10⁹⁴;
- 6.52.8 prescribing accounting requirements for trust account transactions, including monthly back-ups of electronic accounting records and the keeping of a proper audit trail of all

⁹³ LSSA AA, Record, p 306, para 11.4.5. Consolidated Rule 35.9 reads:

“Updating accounting records

“35.9 A firm shall update and balance its accounting records monthly and shall be deemed to comply with this rule if, inter alia, its accounting records have been written up by the last day of the following month.”

⁹⁴ LSSA AA, Record, p 306, para 11.4.6. Consolidated Rule 35.10 reads:

“Trust money to be kept separate from other money

35.10 Trust money shall in no circumstances be deposited in or credited to a business banking account. Money other than trust money found in a trust banking account at any time shall be transferred to a business banking account without undue delay. A firm shall be deemed to have complied sufficiently with this rule if it:

35.10.1 makes transfers from its trust banking account to its business banking account at least once a month; and

35.10.2 ensures that, when making a transfer from its trust banking account to its business banking account:

35.10.2.1 the amount transferred is identifiable with, and does not exceed, the amount due to it;

35.10.2.2 the trust creditor from whose account the transfer is made is identified; and

35.10.2.3 the balance of any amount due to it remaining in its trust banking account is capable of identification with corresponding entries appearing in its trust ledger.”

electronic transactions – Consolidated Rule 35.13.1 – 35.13.5⁹⁵;

6.52.9 the obligation to implement internal control measures to ensure that trust funds are safeguarded – Consolidated Rule 35.13.7⁹⁶;

⁹⁵ LSSA AA, Record, p 306, para 11.4.7. Consolidated Rules 35.13.1 – 35.13.5 read:

“Accounting Requirements - Trust Account Transactions

35.13.1 A firm shall maintain its accounting records in terms of the Act and these rules.

35.13.2 A firm shall report to the society forthwith, in writing, any loss, theft or destruction of any such records.

35.13.3 A firm shall, in the case of the accounting records being computerised, make monthly backups which shall be kept in a safe, fireproof place remote from the firm or, in the case of accounting records being in the form of manual books of account, by ensuring that, outside normal business hours, such records are kept in a safe place.

35.13.4 If the firm keeps any of its accounting records in electronic form, the firm shall:

35.13.4.1 provide adequate precautions against loss of the records as a result of damage to or failure of the media in which the records are maintained; and

35.13.4.2 ensure that the records are at all times capable of being retrieved to a readable and printable form, including by converting the records from legacy to later systems or software from time to time.

35.13.5 A firm shall, where the firm utilises electronic banking in respect of payments from the trust account, keep a proper audit trail, which shall include verification of the payee's banking account details.”

⁹⁶ LSSA AA, Record, p 306, para 11.4.8. Consolidated Rule 35.13.7 reads:

“35.13.7 A firm shall ensure:

Internal controls

35.13.7.1 that adequate internal controls are implemented to ensure compliance with these rules and to ensure that trust funds are safeguarded; and in particular to ensure –

- 6.52.10 the obligation to ensure prompt depositing of trust monies – Consolidated Rule 35.13.7.1.5⁹⁷;
- 6.52.11 the obligation to transfer certain deposits to trust investment accounts – Consolidated Rule 35.13.7.1.6⁹⁸;
- 6.52.12 the obligation to ensure that trust balances do not exceed trust monies – Consolidated Rule 35.13.8⁹⁹;

35.13.7.1.1 *that the design of the internal controls is appropriate to address identified risks;*

35.13.7.1.2 *that the internal controls have been implemented as designed; 35.13.7.1.3 that the internal controls which have been implemented operate effectively throughout the period;*

35.13.7.1.4 *that the effective operation of the internal controls is monitored regularly by designated persons in the firm having the appropriate authority;”*

⁹⁷ LSSA AA, Record, p 306, para 11.4.9. Consolidated Rule 35.13.7.1.5 reads:

“Prompt depositing of trust monies

35.13.7.1.5 *that all money received by it on account of any person is deposited intact into its trust banking account on the date of its receipt or the first banking day following its receipt on which it might reasonably be expected that it would be banked;”*

⁹⁸ LSSA AA, Record, p 306, para 11.4.10. Consolidated Rule 35.13.7.1.6 reads:

“Transfers for trust investment account

35.13.7.1.6 *unless the firm has received written authorisation for the payment of any guarantees issued by a bank on the strength of a trust investment, that any amount withdrawn by it from a trust investment account is deposited promptly by it in its trust banking account.”*

⁹⁹ LSSA AA, Record, pp 306 – 307, para 11.4.11. Consolidated Rule 35.13.8 reads:

“Trust balances not to exceed trust monies

35.13.8 *A firm shall ensure that the total amount of money in its trust banking account, trust investment account and trust cash at any date shall not be less than the total amount of the credit balances of the trust creditors shown in its accounting records.”*

- 6.52.13 the prohibition against trust balances exceeding the trust balances of all trust creditors – Consolidated Rule 35.13.8;
- 6.52.14 the prohibition against trust accounts being in debit – Consolidated Rule 35.13.9¹⁰⁰;
- 6.52.15 the obligation put upon a practitioner to immediately report a trust shortfall to his/her Provincial Statutory Law Society – Consolidated Rule 35.13.10¹⁰¹;
- 6.52.16 determining that all monies held on account of clients for future services or disbursements must be regarded as trust monies – Consolidated Rule 35.13.13¹⁰²;

¹⁰⁰ LSSA AA, Record, p 307, para 11.4.13. Consolidated Rule 35.13.9 reads:

“Trust accounts not to be in debit

35.13.9 A firm shall ensure that no account of any trust creditor is in debit.”

¹⁰¹ LSSA AA, Record, p 307, para 11.4.14. Consolidated Rule 35.13.10 reads:

“Reports to society of non-compliance

35.13.10 A firm shall immediately report in writing to the society should the total amount of money in its trust bank accounts and money held as trust cash be less than the total amount of credit balances of the trust creditors shown in its accounting records, together with a written explanation of the reason for the debit and proof of rectification.”

¹⁰² LSSA AA, Record, p 307, para 11.4.15. Consolidated Rule 35.13.13 reads:

“Deposits on account of charges

6.52.17 prescribing conditions when withdrawals from a trust bank account may be made – Consolidated Rule 35.13.14¹⁰³;

6.52.18 prescribing methods of payment from a trust bank account – Consolidated Rule 35.13.15¹⁰⁴;

35.13.13 *Amounts received by a firm in advance to cover a prospective liability for services rendered or to be rendered or for disbursements (including counsel's fees) to be made must be deposited forthwith to the credit of its trust banking account."*

¹⁰³ LSSA AA, Record, p 307, para 11.4.16. Consolidated Rule 35.13.14 reads:

"Withdrawals from trust banking account

35.13.14 *Withdrawals from a firm's trust banking account shall be made only:*

35.13.14.1 *to or for a trust creditor, or*

35.13.14.2 *as transfers to the firm's business banking account, provided that such transfers shall be made only in respect of money due to the firm; and provided that no transfer from its trust banking account to its business banking account is made in respect of any disbursement (including counsel's fees or fees of the firm) unless:*

35.13.14.2.1 *the disbursements have actually been made and debited by the firm; or*

35.13.14.2.2 *a contractual obligation has arisen on the part of the firm to pay the disbursement; or*

35.13.14.2.3 *fees and disbursement have been correctly debited in its accounting records."*

¹⁰⁴ LSSA AA, Record, p 307, para 11.4.17. Consolidated Rule 35.13.15 reads:

"Payments from trust banking account

35.13.15.1 *Any cheque drawn on a firm's trust banking account shall be made payable to or to the order of a payee specifically designated.*

35.13.15.2 *Payments from the trust banking account of a firm shall only be by cheque or electronic transfer.*

35.13.15.3 *No withdrawals from the trust banking account of a firm may be made by way of cellular and telephone transacting."*

6.52.19 the obligation imposed to extract, at intervals of not more than 3 calendar months, lists showing balances of all persons on whose account money is held or has been received – Consolidated Rule 35.14¹⁰⁵;

¹⁰⁵ LSSA AA, Record, p 307, para 11.4.18. Consolidated Rule 35.14 reads:

“Lists of balances

35.14.1 Every firm shall extract at intervals of not more than three calendar months, and in a clearly legible manner, a list showing all persons on whose account money is held or has been received and the amount of all such monies standing to the credit of each such person, who shall be identified therein by name, and shall total such list and compare the said total with the total of the balance standing to the credit of the firm's trust banking account, trust investment account and amounts held by it as trust cash, in order to ensure compliance with rule 35.13.7.

35.14.2 The balance listed in respect of each such account shall also be noted in some permanent, prominent and clear manner in the ledger account from which the balance was extracted.

35.14.3 Each such list shall be part of the accounting records of the firm to be retained for the five-year period referred to in rule 35.8.

35.14.1 Every firm shall extract at intervals of not more than three calendar months, and in a clearly legible manner, a list showing all persons on whose account money is held or has been received and the amount of all such monies standing to the credit of each such person, who shall be identified therein by name, and shall total such list and compare the said total with the total of the balance standing to the credit of the firm's trust banking account, trust investment account and amounts held by it as trust cash, in order to ensure compliance with rule 35.13.7.

35.14.2 The balance listed in respect of each such account shall also be noted in some permanent, prominent and clear manner in the ledger account from which the balance was extracted.

35.14.3 Each such list shall be part of the accounting records of the firm to be retained for the five-year period referred to in rule 35.8.”

- 6.52.20 the obligation to notify the relevant Provincial Statutory Law Society of the practitioner's trust banking account details – Consolidated Rule 35.15¹⁰⁶;
- 6.52.21 the creation of personal responsibility for practitioners to ensure that all rules relating to trust accounts be complied with – Consolidated Rule 35.18¹⁰⁷;
- 6.52.22 the obligation of submitting audited financial statements – Consolidated Rule 35.19¹⁰⁸;

¹⁰⁶ LSSA AA, Record, p 308, para 11.4.19. Consolidated Rule 35.15 reads:

“Notification of trust banking account

35.15 *Every firm shall:*

35.15.1 *immediately notify the society in writing of the name and address of the bank or banks at which its trust banking account or accounts are kept and shall thereafter notify the Council immediately of any change in the name and address of such bank or banks;*

35.15.2 *whenever so required by the Council, furnish to the Council within ten days or such longer period as the Council may stipulate, a signed statement issued by the bank or banks with which it keeps its trust banking account or accounts and a signed statement issued by the bank with which the firm keeps any trust investment account, certifying the amount of the balance of such trust banking account or accounts or trust investment account at such date or dates as may be specified by the Council.”*

¹⁰⁷ LSSA AA, Record, p 308, para 11.4.20. Consolidated Rule 35.18 reads:

“Responsibility for ensuring compliance

35.18 *Every partner of a firm, and every director of a personal liability company, will be responsible for ensuring that the provisions of the Act and of those rules relating to trust accounts of the firm are complied with.”*

¹⁰⁸ LSSA AA, Record, p 308, para 11.4.21. Consolidated Rule 35.19 reads:

“Reporting Requirements

- 6.52.23 prescribing bank accounts and books that should be created once a practitioner opens a practice – Consolidated Rule 35.33¹⁰⁹;
- 6.52.24 the obligation imposed on every practitioner to report any dishonest or irregular conduct of another member in relation to the handling or accounting of trust money on the part of that other member – Consolidated Rule 35.35¹¹⁰; and

35.19 *A firm shall at its expense once in each calendar year or at such other times as the Council may require appoint an auditor to discharge the duties assigned to the auditor in terms of these rules; provided that:*

35.19.1 *the Council may refuse to recognise the appointment by a firm of an auditor of whom the Council on good cause does not approve;*

35.19.2 *the Council may at any time, in its discretion and at its expense, appoint an auditor or a suitably qualified inspector to discharge those duties;*

35.19.3 *on the written application of a firm the Council may authorise the firm to appoint a person who in the opinion of the Council is suitably qualified as an inspector to perform the functions of an auditor in terms of these rules, subject to such terms as the Council in its discretion may determine.”*

¹⁰⁹ LSSA AA, Record, p 308, para 11.4.22. Consolidated Rule 35.33 reads:

“Opening of practice

35.33 *An office opened by a firm, which for the first time opens a practice within the jurisdiction of the society shall be designated as a main office of the firm in that jurisdiction, and the firm shall ensure that:*

35.33.1 *banking accounts for the firm are opened in that jurisdiction;*

35.33.2 *the trust interest on those accounts is paid to the society;*

35.33.3 *a separate set of books is kept for the office;*

35.33.4 *an audit or inspector's report for that firm is submitted to the society.”*

¹¹⁰ LSSA AA, Record, p 308, para 11.4.23. Consolidated Rule 35.35 reads:

“Report of dishonest or irregular conduct

- 6.52.25 the formulation of carefully designed investment practice rules
– Consolidated Rules 36 and 37¹¹¹.

35.35 *Unless prevented by law from doing so every member is required to report to the society any dishonest or irregular conduct on the part of another member in relation to the handling or accounting for trust money on the part of that other member.*"

¹¹¹ LSSA AA, Record, p 308, para 11.4.24. Consolidated Rules 36 and 37 reads:

“Investment Practice Rules

Definitions

- 36.1 *A firm shall for the purpose of this rule be deemed to be carrying on the business of an investment practice if it invests funds on behalf of a client or clients and it controls or manages, whether directly or indirectly, such investments.*
- 36.2 *A client shall for the purpose of this rule include any person on whose behalf a firm invests funds or manages or controls investments, whether or not such person is otherwise a client of the firm concerned.*
- 36.3 *This rule shall not apply to:*
- 36.3.1 *investments made pursuant to section 78(2A) of the Act, which are not transactions contemplated in rule 36.1;*
- 36.3.2 *any investment of a temporary nature that is made in the course of and incidental to a conveyancing or other matter, including litigation, to which the investing client is a party;*
- 36.3.3 *investments made by members of firms in their capacity as executors, trustees, curators or in any similar capacity in so far as such investments are governed by any other statutory enactment or regulation;*
- 36.3.4 *any investment (other than referred to in rule 36.1) made with a bank in the name of that client alone and on the written instructions of that client.*

Mandates

- 36.4 *A firm carrying on an investment practice shall obtain an investment mandate from each client before or as soon as possible after investing funds for that client. The form of the investment mandate shall be substantially in the form of the Fifth Schedule to these rules, and shall contain a statement that the client acknowledges that monies so invested do not enjoy the protection of the Fund. Reports to clients*
- 36.5 *Every firm carrying on an investment practice shall report to its client in writing in terms of the client's investment mandate at least once every twelve*

months on income earned and capital movements during the period of the report. That report shall reflect all commission earned or other charges made by the member in carrying out the mandate.

Accounting records for investment practices

- 36.6 *Every firm carrying on an investment practice shall, in addition to its normal accounting records, also keep a separate trust account record and supporting documents in respect of each client, which record shall reflect:*
- 36.6.1 *payments of all monies entrusted to it from time to time by the client for investment pursuant to the mandate granted by the client in terms of rule 36.4;*
- 36.6.2 *payments of all monies invested by it on the client's behalf;*
- 36.6.3 *payments of all amounts, both capital and income, derived from investments and received for the client's account;*
- 36.6.4 *all payments made by it to the client in respect of the client's investments, and*
- 36.6.5 *all charges paid to the firm in respect of services rendered by it to the client pursuant to the client's mandate in terms of rule 36.4.*
- 36.7 *The accounting records and other supporting documents referred to in rule 36.6 shall be retained by the firm in such manner as to enable it to furnish each client upon request with all current details of the client's investments as recorded in rule 36.6. Such accounting records, other supporting documents and systems shall be maintained in sufficient detail and be cross-referenced to the trust account records retained in respect of each client, in such a way as to provide an adequate and appropriate audit trail which will enable a particular transaction to be identified at any time and traced through the accounting records to the client. The system shall collect the information in an orderly manner and the accounting records and other supporting documents shall be properly arranged, filed and indexed so that any particular record can be promptly accessed. Where accounting records are maintained by means other than on paper, adequate facilities shall exist for such records to be reproduced in printed form.*
- 36.8 *All accounting records required to be retained in terms of this rule 36.6 and copies of all reports dispatched in terms of rule 36.7 shall be retained for at least five years, unless there is statutory provision to the contrary, from the date of the last entry recorded in each particular book or other document of record and shall be held at the same office as the firm's other accounting records.*

Pooling of investments

- 36.9 *No firm may mix deposits in a pooled account or make other money market investments in any manner otherwise than by accepting funds as agent for each participating client and placing such funds with a bank in a savings account or on the money market on behalf of the client. The firm shall obtain from the bank an acknowledgement of receipt of each deposit or money market investment and such written receipts shall be retained by the firm as part of its accounting records.*

- 6.53 We obviously did not repeat each and every Consolidated Rule that helped shape the custom. Suffice to state that the statutory and institutional control over the conveyancing profession helped shape it and resulted in conveyancers attending to the entire transfer process and not only to the aspects expressly mentioned in the subject legislation.
- 6.54 All the above Consolidated Rules were promoted with consumer protection in mind. Their creation instilled public confidence and

36.10 *All monies received by a firm for investment with a bank, shall be paid to such bank as soon as reasonably possible after receipt by the firm, having regard to matters such as whether a payment by cheque has been cleared with the issuing bank.*

Restrictions applicable to certain investments

36.11 *A firm may not invest on behalf of a client: 36.11.1 in shares or debentures in any company which is not listed on a licensed securities exchange in the Republic, unless it is a subsidiary of a listed company; or 36.11.2 in loans in respect of which, in the firm's reasonable opinion at the time of making the investment, there is no adequate security, unless the client's specific written authorisation for each such investment has first been obtained.*

Investment of funds by members on behalf of persons, otherwise than in terms of rule 36

37.1 *A member shall not invest any funds on behalf of any person otherwise than in accordance with the written instructions of that person, detailing the manner and form of the investment.*

37.2 *The written instructions referred to in rule 37.1: 37.2.1 shall be obtained by the member concerned before the investment is made, save that, in cases of urgency, he or she may obtain them as soon as possible thereafter and shall forthwith upon making the investment request the person concerned in writing to furnish him or her with such instructions, detailing in that request the manner and form of the investment; 37.2.2 may be incorporated in a written contract to which the person giving the instructions is a party.*

37.3 *If the member does not receive the written instructions to be obtained by him or her in terms of rule 37.2 within one month after his or her written request he or she shall forthwith notify the secretary in writing and at the same time furnish him or her with copies of all relevant letters of request and responses, if any."*

trust in conveyancers and the conveyancing profession when attending to all financial aspects relating to any property transaction through his/her trust account¹¹².

6.55 The practice whereby all finances pertaining to a property transaction are channelled through the conveyancer's trust account holds the additional benefit that members of the public will be protected against theft of trust monies so deposited by virtue of the provisions of the Fund, by virtue of section 25 of the Attorneys Act¹¹³, in order to reimburse persons suffering any pecuniary loss as a result of theft by practitioners, their candidate attorneys or personnel of any money or other property entrusted to them¹¹⁴.

6.56 Consumer protection resulting from the practice of conveyancers being required to collect all monies payable in terms of a property transaction includes the practice where monies are paid into a conveyancer's trust account, that the risk involved by a seller parting with his/her property without receiving compensation or a purchaser parting with his/her money without receiving title is significantly reduced, since conveyancers controlling all the finances within a property transaction exercise control over both

¹¹² LSSA AA, Record, p 309, para 11.5

¹¹³ LSSA AA, Record, pp 309 – 310, para 11.7

¹¹⁴ LSSA AA, Record, p 310, para 11.8

transfer and release of monies from the trust account in order to ensure, as reasonably possible, that transfer and payment occur *pari passu*¹¹⁵.

- 6.57 We submit that the strict rules of conduct and accounting formulated by Law Societies directed at consumer protection contributed extensively to the development of the practice.
- 6.58 Another factor that has contributed to the establishment of the practice is the number of supporting documents a conveyancer has to submit with every transfer of ownership or real right in immovable property, without which such a transfer will not be possible. It therefore only makes sense that the conveyancer will secure all such supporting documentation and collect all monies due and payable in order to obtain such documents and consents.
- 6.59 Not all documents and processes that are lodged by a conveyancer in a Deeds Registry or processes followed within a Deeds Registry are exclusively defined or prescribed in the DRA and DRA Regulations. Some are found in CRC's, others in RCR's and even in RC's, all of which have played a major part in shaping conveyancing practice¹¹⁶.

¹¹⁵ LSSA AA, Record, p 303, para 11.1

¹¹⁶ LSSA AA, Record, p 286, para 10.33

6.60 A great number of supporting documents must accompany a “*typical*” transfer in the deeds office without which registration would not be possible. These documents do not contain preparation certificates. Yet, despite the absence of a preparation certificate, conveyancers have over centuries attended to the preparation and lodging of such documentation as part of a typical transfer. These include, *inter alia*:

6.60.1 transfer duty receipts¹¹⁷;

6.60.2 clearance certificates issued by local authorities¹¹⁸;

6.60.3 clearance certificates issued by homeowners’ associations¹¹⁹;
and

6.60.4 clearance certificates issued by body corporates for sectional title transfers.

6.61 We submit that another factor that helped shape the practice is to be found in the fact that transfer duty receipts had to be submitted

¹¹⁷ LSSA AA, Record, p 287, para 10.34.1.4

¹¹⁸ LSSA AA, Record, p 287, para 10.34.1.5

with each transfer from the naissance of the conveyancing profession, for instance¹²⁰:

- 6.61.1 in the Cape in terms of Acts 5 of 1884, 12 of 1908 and 11 of 1913 (Union);
 - 6.61.2 in Natal in terms of Laws 5 of 1860, 19 of 1883, 19 of 1884, 5 of 1890 and Acts 23 of 1907, 31 of 1908, 11 of 1909 and 11 of 1913 (Union);
 - 6.61.3 in the Orange Free State in terms of Ordinance 12 of 1906 and Acts 30 of 1909 and 11 of 1913 (Union); and
 - 6.61.4 in the Transvaal in terms of Proclamation 8 of 1902, Ordinance 14 of 1905 and Act 28 of 1919 (Union).
- 6.62 In 1918 the Old DRA, in section 44(1) and (2) prevented a Registrar from registering a deed or grant without the submission of a transfer duty receipt¹²¹.

¹¹⁹ LSSA AA, Record, pp 287 – 288, para 10.34.1.5

¹²⁰ *Land and Mining Title and Conveyancing in South Africa*, Nathan, Holmes & Craighead, Hortors Ltd, 1934, p 95

¹²¹ *Land and Mining Title and Conveyancing in South Africa*, Nathan, Holmes & Craighead, Hortors Limited, 1934, p 274

6.63 It was not until 1949 that the laws pertaining to the payment of transfer duty were consolidated into the TDA.

6.64 It made sense for only a conveyancer to secure the amount payable in respect of transfer duty from the purchaser and to make payment over to the relevant Receiver of Revenue, to obtain the transfer duty receipt and to submit it as part of the set of transfer documents.

6.65 In their commentary on the Old DRA, the learned authors Nathan, Holmes and Craighead¹²² indicated that in all cases that:

“In all cases the following documents should be lodged in connection with a transfer of land:-

1. *The title deeds of the property to be transferred.*
2. *The power of attorney authorising the conveyancer to pass transfer.*
3. *The deed of transfer.*
4. *The transfer duty receipt or certificate of exemption from transfer duty.*
5. *Receipts or certificates that all taxes, duties, fees and dues payable to the Union Government, or to any Provincial Administration, on the property to be transferred, have been paid.”*

¹²² *Mining Title and Conveyancing in South Africa*, Nathan, Holmes & Craighead, Johannesburg Hortors Ltd 1934, p 62

- 6.66 The authenticity of every transfer duty receipt is guaranteed by a certificate in the form of a declaration on transfer duty receipts, confirming that the document constitutes a true copy of the document drawn from the SARS e-Filing website¹²³.
- 6.67 The integrity of the system of issuing of transfer duty receipts are dependent upon conveyancers securing the signature of the purchaser and the seller on the transfer duty declarations and keeping such declarations in his/her office file for a period of 5 years¹²⁴.
- 6.68 The whole e-Duty system is, as far as the securing of transfer duty receipts are concerned, designed with only the conveyancer playing an active role therein¹²⁵ and no other party.
- 6.69 Why, one would ask, is the authentication of transfer duty receipts left in the hands of conveyancers? We submit that the reason is to be found in the fact that conveyancers have since the establishment of the conveyancing profession, been the persons responsible for submitting such receipts. And they are officers of the Court.

¹²³ LSSA AA, Record, p 292, para 10.46

¹²⁴ LSSA AA, Record, p 293, para 10.49.2

¹²⁵ LSSA AA, Record, pp 290 – 296, paras 10.40 – 10.54

6.70 The fact that section 44(1) of the Old DRA¹²⁶ required the submission of a transfer duty receipt before allowing the Registrar to pass transfer of an immovable property also resulted in the practice of conveyancers attending to the procurement and lodging thereof to have developed since 1918 and, before that, in terms of the provincial legislation discussed above.

6.71 The provisions of the Old DRA pertaining to the submission of transfer duty receipts were re-enacted in section 92(1) of the DRA and regulation 63(2) of the DRA Regulations¹²⁷.

6.72 The submission of rates clearance certificates likewise developed over many years. In terms of this procedure:

6.72.1 a conveyancer makes application to a municipality on behalf of a seller to obtain a clearance certificate¹²⁸,

6.72.2 the conveyancer dispatches an application form, together with the requisite administrative fee to the relevant municipality,

¹²⁶ LSSA AA, Record, p 297, para 10.56

¹²⁷ LSSA AA, Record, pp 296 – 297, para 10.55

¹²⁸ LSSA AA, Record, p 298, para 10.58.1

together with the form developed by the relevant municipality containing the purchaser's information¹²⁹;

6.72.3 the municipality calculates all the outstanding amounts and then issues a memorandum setting forth the amount of rates and taxes and other imposts necessary in order to issue a clearance certificate¹³⁰;

6.72.4 the conveyancer makes payment to a relevant municipality in the amount reflected in the memorandum¹³¹;

6.72.5 the relevant municipality issues a clearance certificate that gets collected by the conveyancer requesting same for submission at the deeds registry¹³²;

6.72.6 the conveyancer ultimately inserts the clearance certificate in the "cover" containing all the transfer documents and submits it as part of the set of documents for registration purposes¹³³;
and

6.72.7 upon registration, the conveyancer submits an application to inform the municipality about the registration and submits an

¹²⁹ LSSA AA, Record, p 298, para 10.58.2

¹³⁰ LSSA AA, Record, p 298, para 10.58.3

¹³¹ LSSA AA, Record, p 299, para 10.58.4

¹³² LSSA AA, Record, p 299, paras 10.58.5 – 10.59

¹³³ LSSA AA, Record, p 299, para 10.59

application for a refund of any pre-paid amounts on behalf of the seller to the relevant municipality¹³⁴.

6.73 In order to guarantee the authenticity of clearance certificates, the Chief Registrar of Deeds has issued CRC 8 of 2014, and compelled conveyancers to attach a certificate to the relevant electronically issued clearance certificate, thereby guaranteeing its authenticity¹³⁵.

6.74 The fact that section 44(1) of the Old DRA prescribed that no transfer would be possible without the submission of a rates clearance certificate, which obligation was re-enacted in section 92(1)¹³⁶ of the DRA and regulation 63(2) of the DRA Regulations¹³⁷. This is supported by national legislation in the form

¹³⁴ LSSA AA, Record, pp 299 – 300, para 10.60

¹³⁵ LSSA AA, Record, p 301, paras 10.63 – 10.64

¹³⁶ Section 93 of the DRA reads:

“92. Taxes and transfer duty to be paid before transfer of land.—

(1) *No deed of grant or transfer of land shall be registered unless accompanied by a receipt or certificate of a competent public revenue officer that the taxes, duties, fees and quitrent (if any) payable to the Government or any provincial administration on the property to be granted or transferred have been paid.*

(2) *If land or any real right in land has been settled upon or donated to an intended spouse in terms of an antenuptial contract, no transfer or cession of such land or right by the donor to any person other than the donee and no mortgage thereof by the donor shall be executed, attested or registered by the registrar unless the transfer duty (if any) payable on the settlement or donation has been paid.”*

¹³⁷ Section 63(2) of the DRA Regulations reads:

“(2) All deeds, bonds, diagrams, or documents necessary in connection with the examination, execution, or registration of any deed, bond, power or other document lodged in a Deeds Registry, including all receipts or certificates

of section 118 of the Systems Act and before that by various provincial ordinances¹³⁸. It has also enhanced the practice that conveyancers would, as part of a set of transfer documents, submit a rates clearance certificate and collect all monies payable to have same issued. This is despite the fact that such a document does not contain a preparation certificate or is not defined in the subject legislation.

6.75 We submit that this time-honoured procedure concerning the submission of clearance certificates by conveyancers has also hardened into law.

6.76 A number of additional supporting documents that are nowhere mentioned in the DRA and DRA Regulations but need to carry a preparation certificate such as: consents by reversionary right holders, consents by usufructuaries, consents by homeowners' associations, consents informed by the wording of certain title conditions and many more such documents. Since the

required by law to be produced, shall accompany such deed. A Registrar shall not execute or attest a deed or bond unless the title deeds and bonds thereon for cancellation, release or substitution accompany the deed of bond lodged for execution save where such production is specifically waived under the Act or these regulations."

¹³⁸ The various Provincial Ordinances that demanded the payment of rates and taxes include: In the Cape – section 96(1) of the Divisional Councils Ordinance 18 of 1976 and section 96(1) of the Municipal Ordinance 20 of 1974; In Natal – Ordinance 20 of 1941, section 175 of the Local Government Ordinance 25 of 1974; Water Services Ordinance, 27 of 1963; In the Free State – Local Government Ordinance 8 of 1962; Transvaal – section 50(1) of the Local Government Ordinance 17 of 1939 and the Peri-

aforementioned documents are “*required for registration purposes*” they must carry a preparation certificate by virtue of RCR 39 of 2014.

6.77 Another factor that has shaped the practice in terms of which conveyancers attend to all steps of the conveyancing process is that, since their inception Law Societies have prescribed all-inclusive fees for conveyancing work. By then the practice of conveyancers attending to each aspect of the conveyancing process had become so well-established, in fact so well-established that the Law Societies opted for an all-inclusive fee to “*cover*” all tasks performed during the transfer process. These steps had become so intertwined and indivisible from the transfer process that it made no sense at all to provide a fee structure for each individual step in the process.

6.78 In commenting on the fees prescribed by the CLS the Cape High Court in *Hoole*¹³⁹ made the following observation in terms of the prescribed fee:

“... The tariff provides for globular sums, the amounts whereof are calculated with reference to the purchase price of the property to be transferred, as fees for preparing the power of

Urban Areas Health Board Ordinance 20 of 1943. In this regard see *Conveyancing in South Africa*, Jones, Juta & Company Limited, Third Edition, pp 141 - 146

attorney to pass transfer and the transfer deed and it provides that these fees, except in extraordinary circumstances, are intended to include the ordinary and usual correspondence and attendances connected therewith. These fees are therefore intended to cover reserved work and certain unreserved work, and in terms of reg. 42(1) of the applicant's regulations, the conveyancer is obliged to charge the whole fee whether or not he does all the work himself."

7. **CONVEYANCING PRACTICE ESTABLISHED:**

7.1 It is trite that customs constantly observed within a community may harden into rules of law¹⁴⁰. Their force originates in both the conviction and tacit acceptance of the people concerned¹⁴¹.

7.2 Custom is still recognised as a formative or formal source of law in South Africa, albeit one of minor importance¹⁴².

7.3 In our law a custom will be found to constitute law if it complies with the following requirements:

7.3.1 It must have existed for a long time;

¹³⁹ Cape Law Society v Hoole 1975 (2) SA 323 (C), p 327

¹⁴⁰ Hamlen v Dunn & Co (1908) 29 NLR 731 at 734

¹⁴¹ LAWSA, Second Edition, Vol. 5, Part 2, para 389, p 332 and the authorities quoted there

¹⁴² LAWSA, Second Edition, Vol. 5, Part 2, para 389, p 332 and the authorities quoted there; *Van Breda v Jacobs* 1921 AD 330

7.3.2 It must have been uniformly observed by the community concerned;

7.3.3 It must be reasonable; and

7.3.4 It must be certain¹⁴³.

7.4 The requirements for the establishment of trade usage and that of a custom are the same¹⁴⁴. We submit that the requirements are the same to establish a practice¹⁴⁵.

7.5 The custom or trade usage under discussion *in casu* is the practice of a conveyancer attending to all the functions listed in Annexure “FA4A”, that has developed over centuries in this country.

7.6 We submit that the enquiry as to whether a party relying on a particular practice has established the requirements thereof is a factual one.

¹⁴³ *Van Breda v Jacobs* 1921 AD 330; *Catering Equipment Centre v Vriesland Hotel* 1967 (4) SA 336 (O) at 338

¹⁴⁴ *Catering Equipment Centre v Vriesland Hotel* 1967 (4) SA 336 (O) at 338; *Tropic Plastic & Packaging Industry v Standard Bank of SA Ltd* 1969 (4) SA 108 (D) at 119; *Barclays Bank International Ltd v Smallman* 1977 (1) SA 401 (R)

¹⁴⁵ The Court in *Serrurier and Another v Korzia and Another* 2010 (3) SA 166 (W) at 179, quoted with approval the submissions made that “*practice must be taken to have*

- 7.7 *In casu* the LSSA has affidavits filed by:
- 7.7.1 Johannes Cornelis Janse Van Rensburg, being a practising attorney and conveyancer and a councillor of the LSSA¹⁴⁶;
- 7.7.2 Anton Murray Theron, a conveyancer admitted as such in 1992 and practising conveyancing for the past 25 years¹⁴⁷;
- 7.7.3 Marthinus Johannes Ferreira, a conveyancer admitted as such in 1981 and practising conveyancing for 36 years¹⁴⁸.
- 7.8 In order to dispute the averments pertaining to the long established practice relied upon by the LSSA, Proxi's deponent Garreth Edwards Griffiths, a former attorney and conveyancer with only 2 years of conveyancing experience¹⁴⁹, denies the existence of the practice¹⁵⁰.
- 7.9 The ineluctable conclusion that the practice in terms of which a conveyancer attends to all the steps and functions as contained in Annexure "FA4A", as part of the property transfer process at an all-

hardened into law, through being established as the uniform custom, owing to the ...", thereby treating practice as a form of custom

¹⁴⁶ LSSA AA, Record, p 249, para 2.1

¹⁴⁷ LSSA AA, Record, p 645, paras 1 – 3

¹⁴⁸ LSSA AA, Record, p 248, paras 1 – 3

¹⁴⁹ Proxi FA, Record, p 25, para 2;

inclusive fee has long been established, lies in the fact that the Applicant deemed it necessary to have brought this application. Had this practice not been so well established, there would have been no need for Proxi to have brought this application.

7.10 On Proxi's own version the practice is well established. In this regard the application is replete with reference to the words "*routinely performed by*"¹⁵¹ and "*ordinarily performed by*"¹⁵², being indicative of the fact that it is accepted by Proxi to be the norm that conveyancers attend to all steps in the conveyancing process.

7.11 The practice contended for by the LSSA has in fact received judicial recognition¹⁵³.

8. **THE APPLICANT'S DENIAL OF THE EXISTENCE OF THE PRACTICE AND THE PLASCON EVANS RULE**

8.1 The *Plascon-Evans* rule applies irrespective of where the onus lies – the *Plascon-Evans* rule does not apply in reverse¹⁵⁴.

¹⁵⁰ Proxi RA, Record, p 915, para 124; page 919, para 139; page 943, para 224; page 877, para 12.3; page 880, para 12.13; page 880, para 12.14

¹⁵¹ Proxi FA, Record, p 28, para 7

¹⁵² Proxi FA, Record, p 29, para 10

¹⁵³ *Margalit v Standard Bank of SA Limited & Another* 2013 (2) SA 466 (SCA), para 23

¹⁵⁴ *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33 (C) at 40G-H; *BHT Water Treatment supra* at 55E-56A; *Ngqumba v Staatspresident*; *Damons N.O. v Staatspresident*; *Jooste v Staatspresident* 1988 (4) SA 224 (A) at 259E-263C

- 8.2 The case advanced by the LSSA in its answering affidavit is not made up of bald or uncreditworthy denials, does not raise fictitious disputes of fact and is not palpably implausible, farfetched or clearly untenable. Accordingly, the version advanced by the LSSA cannot be rejected on the papers.
- 8.3 The only possible basis upon which this Court can make a finding in favour of Proxi is if it rejects the version advanced by the LSSA pertaining to the existence of the practice that has hardened into law. This we respectfully submit the Court cannot to do.
- 8.4 Referring to the general rule set out in *Plascon-Evans, Botha JA in Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*¹⁵⁵ said the following:

“Op die algemene reël is daar wel uitsonderings, soos die weë waar die bewerings of ontkennings van die respondent so vergesog of klaarblyklik onhoudbaar is dat die verwerping daarvan bloot op die stukke geregverdig is. Vir my doeleindes is dit nie nodig om verder hierop uit te brei nie. Van belang is dat die algemene reël na my mening klaarblyklik ook van toepassing is op die verwere wat die respondent teen die applikant se eis opper in sy beantwoordende verklaring. As die respondent se bewerings ’n verweer openbaar, dan kan die applikant op die stukke nie slaag nie. Al sou hy sodanige bewerings in sy repliserende verklaring ontken, en al sou die bewyslas ten opsigte van die

¹⁵⁵ 1982 (2) SA 893 (A) at 923G – 924B

*verweer volgens die gewone toepaslike reëls op die respondent berus.*¹⁵⁶

- 8.5 If this Court finds that it cannot reject the LSSA's version on the papers and in the event of this Court finding that the facts alleged by the LSSA constitute a defence valid in law (irrespective of where the onus for such defence lies,) Proxi cannot succeed with its application.
- 8.6 An attempt to evaluate the competing versions of either side is both inadvisable and unnecessary in motion proceedings, as the issue is not about which version is more probable, but whether that of the LSSA is so farfetched and improbable that it can be rejected on the papers¹⁵⁷.
- 8.7 As the LSSA's version cannot be rejected and as the LSSA discloses a complete defence to the relief sought, the application should be dismissed with costs.

¹⁵⁶ *BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W) at 55F – 56A; *Walter McNaughton (Pty) Ltd v Schwartz* [2003] 1 All SA 770 (C) at 776H-I

¹⁵⁷ *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others* 2012 (5) SA 300 (SCA) at para [21]

8.8 It is also trite that a declarator should not be sought on motion if there is a real and *bona fide* dispute of fact¹⁵⁸. Proxi ignored this trite principle.

9. **THE RELEVANT PRINCIPLES PERTAINING TO STATUTORY INTERPRETATION**

9.1 A Court tasked with a matter concerning the interpretation of legislation will be guided by the following principles:

9.1.1 Interpretation is the process of attributing meaning¹⁵⁹ to the words actually used in a document, be it legislation or contract, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence;

9.1.2 Interpretation is a matter of law and not of fact, accordingly, interpretation is a matter for the Court and not for witnesses¹⁶⁰;

9.1.3 Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision

¹⁵⁸ Hattingsh v Ngake 1966 (1) SA 64 (O)

¹⁵⁹ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), para 18

appears; the apparent purpose to which it is directed and the material known to those responsible for its production¹⁶¹;

9.1.4 Where more than one meaning is possible, each possibility must be weighed in the light of all the factors referred to in the immediate preceding subparagraph¹⁶²;

9.1.5 The process is objective, not subjective¹⁶³;

9.1.6 A sensible meaning is to be preferred to one that leads to insensible or un-business-like results or undermines the apparent purpose of the document¹⁶⁴;

9.1.7 Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so, in regard to a statute or statutory instrument, is to cross the divide between interpretation and legislation¹⁶⁵;

¹⁶⁰ KPMG Chartered Accountants (SA) v Securefin Limited & Another 2009 (4) SA 399 (SCA), para 39

¹⁶¹ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), para 18

¹⁶² Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), para 18

¹⁶³ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), para 18

¹⁶⁴ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), para 18

¹⁶⁵ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), para 18

- 9.1.8 The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document¹⁶⁶;
- 9.1.9 Whilst the starting point remains the words used in the document itself, which are the only relevant medium through which the parties have expressed their intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being¹⁶⁷;
- 9.1.10 The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away¹⁶⁸;
- 9.1.11 Interpretation is no longer a process that occurs in stages, but is essentially one unitary exercise¹⁶⁹;

¹⁶⁶ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), para 18

¹⁶⁷ Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA), para 12

¹⁶⁸ Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA), para 12; FirstRand Bank Limited v Land and Agricultural Development Bank of South Africa 2015 (1) SA 38 (SCA), para 27

- 9.1.12 To the extent that evidence may be admissible to contextualise the document in establishing its factual matrix (since context is everything), one must use it as conservatively as possible¹⁷⁰.
- 9.2 The above approach to interpretation was recently reconfirmed by the SCA in *B Braun Medical v Ambasaam*¹⁷¹.
- 9.3 It is trite that our Courts are loathe to alter any well-established practice. For this reason we submit the subject legislation ought to be interpreted to include the above longstanding practice.
- 9.4 When interpreting any legislation, Courts will be well aware of the presumption against altering of the common law and that any statute should be construed in conformity with the common law, except where there is a clear intention to depart therefrom¹⁷².
- 9.5 It is an established fact that the conveyancing process and profession are regulated by statute, to some extent by Deeds Registries and Registrars of Deeds and also by practice. It therefore seems clear that unless the subject legislation specifically

¹⁶⁹ Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA), para 12

¹⁷⁰ KPMG Chartered Accountants (SA) v Securefin Limited & Another 2009 (4) SA 399 (SCA), para 38

¹⁷¹ 2015 (3) SA 22 (SCA), paras 14 - 15

¹⁷² East London Municipality v Tomson 1944 AD 56; Sheshe v Vereeniging Municipality 1951 (3) SA (A) at 669

changes an established practice, the existing practice should inform the interpretation of the subject legislation.

9.6 Surrounding and background circumstances are therefore of considerable importance during the interpretation process. The LSSA submits that conveyancing practice in this country has evolved over centuries and is not necessarily codified in the provisions of the Attorneys Act, the LPA or the DRA and its Regulations. In fact, it goes far wider. It is against this background that the subject legislation is to be interpreted.

10. **INTERPRETATION OF THE DRA AND THE DRA REGULATIONS**

10.1 Under this caption we deal only with the interpretation of sections 15 and 15A of the DRA and Regulations 43(1), 44(1) and 44A of the DRA.

10.2 As far as the DRA and DRA Regulations are concerned, Proxi seeks an order to the effect that its model would not contravene or otherwise fall foul of the aforesaid provisions contained in the DRA and DRA Regulations¹⁷³.

¹⁷³ Proxi's notice of motion, Record, p 2, para 1

- 10.3 The LSSA submits that the relevant provisions of the DRA and the DRA Regulations, in terms of which Proxi's declarator is sought, were never enacted for the purpose of distinguishing between reserved and non-reserved work.

Section 15 of the DRA and regulations 43(1) and 44(1) of the DRA Regulations

- 10.4 Section 15 of the DRA was preceded by section 55 of the Old DRA, which at the time read:

*“55. Save as is otherwise provided in any other law, no deed of transfer, or any certificate of title issued under this Act, or any mortgage bond shall be registered in any deeds registry unless it has been prepared by a conveyancer entitled to practise in the prescribed limits of that deeds registry.”*¹⁷⁴

- 10.5 The Regulations promulgated under the Old DRA provided the following:

“37(9) Every deed of transfer, certificate of title or mortgage bond shall bear an endorsement signed by the conveyancer who prepares such deed, certificate or bond, that it was prepared by him, and no such deed,

¹⁷⁴ LSSA AA, Record, p 313, para 12.3

certificate or bond shall be accepted for execution or registration which does not bear such endorsement.”¹⁷⁵

- 10.6 On 1 September 1937, when the DRA came into operation, section 15 read as follows:

“15. Preparation of deeds by conveyancer. –

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 entitled to practise in the prescribed limits of that registry.”¹⁷⁶

- 10.7 Section 15 of the DRA was later amended by Act 170 of 1993 removing the requirement that a conveyancer had to practise in a province in which a particular registry was situated. Section 15 of the DRA thereafter read as follows:

“15. Preparation of deeds by conveyancer. –

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.”¹⁷⁷

¹⁷⁵ Regulation 37(8) of the Deeds Regulations Government Notice Number 1630 of 1922 reproduced in *Land and Mining Title and Conveyancing in South Africa*, Nathan, Holmes and Craighead, Hortors, page 294

¹⁷⁶ LSSA AA, Record, p 313, para 12.4

¹⁷⁷ LSSA AA, Record, pp 313 – 314, para 12.5

10.8 Deeds Registries are mainly kept for purposes of recording the transfer of ownership and real rights in immovable property. All other functions being performed within a Deeds Registry are ancillary to the main purpose of recordal of and record keeping.

10.9 The principal instruments by which the transfer of ownership or real rights in immovable property are achieved, is by way of the four documents expressly mentioned in section 15 of the DRA, namely
a:

10.9.1 deed of transfer;

10.9.2 mortgage bond;

10.9.3 certificate of title; and

10.9.4 certificate of registration.

10.10 In the first Regulations promulgated after the enactment of the DRA, i.e. Regulation GN1265 of 29 July 1938, regulation 44 thereof determined that powers of attorney, bond registrations, bondholder consents and any other consents of an owner of immovable property or a real right had to be prepared by a

practising attorney, notary or conveyancer who had to sign the preparation clause¹⁷⁸.

10.11 Regulation 43 of the DRA Regulations, introduced in 1963¹⁷⁹, contained a description of the documents that are intended to carry a preparation certificate. In addition thereto, it also prescribes the format a preparation certificate has to contain. Regulation 43 of the DRA Regulations currently reads as follows:

“43. (1) *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 full name and surname in block letters)

(2) *A conveyancer who prepares a deed of transfer, certificate, deed of cession or mortgage bond referred to in subregulation (1) shall initial personally all alterations or interlineations in such deed of transfer, certificate, deed of cession or mortgage bond and also every page thereof not requiring his signature if such deed of transfer, certificate, deed of cession or mortgage bond is written on separate sheets, and no such deed of transfer, certificate, deed of cession or mortgage bond shall be accepted for execution or registration if it does not bear such certificate and is not so initialled: Provided, however, that in the case of a deed of transfer or mortgage bond where an alteration*

¹⁷⁸ *The Law and Practise of Deeds Registration*, Newall, Butterworths, page 123
¹⁷⁹ GNR557 published in Government Gazette Number 485 of 26 April 1963

or interlineation does not, in the opinion of the Registrar, require initialling by the conveyancer who prepared such deed of transfer or mortgage bond, such alteration or interlineation shall be initialled by the conveyancer executing such deed of transfer or mortgage bond.

- (3) *The provisions of subregulations (1) and (2), and regulation 44 shall not apply in respect of the first issue of a certificate of title of a lot in terms of the Black Communities Development Act, 1984 (Act 4 of 1984)."*

10.12 Regulation 43(1) of the DRA thus requires that a preparation certificate must be signed by a conveyancer on deeds of transfer, certificates conferring title to immovable property as well as deeds of cession referred to in section 32 of the DRA and on mortgage bonds.

10.13 Regulation 44 of the DRA Regulations was also introduced in 1963. It currently reads as follows:

- “44. (1)** *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:*

Prepared by me

*ATTORNEY/NOTARY/CONVEYANCER
(Use whichever is applicable)*

(State full name and surname in block letters)

- (2) Subject to the provisions of subregulation (3), any material alteration or interlineation in any power of attorney, application, consent or agreement of partition referred to in subregulation (1) shall be initialled by the attorney, notary or conveyancer who prepared such document.*
- (3) Notwithstanding the provisions of subregulations (1) and (2), a Registrar may in his discretion waive compliance with this regulation in respect of a power of attorney, application, consent or agreement of partition executed outside the Republic or in respect of a power of attorney, application, consent or agreement of partition not provided for by the Act or the Regulations.*
- (4) The provisions of subregulations (1) and (2) shall not prevent any attorney, notary or conveyancer in the employ of the State from preparing, in the course of his employment, any document therein mentioned which is required for the performance of any function to be performed in the department in which he is employed.*
- (5) When a certificate referred to in subregulation (1) is signed by an attorney or notary, the fact that the signatory is a practising attorney or notary shall be confirmed by a practising conveyancer, who shall countersign the certificate by making and signing the following certificate thereon:*

Countersigned by me

CONVEYANCER

(State full name and surname in block letters)”

10.14 Regulation 44 of the DRA Regulations thus provides for:

10.14.1 any power of attorney, application or consent required for the performance of any act of registration in the Deeds Registry and any agreement of participation referred to in section 26 of the DRA, to be prepared by a practising attorney, notary or conveyancer who needs to sign a preparation certificate in the format as suggested in Regulation 44(1) of the DRA;

10.14.2 when a preparation certificate is signed by an attorney or notary, the fact that the signatory is a practising attorney or notary shall be confirmed by a certificate attached to the very same document, signed by a conveyancer, confirming that the person who signed the preparation certificate is in fact a practising attorney or notary.

10.15 Since Regulations 43 and 44(1) of the DRA Regulations only introduced the format a preparation certificate has to take and listed the documents to which such a certificate should be attached, it thus became necessary for the legislature to define the extent to which a conveyancer accepts responsibility for the

accuracy of those facts mentioned in documents bearing a preparation certificate. This was done by the promulgation of Regulation 44A of the DRA Regulations.

10.16 The legislature of the Old DRA, the DRA and the DRA Regulations, was well aware of the fact that no transfer of ownership or real right in immovable property recorded in one of the four principal documents expressly referred to in section 15 of the DRA may occur without the submission of certain supporting documents.

10.17 The legislature of the DRA was also aware of the existing practice that all of the four principal documents are always contained in a “cover” that gets lodged in the Deeds Registry, which “cover” would contain a number of supporting documents depending on the nature of the transaction.

10.18 The legislature was also aware of the fact that the Old DRA retained the provisions of the earlier legislation, compelling the submission of rates clearance certificates and transfer duty receipts as part of the documentation submitted for registration purposes.

10.19 We submit that there existed no reason for the legislature, in section 15 of the DRA, to have extended the number of documents

mentioned in section 15 of the DRA by including all documents forming part of the set of documents that gets lodged at the Deeds Registry. By then (i.e 1937) the practice had long been established that transfer duty receipts and clearance certificates would be prepared and submitted by a conveyancer attending to a particular transfer of property.

10.20 Since it is impossible to legislate the exact number or nature of supporting documents that must be submitted with a particular transfer of ownership or real right in immovable property, the legislature only named the four principal documents by which such rights get transferred. There existed no need for the legislature to have also included supporting documents in section 15 of the DRA.

10.21 In order to retain flexibility in the nature and number of supporting documents that need to be submitted, the legislature would in any event not have attempted to, under section 15 of the DRA, demanded that all such documents be specifically referred to in section 15 of the DRA.

10.22 It is submitted that for this reason the legislature only intended, in section 15 of the DRA, to name the four principal documents by which ownership or rights in immovable property get transferred.

The legislature, in drafting section 15 of the DRA, most certainly never intended that documents not mentioned therein may be prepared by persons other than conveyancers (except possibly by the owner of a particular property himself/herself).

10.23 It is submitted that implied in the reference to the four principal documents referred to in section 15 of the DRA are all supporting documents forming part of the set of documents that gets submitted to the Registrar of Deeds¹⁸⁰. This is so because section 92(1) of the DRA and regulation 63(2) of the DRA Regulations prevent the Registrar of Deeds from effecting a transfer of ownership without proof of payment of transfer duties and municipal rates and taxes.

10.24 We submit that the legislature never intended for section 15 of the DRA to reserve work for conveyancers.

Section 15A of the DRA and regulation 44A of the DRA Regulations

10.25 The LSSA submits that section 15A of the DRA and regulation 44A of the DRA Regulations were never enacted with the purpose of preserving work for conveyancers. The intention of the legislature

¹⁸⁰ LSSA AA, Record, p 315, para 12.8

thereof, according to the LSSA, was to remove the Deeds Registries' and Registrars' responsibility for certain aspects and to pass it on to conveyancers who had to, under a preparation certificate, certify the correctness of certain facts¹⁸¹.

10.26 Prior to the introduction of section 15A into the DRA, Deeds Registries kept the constitutions of legal persons in a so-called "*certificate book registers*"¹⁸². Prior to registering a transfer of property or mortgage bond Examiners in the Deeds Office would consult the relevant constitution of the particular legal entity so filed in order to establish whether the authority to either dispose of land or to grant a mortgage bond was contained in the constitution of the relevant legal person.

10.27 In the first Regulations made after the commencement of the DRA, namely Regulation GN1265 of 29 July 1938, regulation 58 thereof provided as follows:

"58. In the event of any deed of transfer or any mortgage bond either by or in favour of any bank, company, church, association, society, or other body or institution, or of any trustees or other officers thereof, being lodged for execution or registration in a Deeds Registry, or of any consent to the performance of any act on behalf of an one or other of them being lodged in such Registry, there shall be produced for record

¹⁸¹ LSSA AA, Record, p 322, para 12.22

¹⁸² LSSA AA, Record, pp 317 – 318, para 12.12

*purposes a certified copy of or a relevant extract from the deed of constitution or regulations of such body or other institution and of such further evidence as may be necessary to prove that the transaction is within the scope of its constitution or regulations.”*¹⁸³

10.28 Regulation 58 of the DRA Regulations promulgated on 29 July 1938, thus determined that any consent required by a bank, company, a church, an association or other institution for purposes of a deed of transfer or mortgage bond necessitated the submission of a constitution of such entity to prove that the transaction was duly authorised. Such constitutions had to be submitted as part of the transfer or bond documents and had to be separately filed and indexed with the Deeds Registry under a separate (CB) number allocated to the specific document¹⁸⁴.

10.29 Registrars of Deeds at the time therefore had to be convinced about the capacity of legal entities and other associations to acquire property or sell property or to grant or cancel mortgage bonds, since section 3(1)(b) of the DRA required, as it still does, of a Registrar to examine all deeds or other documents submitted for execution or registration¹⁸⁵.

¹⁸³ LSSA AA, Record, p 317, para 12.11

¹⁸⁴ LSSA AA, Record, pp 317 – 318, para 12.12

¹⁸⁵ LSSA AA, Record, p 318, para 12.13

10.30 Registrars of Deeds soon experienced a lack of storage space as a result of the extreme volume of documents contained in their CB registers¹⁸⁶. They further experienced an excessive workload in having to trawl through piles of paper in order to establish whether a particular legal entity or other association provided for in regulation 58 of the DRA Regulations had the necessary authority to conclude a particular transaction that had to be recorded in the Deeds Registry. Registrars of Deeds then engaged in a campaign to shift the obligation of keeping such constitutions to conveyancers¹⁸⁷.

10.31 Initially the DRA did not contain a section 15A. It was inserted only into the DRA by Act 27 of 1982. Section 15A(2) later got amended by Act 14 of 1993. Section 15A of the DRA currently reads as follows:

“15A. Proof of certain facts in connection with deeds and documents by means of certain certificates. –

- (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*

¹⁸⁶ LSSA AA, Record, p 318, para 12.14

¹⁸⁷ LSSA AA, Record, pp 318 – 319, para 12.14

with the registration or filing thereof, which are prescribed by regulation.

(2) *The provisions of subsection (1) shall apply mutatis mutandis to any person other than a conveyancer –*

(a) *who is prescribed by regulation; or*

(b) *who is authorized by any other law to prepare a deed or other document for registration or filing in a deeds registry,*

and who has in accordance with the regulations prepared a deed or other document for registration or filing in a deeds registry.

(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) or (2) has been signed, have for the purposes of such examination been conclusively proved: Provided that the foregoing provisions of this subsection shall not derogate from the obligation of a registrar to give effect to any order of court or any other notification recorded in the deeds registry in terms of this Act or any other legal provision, and which affects the registration or filing of such deed or other document.”*

10.32 The enactment of section 15A in the DRA, absolved Registrars of Deeds from verifying whether corporate bodies had the necessary authority to conduct actions within the Deeds Registry, such as disposals or mortgaging. Hence, any Registrar of Deed would, in terms of the provisions of section 15A(3) of the DRA, accept the

accuracy of such facts mentioned in deeds or documents, to the extent prescribed by regulation.

10.33 Due to the scheme that was introduced by the provisions of section 15A of the DRA, it would require:

10.33.1 for certain documents, as would be prescribed by regulation, to bear a preparation certificate; and

10.33.2 to determine the extent to which a person signing the preparation certificate accepts responsibility for the accuracy of the facts mentioned therein, also to be prescribed by regulation¹⁸⁸.

10.34 Regulation 44A of the DRA Regulations was then introduced in 1983. It now reads as follows:

“44A. *The person signing the preparation certificates prescribed by regulations 43 and 44 (1) of the Regulations 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:*

¹⁸⁸ LSSA AA, Record, p 323, para 12.24

- (a) *That all copies of the deeds or documents intended for execution and/or registration are identical at the date of lodgement;*
- (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) *the necessary authority has been obtained for the signing of such document in a representative capacity on behalf of a natural person, 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, company, close corporation, society, trust, or other body of persons, or any institution (whether created by statute, including a foreign statute or otherwise) 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.*
- (dd) *the person, entity, body of persons, whether created by statute or otherwise, is contractually capable of concluding the transaction disclosed in the deed or document lodged for registration; and”*

10.35 From the express wording of section 15A of the DRA and regulation 44A of the DRA Regulations, it is clear that the acceptance of responsibility for the correctness of a listed number of facts by the conveyancer signing the preparation certificate on certain prescribed documents, was the aim sought to be achieved by the aforesaid legislative dictates. It was never intended to create a distinction between reserved and non-reserved work or to reserve work for conveyancers. Its only purpose was to have required a conveyancer to be responsible and accountable for the correctness of a list of facts mentioned in Regulation 44A of the DRA Regulations.

11. **INTERPRETATION ON SECTION 83(8)(a)(i) OF THE ATTORNEYS ACT AND 33(3) OF LPA**

11.1 It is submitted that the legislature of section 83(8)(a)(i) of the Attorneys Act was well aware of the existence of the practice that conveyancers attended to all aspects of the conveyancing process. There was therefore no need to repeat or to attempt to describe the content of the practice in section 83(8)(a)(i) of the Attorneys Act.

11.2 The relevant provisions of section 83 of the Attorneys Act read as follows:

“83. Offences

(1) - (7) ...

(8)

(a) *Any person, except a practising practitioner, whom for or in expectation of any fee, gain or reward, direct or indirect, to himself or herself 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 leases for periods not exceeding five years, conditions of sale or brokers' notes;*

(ii) *any will or other testamentary writing;*

(iii) *any memorandum or articles of association or prospectus of any company;*

- (iv) *any agreement, deed or writing relating to the creation or dissolution of any partnership or any variation of the terms thereof;*
- (v) *any instrument or document relating to or required or intended for use in action, suit or other proceeding in a court of civil jurisdiction within the Republic,*

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.

(b) *The expression 'fee, gain or reward, direct or indirect' referred to in paragraph (a) shall not apply to -*

- (i) *the salary or emoluments of an employee if no fee, gain or reward is sought or obtained by his or her employer from the person on whose behalf the document was drawn or prepared; or*
- (ii) *any commission or other remuneration to which any person is or may be entitled either by law or otherwise for services rendered in his or her capacity as executor, administrator, trustee, curator, tutor or guardian by virtue of his or her appointment as such by any court of law or under the provisions of any will or other testamentary writing, or as agent for any person holding such appointment.*

(9) - (11) ...

(12) *The provisions of subsection (8) shall not apply to -*

(a) *any person in the employment of a practising practitioner drawing or preparing or causing to be*

drawn or prepare any of the documents concerned in the course of his or her employment and on behalf of his or her employer;

(b) - (g) ...

(13) - (15) ...”

11.3 The provisions of section 33(3) of the LPA determine as follows:

“33. Authority to render legal services

(1) Subject to any other law no person other than a legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward –

(a) appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear; or

(b) draw up or execute any instrument or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.

(2) No person other than a legal practitioner may hold himself or herself out as a legal practitioner or make any representations or use any type of description indicating or implying that he or she is a legal practitioner.

(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.

(4) ...”

- 11.4 We submit that section 33(3) of the LPA preserves the common law position advanced by the LSSA, since the practice, by which conveyancers attend to all aspects of the conveyancing process, has hardened into law and no person, such as Proxi, may do the work conveyancers traditionally do in expectation of any fee, commission, gain or reward, directly or indirectly.
- 11.5 It is not necessary for a legal practitioner to perform reserved work before he can be said to practice the profession of law¹⁸⁹. If he holds himself out to the public as a legal practitioner performing other work not reserved to, but commonly performed by, a practicing legal practitioner, such as the drawing and preparation of wills, contracts of sale, leases, or the memorandum or articles of association of a company, he is practicing the profession of law¹⁹⁰.
- 11.6 We respectfully submit that the same goes for the conveyancing profession. A conveyancer need not perform reserved conveyancing work before he/she can be said to practice as a conveyancer. A conveyancer does what a conveyancer has always done: He/she practises conveyancing, being a practice that evolved over centuries in this country. The practice is not

¹⁸⁹ Law Society, Zimbabwe v Lake 1988 (4) SA 532 (ZS) at p 534

¹⁹⁰ Law Society, Zimbabwe v Lake 1988 (4) SA 532 (ZS) at p 534

exhaustively defined by section 83(8)(a)(i) of the Attorneys Act or section 33(3) of the LPA or, for that matter, any other statutory provision.

12. **LSSA'S COUNTER-APPLICATION**

12.1 The LSSA launched a counter-application, seeking an order that performance of the tasks listed in Annexure "FA4B" would be unlawful for contravening:

12.1.1 paragraph 7 of the Code of Conduct for Estate Agents¹⁹¹ published by the Estate Agencies Affairs Board under section 8 of the EAAA;

12.1.2 rule 43.1¹⁹² of the Consolidated Rules for the Attorneys' Profession, published in accordance with section 74(4) of the Attorneys Act;

¹⁹¹ Paragraph 7 of the Code of Conduct for Estate Agents reads:

"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 –

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

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

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

12.1.3 rule 48 of the Consolidated Rules¹⁹³;

12.1.4 rule 49.8 of the Consolidated Rules¹⁹⁴;

12.1.5 rule 49.17 of the Consolidated Rules¹⁹⁵;

¹⁹² Consolidated Rule 43.1 reads:

“Touting

[THE TITLE OF TOUTING APPLIES TO LSNP, KZNS AND FSLs ONLY WITH RESPECT TO RULES 43.1, 43.2 AND 43.3]

Sharing of Fees

[THE TITLE OF SHARING OR FEES APPLIES TO CLS ONLY WITH RESPECT TO RULES 43.1, 43.2 AND 43.3]

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

¹⁹³ Consolidated Rule 48 reads:

“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 if a separate written instruction is given to the member prior to the signature of the Deed of Alienation or to an agreement prepared by the member on instruction from the client.”*

¹⁹⁴ Consolidated Rule 49.8 reads:

“Specific provisions relating to conduct

49. *A member shall:*

49.8 *not act for or in association with any organisation or person, not being a practising practitioner, whose business or part of whose business it is to solicit instructions for the practitioner;”*

¹⁹⁵ Rule 49.17 reads:

“Specific provisions relating to conduct

- 12.1.6 the contractual freedom and autonomy a seller enjoys under our common law to appoint his/her own conveyancer¹⁹⁶;
- 12.1.7 section 11(1) of the CPA¹⁹⁷;
- 12.1.8 section 4(1)(a) of the Competition Act¹⁹⁸; and

49. A member shall:

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, or solicits for, professional work in an improper or unprofessional manner or by unfair means, all of which for purposes of this rule will include, but not be limited to:*

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 purposes of this 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."

¹⁹⁶ LSSA counter-application, prayer 1.6, Record, pp 226

¹⁹⁷ Section 11(1) of the CPA reads:

"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 preemptively block,*

any approach or communication to that person, if the approach or communication is primarily for the purpose of direct marketing."

- 12.1.9 section 4(1)(b) of the Competition Act.
- 12.2 We submit that the unlawfulness of Proxi's model (for contravening all or some of the provisions mentioned above) is a critical factor to be considered by the Honourable Court when exercising its declaratory jurisdiction in terms of section 12(1)(c) of the Superior Courts Act¹⁹⁹.
- 12.3 We intend showing hereunder how Proxi's model contravenes certain, if not all, of the above provisions.

Paragraph 7 of the Code of Conduct for Estate Agents

¹⁹⁸ Section 4(1) of the Competition Act reads:

“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.”*

¹⁹⁹ Durban City Council v Association of Building Societies 1942 AD 27 at 32

- 12.4 Proxi's model is dependent upon estate agents convincing prospective purchasers and sellers to make use of the Proxi model and of its conveyancing attorney. In return the estate agency to which a particular agent belongs will receive an introductory commission for having sold Proxi's model to consumers.
- 12.5 When regard is had to paragraph 7 of the Code of Conduct for Estate Agents it determines that, as far as the services of any particular attorney or conveyancer is concerned, an estate agent is barred from soliciting, encouraging, persuading or influencing consumers to utilise or refrain from utilising the services of any particular attorney or conveyancer, without good and sufficient cause.
- 12.6 We respectfully submit that there can be no doubt that there exists no good and sufficient cause for any estate agent diverting conveyancing work away from any conveyancer that would have, had it not been for Proxi's model, received an instruction to attend to the transfer of a particular immovable property.
- 12.7 We submit that without Proxi having disclosed its fee structure it would be impossible for an estate agent to convince consumers

that it would be any cheaper to make use of Proxi's model instead of the purchaser paying the all-inclusive conveyancing fee recommended from time to time by the LSSA²⁰⁰.

12.8 We furthermore submit that the tried and tested practice in terms of which all monies pertaining to a property transfer get deposited into an attorney's trust account with the full protection afforded by the Fund, overseen by the strict rules of conduct and accounting applicable to the conveyancing profession, can never constitute good or sufficient cause for redirecting the conveyancing work to Proxi and its panel of conveyancers.

12.9 We therefore respectfully submit that the Proxi model offends the provisions of paragraph 7 of the Code of Conduct for Estate Agents and is therefore unlawful.

Rule 43.1 of the Consolidated Rules

12.10 Rule 43.1 of the Consolidated Rules expressly prohibits any member of the conveyancing profession from entering into any express or tacit agreement that will result in the practitioner securing professional work solicited by a person who is not a practitioner for reward, whether in money or in kind.

²⁰⁰ The current conveyancing fees guidelines are contained in annexure "A20", Record,

- 12.11 The question that begs to be asked here is why Proxi would go to the trouble of designing its model and then appoint only a limited number of conveyancers (one or more in the words of Proxi) to do all the conveyancing work that may follow from the implementation of the model if there is no benefit to be derived in money or in kind for Proxi.
- 12.12 One would be completely naïve to think that Proxi would offer the opportunity to a limited number of conveyancers attending to all its conveyancing work without Proxi demanding some reward from those practitioners making it to Proxi's panel of conveyancers.
- 12.13 Such conduct has in the past resulted in the suspension of conveyancers from practise of a participating practitioner²⁰¹ and even may lead to a possible striking from the roll²⁰².
- 12.14 Watermeyer J had no difficulty in finding in Hoole²⁰³ that an arrangement in terms of which an estate agency was to be appointed agent to arrange for transfer, and that the transfer should be registered by its attorney, amounts to a solicitation of

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²⁰¹ Law Society, Cape of Good Hope v Berrangé 2005 (5) SA 160 (C) at 173E - G

²⁰² Law Society, Cape of Good Hope v Berrangé 2005 (5) SA 160 (C) at 164E - G

²⁰³ Cape Law Society v Hoole 1975 (2) SA 323 (C) at p 328

professional business for the agent's attorney, whoever he may be.

The Court summarised it as follows:

*"I think there can be little doubt that the direct or indirect results of making such an agreement would be secure for respondent the benefit of professional business."*²⁰⁴

12.15 The LSSA therefore submits that participation by practitioners in the scheme devised by Proxi by concluding the PMMA with Proxi, will therefore be unlawful.

Rule 48 of the Consolidated Rules

12.16 This rule prevents a member from acting in terms of a deed of sale in which the member's name has been printed or duplicated as transferring attorney.

12.17 It is submitted that Proxi's model is dependent upon the naming of the conveyancer who has made it to Proxi's panel of conveyancers in the deed of sale, whose name will be printed or duplicated as transferring attorney.

²⁰⁴ Cape Law Society v Hoole 1975 (2) SA 323 (C) at p 328

12.18 The LSSA respectfully submits that such conduct is unlawful.

Rule 49.8 of the Consolidated Rules

12.19 This rule prevents a member from acting in association with an organisation not being a practising practitioner whose business it is to solicit instructions for a practitioner.

12.20 The LSSA submits that there will clearly be an association established between Proxi and its selected few conveyancers otherwise the model would simply not work in practice. The purpose of such an association would clearly be to solicit instructions for the practitioner as well as to obtain the administrative work canvassed for by Proxi.

12.21 The LSSA submits that the model is therefore unlawful.

Rule 49.17 of the Consolidated Rules

12.22 This rule is similar to rule 43.1 of the Consolidated Rules and is directed at preventing a practitioner from touting for work by securing professional work against payment of money or the offering of any financial reward or other inducement in return for

referral of professional work or participating in an arrangement calculated at the securing of professional work solicited by a third party.

12.23 We refer to our comments with regards to rule 43.1 above, which apply *mutatis mutandis* to this rule.

12.24 The LSSA submits that by participating in Proxi's scheme it would amount to unlawful conduct for contravening this particular rule.

Freedom and autonomy of nominating a conveyancer

12.25 It is trite that a seller of immovable property has the right to nominate the conveyancer attending to the transfer of ownership²⁰⁵.

12.26 This principle originates from the obligation being imposed upon a seller to deliver the thing sold. Since the seller of an immovable property cannot deliver (transfer) the immovable property sold but needs a conveyancer to do so, the seller retains the right to nominate his/her agent to attend to that obligation.

²⁰⁵ Margalit v Standard Bank of SA Limited & Another 2013 (2) SA 466 (SC)A, para 3

12.27 Under Proxi's model some pressure would be exerted upon a seller to agree that Proxi's conveyancer attends to his/her transfer simply because it will allegedly, be cheaper for the purchaser to make use of Proxi's model than to go the traditional route of making use of the seller's conveyancer at an all-inclusive fee.

12.28 There is no doubt that the model is therefore directed at removing the seller's choice of appointing his/her own conveyancer.

Section 11(1) of the CPA

12.29 The LSSA submits that no seller approached by an estate agent selling the Proxi model will insist on making use of his/her traditional conveyancer if that seller stands the chance of losing a prospective sale by insisting that his/her traditional conveyancer attends to the transfer, as opposed to Proxi's conveyancer at a substantial discount.

12.30 Such a practice would therefore render the seller's right to restrict unwanted direct marketing nugatory, therefore offending the provisions of section 11(1) of the CPA.

12.31 The LSSA therefore submits that the model would also be unlawful for this reason.

Section 4(1)(a) of the Competition Act

12.32 In view of Proxi's omission to provide any detail on why any possible technological or efficiency advantage of its model would outweigh the preventing or lessening of competition in the conveyancing market, there ought to be no doubt that the model contravenes the provisions of section 4(1)(a) of the Competition Act.

12.33 There can further be no doubt that only a limited number of conveyancers will be permitted onto Proxi's panel, thereby substantially lessening or preventing competition in the conveyancing market.

12.34 The LSSA submits that such conduct is unlawful.

Section 4(1)(b) of the Competition Act

12.35 The PMMA concluded between Proxi and any participating conveyancer would no doubt have the effect of directly or indirectly fixing a price or a trading condition.

12.36 Proxi's whole approach is that it will negotiate a maximum fee with a participating conveyancer for attending only to what it defines as "*reserved work*", which is nothing but price-fixing.

12.37 We submit that the model offends section 4(1)(b) of the Competition Act and is therefore unlawful.

13. **CONCLUSION AND RELIEF SOUGHT**

13.1 We submit that the practice in terms of which a conveyancer attends to all aspects of the conveyancing process has hardened into law as a result of which the relief sought by the Applicant is not dismissive of the question whether Proxi's model offends the *capita selecta* of the subject legislation.

13.2 We furthermore submit that the model offends various statutory provisions as well as the Consolidated Rules rendering it unlawful and as such a factor that the Court ought to take into account when exercising its declaratory jurisdiction.

13.3 We submit that the application ought to be dismissed with costs of two counsel.

13.4 In addition thereto we respectfully pray for the relief set out in the LSSA's counter-application, with costs of two counsel.

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