

DISPUTE RESOLUTION AND REAL ESTATE ALERT



IN THIS ISSUE

A DECLARATORY ORDER IS NOT LEGAL ADVICE: CONVEYANCER PROXY TURNED AWAY

In Proxi Smart Services (Pty) Ltd v Law Society of South Africa (74313/16) [2018] ZAGPPHC 333, Proxi Smart Services (Pty) Ltd brought an application for a declaratory order requesting the Gauteng Division, Pretoria to declare that its proposed business model was not in contravention with certain provisions of the Attorneys Act, No 53 of 1979, Deeds Registries Act, No 37 of 1947, and the Legal Practice Act, No 28 of 2014.

A DECLARATORY ORDER IS NOT LEGAL ADVICE: CONVEYANCER PROXY TURNED AWAY

The court held Proxi's proposed business model to be in contravention of s83(8)(a)(i) of the Attorneys Act, as it entailed Proxi's employees performing work reserved solely for practising conveyancers.

The court reiterated that the overarching requirement to be satisfied when seeking declaratory relief is that the applicant must illustrate that it has a direct and substantial interest in the relief sought.



In *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* (74313/16) [2018] ZAGPPHC 333, Proxi Smart Services (Pty) Ltd (Proxi) brought an application for a declaratory order requesting the Gauteng Division, Pretoria to declare that its proposed business model was not in contravention with certain provisions of the Attorneys Act, No 53 of 1979 (Attorneys Act), Deeds Registries Act, No 37 of 1947, and the Legal Practice Act, No 28 of 2014.

In line with the ever-increasing number of start-up companies purporting to offer open-source, automated and/or ultra-affordable legal services for the end consumer, Proxi's proposed business model includes the performance of work which over time has become work that is performed exclusively by conveyancers. This entailed property transaction-related work, including:

- (i) collation and capturing of data, in order to enable a conveyancer to have all prescribed documents populated by this data "at the push of a button";
- (ii) ascertaining whether suspensive conditions applicable to the particular sale agreement in question have been fulfilled; and
- (iii) management of all communications between all parties concerned relating to, among other things, the management of payments, the collection and payment of any commissions due, the securing of bank guarantees, ensuring compliance with FICA-related requirements and bond cancellation.

Firstly, the court was of the view that the above would amount to "causing" conveyancing documents to "be drawn up" or "prepared" by persons "other than a practising attorney or conveyancer", as prescribed by the Attorneys Act. As such,

the court held Proxi's proposed business model to be in contravention of s83(8)(a)(i) of the Attorneys Act, as it entailed Proxi's employees performing work reserved solely for practising conveyancers.

Secondly, the court found that there was no basis to justify exercising its discretion in Proxi's favour by making a final decision on the matter, for the reasons discussed below.

It is trite that court orders must be practical, enforceable and clear – the Constitutional Court has previously held that if a court order does not satisfy these requirements, then "it cannot be said that the court had exercised its discretion properly". Proxi had attempted to describe its proposed business model – it did so by merely referring to a table attached to its affidavit. Although Proxi also stated that it would "tailor its model in line with any relief the court granted", the court held that Proxi's description of its business model did not contain an adequate, detailed explanation of various technical terms and principles referred to in Proxi's affidavits and the attachments thereto.

The court reiterated that the overarching requirement to be satisfied when seeking declaratory relief is that the applicant must illustrate that it has a direct and substantial interest in the relief sought. In this regard, it relied on various standing court decisions

A DECLARATORY ORDER IS NOT LEGAL ADVICE: CONVEYANCER PROXY TURNED AWAY

CONTINUED

The court specifically emphasised the importance of having a pre-existing, direct and substantial interest in the granting of the declaratory relief.



and s21(1)(c) of the Superior Courts Act, No 10 of 2013; the result being that a court will not grant declaratory relief where there is merely a financial, commercial or derivative interest which is not only indirect but also hypothetical, abstract and/or academic.

The court held further that since Proxi's proposed business model and its accompanying software were yet to be implemented, it was not clear how these would actually function in practice. It also held that there was an apparent lack of purpose for the declaratory relief to be granted and that the declaration sought by Proxi was vague, unenforceable and would not ensure finality. The court then noted that, should it grant Proxi the declaratory order sought, it would essentially be making an impermissible finding by determining in advance whether Proxi's conduct in terms of its proposed business model would be lawful.

The court was of the opinion that as Proxi's business operations would not be subject to the disciplinary powers of any of the law societies, the declaratory order sought would not resolve any dispute between Proxi and any of the law societies.

Additionally, the court was of the opinion that the eventual implementation of the proposed business model would likely create a dispute between the relevant law societies or the Estate Agency Affairs Board and their respective members. The court thus concluded that the relief Proxi sought was "hypothetical, abstract and academic" and declined to come to Proxi's assistance.

This case illustrates that the courts remain stringent insofar as the application of requirements for declaratory relief are concerned. The court specifically emphasised the importance of having a pre-existing, direct and substantial interest in the granting of the declaratory relief and the case demonstrates our courts' unwillingness to entertain a matter if such interest has not been sufficiently proved. It is also evident that the importance of having sufficiently detailed affidavits before the court should not be overlooked, nor should the relevance of an existing dispute (or absence thereof).

*Gareth Howard and
JD van der Merwe*

Best Lawyers 2018 South Africa Edition

Included 53 of CDH's Directors across Cape Town and Johannesburg.

Recognised Chris Charter as Lawyer of the Year for Competition Law (Johannesburg).

Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).

Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

Recognised Terry Winstanley as Lawyer of the Year for Environmental Law (Cape Town).

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

Named Cliffe Dekker Hofmeyr Real Estate Law Firm of the Year.



OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:



Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com



Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Tracy Cohen
Director
Business Development
T +27 (0)11 562 1617
E tracy.cohen@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Janet MacKenzie
Director
T +27 (0)11 562 1614
E janet.mackenzie@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Ashley Pillay
Director
T +27 (0)21 481 6348
E ashley.pillay@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Willem Janse van Rensburg
Executive Consultant
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Marius Potgieter
Executive Consultant
T +27 (0)11 562 1142
E marius.potgieter@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

Nicole Amoretti
Professional Support Lawyer
T +27 (0)11 562 1420
E nicole.amoretti@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2018 2453/JUNE



OUR TEAM

For more information about our Real Estate practice and services, please contact:



John Webber
National Practice Head
Director
T +27 (0)11 562 1444
E john.webber@cdhlegal.com



Bronwyn Brown
Director
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com



Nayna Cara
Director
T +27 (0)11 562 1701
E nayna.cara@cdhlegal.com



Mike Collins
Director
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com



Lucia Erasmus
Director
T +27 (0)11 562 1082
E lucia.erasmus@cdhlegal.com



Simone Franks
Director
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com



Daniel Fyfer
Director
T +27 (0)21 405 6084
E daniel.fyfer@cdhlegal.com



Fatima Gattoo
Director
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com



Muhammad Gattoo
Director
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com



Andrew Heiberg
Director
T +27 (0)21 481 6317
E andrew.heiberg@cdhlegal.com



Simone Immelman
Director
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com



William Midgley
Director
T +27 (0)11 562 1390
E william.midgley@cdhlegal.com



Attie Pretorius
Director
T +27 (0)11 562 1101
E attie.pretorius@cdhlegal.com



Muriel Serfontein
Director
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com



Allison Alexander
Executive Consultant
T +27 (0)21 481 6403
E allison.alexander@cdhlegal.com



Janke Strydom
Senior Associate
T +27 (0)11 562 1613
E janke.strydom@cdhlegal.com



Samantha Kelly
Senior Associate
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com

Nirvana Ajoda
Associate
T +27 (0)11 562 1438
E nirvana.ajodha@cdhlegal.com

Joloudi Badenhorst
Director
T +27 (0)11 562 1217
E joloudi.badenhorst@cdhlegal.com

Natasha Fletcher
Associate
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com

Robyn Geswindt
Associate
T +27 (0)21 481 6382
E robyn.geswindt@cdhlegal.com

Palesa Matseka
Associate
T +27 (0)11 562 1851
E palesa.matsheka@cdhlegal.com

Aaron Mupeti
Associate
T +27 (0)11 562 1016
E aaron.mupeti@cdhlegal.com

Emilia Pabian
Associate
T +27 (0)11 562 1076
E emilia.pabian@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2018 2453/JUNE

