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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.



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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.

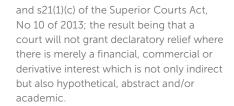
The court reiterated that the overarching requirement to be satisfied when seeking declaratory relief is that the applicant must illustrate that it has a direct and substantial interest in the relief sought. In this regard, it relied on various standing court decisions



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



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





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