REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-111832

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:NO [redacted]

DATE SIGNA [redacted]

In the matter between:

RESIDENTIAL COMMUNITIES COUNCIL (NPC)	First Applicant
ASSOCIATION OF RESIDENTIAL COMMUNITIES CC	Second Applicant
and	
MINISTER OF HUMAN SETTLEMENTS	First Respondent
PROPERTY PRACTITIONERS REGULATORY AUTHORITY	Second Respondent
NATIONAL PROPERTY PRACTITIONERS COUNCIL	Third Respondent

JUDGMENT

N. S KRüGER AJ

Declarator- Regulation 35 of the Property Practitioners Regulations, 2022 *read with Section 62 and 63 of the* Property Practitioners Act 22 of 2019 - *whether conduct of residential estates and communities by charging and/or imposing a fee on property practitioners to be permitted to market and/or sell constitute an undesirable business practice*

In interpreting the word and phrases in an enactment context to be taken into account from the beginning and not relegated secondary to the interpretation of the word or phrase- the unitary approach of interpretation of Natal Joint Municipality Pension Fund v Endumeni Municipality 2012 (4) SA 593 at [18] –[26] *applied*
Order not granted declaring conduct of private residential estates known as homeowners' associations, governing bodies and body corporates of such as estates or communities by charging and/or imposing a fee on property practitioners to be permitted to market and/or sell property within such estate or community does not constitute an undesirable practice as described in regulation 35 read with sections 62 and 63 of the Property Practitioners Act, 22 of 2019

Introduction

[1] It is the practice of some private homeowners' associations, governing bodies and/or body corporates (collectively referred to as "*the residential estates*") to charge and/or impose a fee on property practitioners in order to be permitted to market and/or sell property within their estates. The applicants seek an order declaring such practice ("*the contested practice*") does not constitute an undesirable business practice as provided for in regulation 35 read with section 63 of the *Property Practitioners Act*[1] ("*the PPA*")

[2] The first applicant is a non-profit company. According to its constitution it formulates, deliberates and expresses a united voice on behalf of the Residential Community Industry ("*the RCI*") in interacting with government and other entities and individuals regarding matters of interest to its members. It seeks to achieve effective representation to government and civil society as well as the institution of legal proceedings and opposition thereto as the case may be.

[3] The second applicant is a close corporation whose objective is to provide support services aimed at all residential communities including home owners' associations and body corporates towards establishing, maintaining and enhancing the value of property and the lifestyles of residents therein. It is authorised and appointed to manage the affairs of the first applicant. No relief is claimed by it and it is cited only as an interested party.

[4] The first respondent, which is responsible for the governance and implementation of the PPA, withdrew its notice of intention to oppose the application. It filed a notice to abide the decision of the court. The third respondent is a national

[1] 22 of 2019

representative body consisting of a unified national council. It represents the interests of agents, brokers, professionals, consultants, developers, managing agents, financial institutions and all individuals falling within the ambit of the PPA. Disappointingly, it also filed a notice of intention to abide the decision of the court. Its input may have provided a valuable perspective on the issue at hand.

[5] The second respondent ("*the PPRA*") opposes the application. It is enjoined by section 6 of the PPA to regulate the conduct of property practitioners towards costumers and their conduct pertaining to marketing, managing, financing, letting, renting, hiring and purchase of property. It regulates and ensures compliance with the PPA and ensures that consumers are protected from undesirable and sanctionable practices as specified in sections 62 and 63 of the PPA.

[6] The PPRA does not dispute the applicants' *locus standi* to seek the declaratory relief as they do on behalf of homeowners' associations, governing bodies and/or body corporates of residential estates and communities.

Background

[7] The applicants allege that the members of the first applicant are all privately owned residential estates which are independently governed according to their memorandum of incorporation or constitution, together with rules and regulations. Governance of the residential estates is dependent upon "…*the will of its members which are made up of homeowners of the estate.*"

[8] Allegedly "*One such rule common to most of, if not all residential estates is that property practitioners are required to pay a fee in exchange for training and/or induction in regard to the rules and regulations of the estate prior to being permitted to conduct the affairs of a property practitioner, i.e. to market and/or sell property situated within such an estate.*"

[9] The practice is objected to by the PPRA. It asserts the disputed conduct offends against the PPA and applicable regulations. It contends it constitutes an undesirable practice as envisaged in regulation 35 to the PPA. The PPRA claims that residential estates by charging the fee in effect give a benefit only to accredited

practitioners in respect of marketing of properties, which it maintains offends against the provisions of regulation 35.1 which is quoted further below.

[10] The PPRA relates that some homeowners' associations, governing bodies and body corporates of established residential estates have developed a practice of requiring property practitioners to register and pay a fee before being allowed to render their services in that estate. It maintains that members of the Real Estate Business Owners of South Africa ("*REBOSA*") over years have been complaining about the practice. This not controverted by the applicants. In an affidavit, the chief executive of REBOSA explains it is an independent, non-profit company established in 2012 to represent the interest of business owners and principals of estate agencies operating in the residential estate sphere. Its members employ some 17 800 registered property practitioners in practice. It is alleged to be the largest and most representative residential real estate body in the country. According to them, evaluation of the various manifestation of demanding accreditation fees under different pretexts in the objective of residential estates the secure a revenue stream at the expense of estate agents.

[11] REBOSA contests the necessity of training being required for a property practitioner to operate within an estate. It maintains no training is required, as property practitioners are competent, as part of their professional services, to understand and explain to prospective buyers the nature and extent of any management rules applicable to a particular estate. REBOSA would not object to the provision of marketing opportunities, premium access convenience and the like to be provided by residential estates against payment of a voluntary fee to be paid, but not imposed as a condition of practitioners being allowed to operate and trade in an estate. It maintains non-voluntary fees restrict the free market and that it restricts the pool of practitioners for sellers to choose from, thereby possibly preventing them from employing their preferred practitioner. It maintains the practice of charging fees are unwarranted, uncompetitive and not in the interests of seller, agents and the broad property sector.

[12] The PPRA related numerous instances indicative of the operation of the disputed practice and its effect. Two of these appear to be members of the first applicant as corresponding names appear on its list of members, namely Copperleaf

and Woodlands. In the case of Copperleaf, it alleged that during 2023 its homeowners' association refused to issue clearing figures on a stand sold by a property practitioner in the estate who had not paid the fee demanded. Copperleaf refers to an *Estate Agent Accreditation Form* which must be completed. The accreditation fee required was R 5000,00. During 2024, Copperleaf again refused to provide clearance certificate figures for lack of payment of a fee. Woodlands charged a private seller an R 10 000,00 rand penalty for not using an accredited agent around September 2024. The seller's wife was a property practitioner. When the transferring attorneys applied for levy clearance figures from the homeowners' association, they were informed of the penalty. Their client instructed them to pay it under protest as the purchaser required transfer as soon as possible. Transfer of property is restrained pending obtaining a clearance certificate from the local authority certifying payment has been made of certain amounts due for municipal services fees and the like in respect of the property.[2]

[13] The PPRA maintains the contested conduct is exclusionary and a bar to the transformative object of the PPA. It disadvantages property practitioners who cannot afford to pay the fees demanded. The yearly fees demanded range from around R 5000,00 to R 50 000,00. In addition property practitioners are required to pay PPRA fees and fidelity fund certificate fees. It restricts upcoming property practitioners from accessing the market and in particular the lucrative market where the fee is often higher than elsewhere.

[14] In a nutshell, the case advanced on behalf of the applicants is that the contested conduct does not fall within the ambit of Chapter 9 of the PPA which regulates the conduct of property practitioners in that section 60, which describes its application, in effect limits its application to property practitioners., which it is maintained does not include residential estates. The provisions of regulation 35 do not apply to the conduct of residential estates. The latter is not subject to, nor are they governed by the provisions of the PPA. In addition, the contested conduct does

[22] Obtaining and paying the clearance figures is vital as section 118(1) of the *Local Government*: *Municipal Systems Act,* 2000 restrains transfer of property by the Registrar except upon the production of a certificate issued by the municipality in which the property is situated certifying that all amounts that became due pertaining to the property for municipal service fees, surcharges on fees, property rates and other municipal taxes and duties during the two years preceding the date of application for the certificate, have been fully paid.

not fall within the description of an undesirable business practice as defined in regulation 3.1.1.2 read with regulation 35.1.1.3. The issue does not concern residential estates, but rather whether the Property Practitioner's Regulatory Authority is empowered with any jurisdiction pertaining to residential estates.

[15] During argument Mr. West, on behalf of the applicants, emphasized that the dispute between the parties is not about whether or not the conduct of property practitioners who pay the fee or charge upon demand of residential estates constitute an undesirable business practice. Nor is it a dispute as to the legitimacy of the regulation in question. Mr. West seeks to limit the issue to be adjudicated upon to the question as whether or not the residential estates, commonly known as homeowners' associations, and/or governing bodies and/or body corporates, in applying the contested practice, is perpetrating an undesirable practice in terms of the PPA and regulation 35. In other words, the issue to be determined is whether residential estates fall within the ambit of the Act and applicable regulations when employing the contested conduct. It was submitted that residential estates does not fall within the definition of a "property practitioner" as provided for in the PPA. In consequence, Chapter 9 of the PPA does not apply to residential estates. Residential estates perpetrating the contested conduct do not fall foul of the PPA and regulation 35 in doing so.

[16] Mr. Naledi, in behalf of the PPRA, maintained the PPA should be interpreted in a purposive and context-driven manner. He contended regulation 35.1 explicitly contemplates application to body corporates or home owners' associations as being bodies that control or manage residential properties. The applicants' argument is understood to be predicated on the proposition that the PPA does not apply to private residential estates and are not governed by the PPA.

[17] Mr. Naledi also maintained that the application of the PPA is widely framed to the extent it includes residential estates and that the prohibited business practices expressly relates to body corporates and homeowners' associations. In addition, residential estates fall within the compass of the wide definition of what a property practitioner is for the purposes of the PPA. It was argued on behalf of the PPRA that the objective of the PPA is to provide transformation of the property practitioners' sector which requires a necessary intervention that will benefit historically

disadvantaged individuals. Its declared objective includes, amongst others, providing for the protection of consumers in which assistance by property practitioners can play in important role. It is contended private residential estates fall within the PPA's definition of what a property practitioner is.

Consideration

[18] Over many years, much had been written in pursuit of an ever more effective mechanism in the interpreting of documents, including statutes, regulations and the like. For a considerable period the foundational precept was the intention theory in terms of which the golden rule was to determine the intention of the lawmaker from the study of the provisions of the enactment at hand.[3] Generally, the approach to interpretation was to determine the ordinary grammatical meaning of the word or phrase used in the enactment. Should the ordinary grammatical meaning of the word be clear, the word or phrase was interpreted accordingly. If it was ambiguous or if the resultant interpretation would lead to an absurdity, one might deviate from the ordinary meaning of the word or phrase to give effect to the meaning intended by the legislature.[4] The courts also established that the ordinary grammatical meaning of a word or phrase was to be considered in its context, which was not limited to the language of the rest of the enactment, such as its apparent scope and purpose, and, within limits, its background.[5] In interpreting and enactment, the Courts have endeavored to give effect to the policy, object or purpose of legislation.[6]

[19] In *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*,[7] Schreiner penned a minority judgment. He pointed out two methods in approaching

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[3] *Farrar's Estate v Commissioner for Inland Revenue* 1926 TPD 501 at 508 See also L M du Plessis *The Interpretation of Statutes* 1985 Butterworths, Durban

[4] *Manyasha v Minister of Law and Order* 1999 (2) SA 179 (SCA) at 185B-C;

[5] *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) [16] – [19]

[6] *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) at [16]

[7] 1950 (4) SA 653 (A) at 662G-663A. Schreiner JA proposed a different approach based on *Re Birdie* (1949), Ch.121 at 129: "*The first thing to be done…in construing particular words in a section of an Act of Parliament is not to take those words* in vacuo*,..and attribute to them what is sometimes called their natural or ordinary meaning in the sense that their meaning is entirely independent of their context…The method of construing statutes…is not to take out particular words and attribute to them a sort of* prima *facie meaning which may be displaced or modified, it is to read the statue as a whole and ask…the question:* 'In this statute, in its context, relating to this subject matter, what is the true meaning of the word?'…*The real question that we have to decide is, what does the word mean in the context in which we find it, both the immediate context of the sub-section in which the word occurs and the general context of the Act and the obvious evil that it is designed to remedy.* "

the interpretation of enactments, the first being for words to be given their grammatical meaning and only when it is ambiguous, vague or will result in an absurdity, regard may be had to its context. The second approach is for words to be construed from the outset having regard to the statute as a whole, in context with its subject matter and in relation to both the immediate context of the section in which the word appears, as well as the general context of the enactment.

[20] A shift occurred when the Supreme Court of Appeal in *Natal Joint Municipality Pension Fund v Endumeni Municipality* adopted Schreiner JA's second approach.[8] It held that the proper approach to the interpretation of documents namely that, from the outset the context and the language are considered together, with neither predominating over the other. The words must be read in its context in the light of the enactment as a whole and the circumstances attendant upon its coming into existence. The language must be considered according to the rules of grammar and syntax, the purpose to which it is directed and the material known to those responsible for its production. The interpretative process is objective in nature and unrelated to whatever intention those responsible for the words may have had at the time such words were selected. Where more than one meaning is possible, each has to be considered and weighted in the light of the objective factors and a sensible meaning is to be preferred which avoids "*unbusinesslike results*" or which may undermine the purpose of the enactment. However, one must guard against substituting what one may regard as reasonable, sensible or businesslike for the words actually used.

[21] *Endumeni* has since been followed in numerous cases.[9] With reference to *Emdumeni* the Constitutional Court declared the principles applicable to interpretation to now be settled.[10]

[22] Mindful of the above, I now turn the consideration of the proposed declaratory order measured against the provisions of the PPA and regulations.

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[8] 2012 (4) SA 593 at [18] –[26]
[9] By the Supreme Court of Appeal on a multitude of occasion. See for instance *Tourvest Holdings (Pty) Ltd v Murti* 2026(3) SA 539 (SCA) at [49]
[10] *KwaZulu Natal Joint Liaison Committee v MEC Department of Education, KwaZulu Natal* 2013 4 sa 262 (CC) at [128] – [129]

[23] The commencement date of the PPA is 1 February 2022.[11] It repealed the *Estate Agency Affairs Act*.[12] Amongst others, it provides for the regulation of property practitioners and for compliance with and enforcement of its provisions, as well as the protection of consumers.

[24] The context of the PPA, as set out in its preamble, includes that consumers require assistance when conducting property transactions, that it is necessary to ensure assistance is rendered in a professional way and to regulate circumstances when such assistance is not rendered in a professional way.[13] The object of the PPA includes advancing transformation of the property practitioner's sector and property market which requires intervention for the benefit of historically disadvantaged persons.[14]

[25] Chapter 9 of the PPA, which consists of sections 60 to 66, has reference to the conduct of property practitioners. It applies to any person who performs any function or service contemplated in the extensive definition of "property practitioner" in section 1 of the PPA, irrespective of whether such person is registered or licenced by the Property Practitioners Regulatory Authority established in terms of the PPA.

[26] Having regard to the declared purpose and object of the PPA, the broad scope of the definition in section1 of what a property practitioner is, does not surprise. It means any natural or juristic person who, directly or indirectly,[15] for gain,

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[11] Government Gazette 45735 dated 14 January 2022

[12] 112 of 1976 as per section 76 of the PPA

[13] The heading of the Act records, amongst others: "…*to provide for consumer protection;…*" In this regard the preamble reads:
"…*AND WHEREAS consumers require assistance when conducting property transactions;*
AND WHEREAS property practitioners can play an important role in providing such assistance;
AND WHEREAS it is necessary to ensure that such assistance is rendered in a professional way;
AND it is necessary to regulate circumstances when such assistance is not rendered in a professional way."

[14] The heading of the Act in part reads: "*To provide for…transformation of the property practitioners sector; to provide for a transformation fund and the establishment of a research centre on transformation;…*" The preamble in part reads: "*AND WHEREAS transformation of the property market is a necessary intervention that will benefit the historically disadvantaged individuals;*"

[15] Section 1(a): "*means any natural or juristic person who or which for the acquisition of gain on his, her or its own account or in partnership, in any manner holds himself, herself or itself out as a person who or which, directly or indirectly, on the instructions of or on behalf of any other person—…*"

performs a wide range of activities which includes selling, purchasing managing or letting immovable property.[16]

[27] The applicants allege the respective estates are governed by their homeowners' associations, body corporates and/or governing bodies according to the will of their members in consistent with their memorandum of incorporation or constitution, together with its rules and regulations. The applicants represent some 181 residential estates, each of which may or may not fall within the definition of 'property practitioner', at least relating to whether or not they manage the respective estates for gain, or in any other sense set out in the definition. I find no exposition in the applicants papers from which it may be established whether the homeowners' associations, body corporates or governing bodies referred to fall outside the ambit of the definition of 'property practitioner' in section 1 of the PPA, and more pertinently whether they are excluded from managing their respective properties for gain or profit. The applicants do not divulge more in respect of their exact nature save to state they are "…*independently governed according to their constitution and/or MOI, couples with rules and regulations"* and according to the will of their members. Nor can I find anything in the papers which may substantiate a proposition that it is generally beyond the realms of possibility for any homeowners' associations, body corporates and governing bodies to manage estates for gain and/or profit.

[28] A body corporate is a statutory legal entity consisting of the owners of units in a sectional title scheme, as provided for in the *Sectional Titles Schemes Management Act.*[17] In short, a registered owner of a unit is a compulsory member of a body corporate. The owners select trustees to run the operations and fiduciary duties on behalf of the body corporate. The body corporate is responsible for the management, control and administration of the common property, maintaining administrative and reserve funds and enforcing the schemes management and conduct rules. It is funded by the individual owners through levies.[18] Body corporates usually exist not for the purpose of making a profit or gain for itself or others. Body

[16] Section 1(b): "*includes any person who sells, by auction or otherwise, or markets, promotes or advertises any part, unit or section of, or rights or shares, including time share and fractional ownership, in a property or property development*…"
Section 1(c): "*includes any person who for remuneration manages a property on behalf of another;..*"
[17] 8 of 2011
[18] Section 3

corporates owe a fiduciary duty to the property owners within the scheme. Usually funds are utilized towards recovery of operational costs. It is unlikely that a body corporate may exercise its duties with a view to profit or gain, but I have not been made aware of such possibility being absolutely excluded.

[29] Usually homeowners' associations and governing bodies would guide the enterprise of the respective estates, including the running of an estate in the sense deciding upon what is required as well as how it is to be achieved and executed. In effect, they manage their estates.

[30] Homeowners' associations and governing bodies are legal constructs. It is my understanding that a homeowners' associations may exist by common law or statute. Typically they operate as a non-profit entity administering and managing the shared spaces in a residential area. It may register as a company in which case it will be subject to the *Companies Act*[19] They operate in terms of their respective constitutions, memorandum of incorporation and the like. But it is not prohibited, should its founding documents so dictate, to manage and administer its estate for gain and/or profit.

[31] There are many possible types of governing bodies which may exist in respect of a great variety of properties, including, by way of example, old age homes. Each would be peculiar to the type of property and what the purpose, objective and requirements of its members are. I am not aware of anything which may restrain it from governing its property for profit and/or gain.

[32] The order sought is framed in general and very broad terms. The nature of the contested conduct is not adequately specified, in particular as regards the nature of the fee and in what circumstances it is demanded. In the founding affidavit a letter dated 28 March 2023 is attached which was addressed to the PPRA by the management agent of the first applicant. Amongst others, it defends the contested conduct by asserting it is not an accreditation fee which disadvantages any property practitioner who wishes to be active in any estate. It is alleged there are two broad reasons for property practitioners to be registered with a homeowners' association

[19] 71 of 2008 and in some respects, its predecessor. It may register as a section 21 company should it be a non-profit entity

namely for security reasons and to ensure that a prospective purchaser or tenant is fully aware of the rules and policies of the relevant homeowners' association. It states that as "…*a general rule, the administrative fee charged by the HOA will be an all-inclusive fee for...*" amongst others, offering the opportunity the place adverts on the website and covering the costs of deploying additional security to handle increased traffic for visitors on show days, keeping a record of properties rented out and dealing with any enquiries that property practitioners may have relevant to any sale. It continues that what the nature of what is termed an administration fee differs from estate to estate, commensurate to the services provided. The exact description of the *quid pro quo* for the fee is not reflected in the order sought, perhaps understandably so as it differs from estate to estate amongst the applicants' members. No doubt it differs from estate to estate around the country as well.

[33] Should an order be granted as framed, it would, in effect, immunise all homeowners' associations and/or governing bodies and/or body corporates country wide which employ the contested conduct from Chapter 9 of the PPA, even should they fall within the definition of 'property practitioner.' The same applies as to whether or not the conduct of each of the homeowners' associations and/or governing bodies and/or body corporates falls beyond the ambit of regulation 35.1, with particular reference to the exact nature and extent of their conduct, including relating to the fee or charge visited upon practitioners who wish to sell or market property in their respective estates without any *quid pro quo*.

[34] The PPRA asserts the fee as alleged by the applicants is merely a fig leaf in an attempt to circumvent the strict provisions of the undesirable practice the PPA ,as stipulated in regulation 35, seeks to prevent. Its effect is to undermine the declared purpose of the PPA and regulation 35. In truth and in fact, so the argument goes, it is nothing more than an additional income stream for the residential estates to the detriment of property practitioners who elect not to comply with the demand for payment of the fee or charge as well as previously disadvantage property practitioners.

[35] Section 2 of the PPA reads:

> "*Application of the Act*
> *This Act applies to the marketing, promotion, managing, sale, letting, financing and*

purchase of immovable property, and to any rights, obligations, interests, duties or powers associated with or relevant to such property."

[36] Section 63 reads as follows:[20]

"*Undesirable practices.*
(1) Subject to subsection (2), the Minister may, after consultation with the Board, by notice in the Gazette, declare a particular business practice in the property market to be undesirable and consequently prohibited.
(2) When deciding whether or not a declaration contemplated in subsection (1) should be made, the Minister and the Board must consider—
(a) ***the right of every citizen to freely choose their trade, occupation or profession;***
(b) that the practice concerned, directly or indirectly, has or is likely to have the effect of—
(i) damaging the relations between property practitioners, or any specific property practitioner, on the one hand, and any specific consumer, category of consumers or the general public on the other hand;
(ii) ***unreasonably prejudicing any consumer or category of consumers****;*
(iii) deceiving any consumer or category of consumers; or
(iv) ***unfairly affecting any consumer*** *or category of consumers; and*
(c) that if the practice is allowed to continue, one or more of the objects of this Act as contemplated in section 2 will or is likely to be defeated…

[37] This accords with the broad objectives of the PPA as expressed in its heading and preamble. It is the backdrop to the contents of regulation 35(1).

[38] Chapter 7 of the *Property Practitioners Regulations*, 2022[21] concerns training, conduct and consumer protection measures. It consists of regulations 33 to 37. Regulation 34 contains a code of conduct. Regulation 35 reads as follows:

"*Undesirable business practices*[22]
35.1 Pursuant to the provisions of section 63 (1) of the Act, the following ***business practices*** *are prohibited—*
35.1.1.1 any arrangement in terms of which any party or person that directly or indirectly controls or manages any franchised business, requires that any franchise operation or outlet of such franchised business may only be marketed, promoted or disposed of through the agency of the franchisor or a property practitioner designated by the franchisor or which imposes any form of penalty in respect of a failure to do so; and
35.1.1.2 ***any arrangement in terms of which any party or person that directly or indirectly controls or manages any residential property development, including any body corporate or homeowners' association (the "managing organisation")—***

[20] My editing and emphasis
[21] Proc 47 of 14 January 2022 (Government Gazette No.45735)
[22] My emphasis

> *35.1.1.3* ***receives money or any other reward in exchange for a benefit, advantage or other form of preferential treatment in respect of the marketing of properties in such property development;***
> *35.1.1.4* ***requires that any property in such property development may only be disposed of through the agency of the managing organisation or a property practitioner designated by the managing organisation or which imposes any form of penalty in respect of a failure to do so;***
> *35.1.1.5 requires that any property in such property development may only be disposed of to the managing organisation or a person or entity designated by the managing organisation;*
> *35.1.1.6* ***effectively provides an advantage to any one property practitioner or group of property practitioners over and above any other property practitioners, in providing services in relation to properties in such property development; or***
> *35.1.1.7* ***effectively excludes or disadvantages any property practitioner or group of property practitioners from being able to provide services in relation to properties in such property development****.*"

[39] The ways in which the paragraphs are numbered are unfortunate. In my view nothing turns on it. What is set out in 35.1.1.1 and 35.1.1.2 stipulates the prospective arrangement firstly in the case of franchises and secondly in the case any party or person that directly or indirectly controls or manages any residential property development, including any body corporate or homeowners' association. It defines the actor of the sanctioned business practice. The following sub paragraphs - 35.1.1.3 to 35.1.1.7- defines the actions of the actors which are sought to be sanctioned.

[40] It is clear the nature of the actions sanctioned includes, with reference to the issue in this matter:

a. the receipt by the actor of money or any other reward in exchange for a benefit, advantage or other form of preferential treatment in respect of the marketing of properties;

b. the actor requiring that any property in such property development may only be disposed of through the agency of the managing organisation or a property practitioner designated by the managing organisation or which imposes any form of penalty in respect of a failure to do so;

c. the actor effectively providing an advantage to any one property practitioner or group of property practitioners over and above any other property practitioners, in providing services in relation to properties in such property development;

d. the actor effectively excluding or disadvantaging any property practitioner or group of property practitioners from being able to provide services in relation to properties in such property development.

[41] An Authority is established in terms of the PPA which is governed by the Board of the Authority. It must provide regulatory mechanisms in respect of, amongst others, marketing, letting, hiring, sale and purchase of property, and may do whatever is required to achieve the objects of the PPA[23] Any person may lodge a complaint with the Authority against a property practitioner in respect of financing, marketing, management, letting, hiring, sale or purchase of property.[24] Mediation is provided for as well as adjudication.[25] If a complaint is upheld, the adjudicator may make an appropriate order which has the status of an order of the magistrates' court.[26]

[42] A property practitioner found guilty of offending against the prohibited practices under section 63 may have its fidelity fund certificate withdrawn, be obliged to pay a fine up to the maximum allowed in the magistrates' courts, or be issued a reprimand.[27] Clearly, consequences for a property practitioner who elects to pay the fee demanded and found guilty of contravening the prohibition are significant. Should residential estates not fall within the ambit of Chapter 9 of the PPA and regulation 35(1), those who abide the prohibition will be at a disadvantage due to the resultant restriction of access to a broader market in relation to residential estates who demand payment.

[43] The effect of the disputed conduct may be to disadvantage those property practitioners who refrain from paying the fee or charge for whatever reason, be it due to financial inability to comply with such demands or otherwise. Against the payment of money, those who abide by the demand benefit by being allowed to market of sell property in the estate to the detriment of others. It constitutes preferential treatment. The exact nature of the fee and any *quid pro quo* in the case of each residential estate will determine if the disputed conduct falls squarely within the undesirable practices as defined.

[23] Section 5
[24] Section 28(1)
[25] Sections 29 and 30
[26] Section 30(6)(b)
[27] Section 62(3)

[44] Depending on the exact nature in the case of each residential estate, the disputed conduct may not be to the benefit of sellers, potential purchasers and may well restrain growth in the property sector not only as regards the volume of sales, but also entry into the market by prospective property practitioners, and in particular those previously disadvantaged. Often they do not have available to them the financial where withal to jump yet another hurdle. Depending on the individual circumstances, such conduct may well be unjustifiable and is exactly the mischief, having due regard to the context of the PPA and regulations, which the authorities seek to curtail.

[45] It is not conducive towards realizing the full potential of economic growth, particularly regarding the property sector. It is restrictive of people's freedom of choice to elect the property practitioner they prefer doing business with. An example would be where a prospective purchaser instructs a property practitioner he or she trusts because of past experience to find a suitable property to purchase. He/she becomes aware of a suitable property or one which may require further investigation as to its suitability. Unfortunately, the property is in an estate which the property practitioner is disallowed from marketing or selling for not paying the charge or fee demanded. Cutting a deal with an accredited property practitioner is likely to either increase the costs to the seller or purchaser, or to reduce the fee the excluded property practitioner would otherwise have been entitled to. In addition, excluded property practitioners may not show properties in estates which they are not accredited with, resulting in consumers' choice of properties being restricted. To my mind, such intrusion upon freedom of choice is inimical to vigorous economic growth and not in the best interests of all concerned.

[46] It appears to me that property practitioners who comply with the contested conduct by paying the fee or charge demanded, may well fall foul of the undesirable business practice which the PPA and regulation seeks to sanction. If the order sought by the applicants is granted, the situation arises that residential estates which demand compliance with the contested conduct does not attract the opprobrium of the PPA and regulation 35 in those instances where the residential estates may fall within the ambit of the definition of 'property practitioner', whereas the practitioner

who complies, is subject to sanction. The latter is caught between the devil and the deep blue sea.

[47] The rule generally is that he who asserts must prove.[28] I do not discern any cogent reason as to why it should be deviated from in this matter. The first applicant provided a resolution of a meeting held between its directors recording a resolution for the first applicant to proceed with the application in the terms it did. Yet, there is no evidence presented by way of confirmatory affidavit or otherwise by any of its members from which may be established whether each falls without the ambit of the definition of what a property practitioner is, or whether the nature and extent of their practice fall outside the provisions of regulation 35(1). To my mind, the issue as to whether or not a homeowners' association, body corporate or governing body offends against the precepts of the PPA and regulation 35(1), depends on the facts as regards their duties as provided for in their respective memorandum of associations, rules and regulations, as well as the exact circumstances upon which a fee or charge is demanded. An application seeking blanket relief is fraught with risk.

[48] For an order to be granted as framed the court must be satisfied that each of the homeowners' associations, body corporates and governing bodies of estates country wide do not fall within the definition of what a property practitioner is. The evidence available is of a general nature to the extent that it cannot be taken to be the case in each instance. There may be exceptions, the possibility of which cannot be discounted.

[49] The same applies to the question of the nature of what the applicants describe as the contested conduct. They aver that the fees charged and the circumstances under which it is charged differ from estate to estate of their members. The evidence as presented, in any event unsupported by confirmatory affidavits, indicates it indeed differs from estate to estate in that it is commensurate with the requirements of each.

[50] Apart from the general allegations pertaining to the practice of their members, I can find no cogent evidential basis upon which it may be reasonably inferred what the nature of other residential estates country wide are in relation to the definition of

[28] *Pillay v Krishna* 1946 AD 946

'property practitioner', or what the nature of their conduct may be, measured against the definition of what is considered an undesirable practice as defined in regulation 35.

[51] I am not persuaded that the applicants have made a case for an order, framed as it is, in respect of every homeowners' association, body corporate or governing body country wide, nor in respect of its members.

[52] Belatedly, during argument, Mr. Naledi raised an issue not foreshadowed in the PPRA's answering affidavit, nor in its heads of argument, namely that in terms of section 21(1)(c) of the *Superior Courts Act*,[29] assuming the jurisdictional requirements are met, the court is clothed with an discretion whether or not to grant a declaratory order. He urged me to exercise my discretion towards not granting the declaratory order by reason that it would serve no purpose in the event of the residential estate's not falling within the ambit of the PPA. The argument raised is that, should the order be granted, it would ring hollow and be of no practical value. I am not wholly in agreement with the basis argued upon which the discretion should be exercised not to grant the order against the provision of the said section, namely that there is no actual dispute between the parties. Nonetheless, it is my view that, having regard to the matter as a whole and the reasoning I set out as to why I am not persuaded to grant the relief claimed, exercising a discretion in favour of consideration of a declaratory order would be imprudent in any event.

Conclusion

[53] Having regard to all of the above, I grant the following order:

> The application is dismissed, the applicants to pay the costs, including costs of two counsel where so employed on scale C, the one paying the other to be absolved.

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[29] 10 of 2013. *It reads: "(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-*
(a)…
(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

[redacted]

N S KRÜGER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
JOHANNESBURG

Electronically submitted
Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **20 October 2026**

Counsel for the applicants:	Adv H P West
Instructed by:	Kruger & Okes Inc
Counsel for the second respondent:	Adv J F Naledi SC & M Lengane
Instructed by:	Molefe Dlepu Attorneys
Date of hearing:	8 May 2026
Date of judgment:	20 October 2026