OPINION

in re:

REAL ESTATE BUSINESS OWNERS OF SOUTH AFRICA

and

HOME OWNERS ASSOCIATIONS

I. INTRODUCTION

1. I have been instructed on behalf of the Real Estate Business Owners of South Africa ("REBOSA") to furnish an opinion in regard to certain business practices conducted by Home Owners Associations ("HOA") and whether such fall foul of the provisions of the Property Practitioners Act, 22 of 2019 (the "PPA") read with the regulations prescribed under the PPA (the "regulations").

2. The specific issues in regard to which I have been requested to furnish an opinion are the following:

   2.1 Are HOA subject to the provisions of the PPA and are they required to comply with the provisions of the Act in general terms ("the first issue").

   2.2 The application of Regulation 35 (entitled 'Undesirable Business Practices') in the context of HOA engaging in the activities, more fully explained below ("the second issue").

   2.3 Whether, if and to the extent that the conduct of a HOA falls within prohibited business practices as defined in Regulation 35, such

would constitute an offence as defined in the PPA ("the third issue").

2.4 Whether by requiring estate agents to pay any amounts as set out below, a HOA is by that fact in and of itself, engaging in an unlawful act ("the fourth issue");

2.5 Whether, if and to the extent that the conduct of a HOA falls within the business practices prohibited in terms of section 63 (1) and the foregoing regulations, whether the Regulator (the Property Practitioners Regulatory Authority) would in principle have the authority to take steps against such homeowner's association ("the fifth issue").

3. This opinion sets out:

3.1 A brief background and explanation of the issues;

3.2 The relevant aspects of the PPA and the regulations insofar as they relate to the issues in question;

3.3 A brief discussion of the law relating to statutory interpretation;

3.4 An opinion in respect of each of the aforesaid issues.

II. THE ISSUES

4. As set out above, the Real Estate Business Owners of South Africa ("REBOSA") seeks an opinion on the application of certain provisions of the Property Practitioners Act, 2019 and its underlying regulations, to HOA.

5. The nub of the problem is this: HOA have for been attempting to regulate which estate agents may sell houses within developments that fall within their control and in so doing, to use it as a mechanism for raising revenue for the HOA.

6. One way in which this has been done is by charging estate agents either "accreditation fees" giving such agents the right to then operate in the development concerned or otherwise by charging "training fees" for training estate agents in specific aspects relating to the development concerned.

7. While certain developments have specific peculiarities attached to them and the manner in which they have been established (for example, in the case of long-term leases), it is REBOSA's view that such training is by and large, if

not in its totality, simply a mechanism for being able to charge fees and raise revenue from estate agents.

8. REBOSA makes the point that estate agents have a professional qualification and that they have for example operated in the sectional titles arena for many years without any requirement for additional training on the part of estate agents and that sectional title schemes are almost invariably more complex than freehold arrangements in developments which are subject to regulation by a homeowner's association. In some instances, the levying of such “fees” may be “dressed up” differently with a view to avoiding any potential restrictions, including those referred to further below.

9. There are several questions which arise in context:

10. Firstly, are HOA subject to the provisions of the PPA at all? By this is meant not whether they are “property practitioners” *per se* as contemplated in the definitions in the PPA but rather whether they are required to comply with the provisions of the PPA in general.

11. In this regard, my attention was drawn to section 2 of the PPA, titled “Application of Act”. It reads:

"*This Act applies to the marketing, promotion, managing, sell, letting, financing and purchase of immovable property, and any rights, obligations, interests, duties or powers associated with all relevant to such property.*"

12. The question is therefore whether to the extent that a HOA has any powers associated with or relevant to any property in a development or concerns itself with the marketing or managing of properties in a development, the PPA would find application to such HOA and whether this would be the case even if the HOA is not technically a "property practitioner" as defined in the PPA.

13. My attention was drawn further to subparagraph (a) (v) of the definition of "property practitioner" which contemplates that a HOA could be (but is not necessarily) a "property practitioner" in the event of performing the acts contemplated in subparagraph (a).

14. Secondly, flowing from and related to the foregoing, REBOSA wishes to understand the application of Regulation 35 (entitled 'Undesirable Business Practices') in the context of homeowners' associations engaging in activities as referred to above. Reference is made specifically to regulation 35.1.1.2 and its incorrectly numbered subparagraphs. Such applies specifically to a party or person that controls or manages any residential property development, including a body corporate or HOA.

15. Thirdly, whether, if and to the extent that the conduct of a HOA falls within the foregoing prohibited business practices, such would constitute an offence, notwithstanding that the PPA does not specifically provide that such would be an offence but only provides that such is "prohibited". My attention was drawn in this regard to section 71 of the PPA.

16. Fourthly, whether by requiring estate agents to pay any such amounts, a HOA by that fact in and of itself, is engaging in an unlawful act.

17. Fifthly, if and to the extent that the conduct of a HOA falls within the business practices prohibited in terms of section 63 (1) and the foregoing regulations, whether the Regulator (the Property Practitioners Regulatory Authority) would in principle have the authority to take steps against such homeowner's association. In this regard my attention is drawn to Chapter 5, which deals with compliance and enforcement in general terms.

III. THE LEGISLATION

The PPA

18. I refer herein only to those sections of the PPA and the regulations which I believe are relevant for the purposes of this opinion. The highlighted in bold

and underlined portions are those portions which I believe are relevant to the determination of the issues.

19. Section 1 of the PPA includes the following definition:

"*"property practitioner"-*

(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-

(i) by auction or otherwise sells, purchases, manages or publicly exhibits for sale property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser in respect thereof;

(ii) lets or hires or publicly exhibits for hire property or any business undertaking by electronic or any other means or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor in respect thereof;

(iii) collects or receives any monies payable on account of a lease of a property or a business undertaking;

(iv) provides, procures, facilitates, secures or otherwise obtains or markets financing for or in connection with the management,

sale or lease of a property or a business undertaking, including a provider of bridging finance and a bond broker, but excluding any person contemplated in the definition of "financial institution" in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990);

(v) ***in any other way acts or provides services as intermediary or facilitator with the primary purpose to, or to attempt to effect the conclusion of an agreement to sell and purchase, or hire or let, as the case may be, a property or business undertaking, including, if performing the acts mentioned in this subparagraph, a home ownership association****, but does not include-*

(aa) ***a person who does not do so in the ordinary course of business****;*

(bb) where the person is a natural person and that person in the ordinary course of business offers a property for sale which belongs to him or her in his or her personal capacity;

(cc) an attorney or candidate attorney as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979); or

(dd) a sheriff as defined in section 1 of the Sheriffs Act, 1986 (Act No. 90 of 1986), when he or she performs any functions contemplated in paragraph (a) of this

definition, irrespective of whether or not he or she has been ordered by a court of law to do so; or

(vi) renders any other service specified by the Minister on the recommendation of the Board from time to time by notice in the Gazette;

(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;

(c) includes any person who for remuneration manages a property on behalf of another;

(d) includes a trust in respect of which the trustee, for the acquisition of gain on the account of the trust, directly or indirectly in any manner holds out that it is a business which, on the instruction of or on behalf of any other person, performs any act referred to in paragraph (a);

(e) for the purposes of sections 34, 46, 48, 59, 60, 61 and 65 includes-

(i) any director of a company or a member of a close corporation who is a property practitioner as defined in paragraph (a);

(ii) any person who is employed by a property practitioner as envisaged in paragraph (a) and performs on his, her or its behalf any act referred to in subparagraph (i), (ii), (iv), (v) or (vi) of that paragraph;

(iii) any trustee of a trust which is a property practitioner as envisaged in paragraph (d);

(iv) any person who is employed by a property practitioner as envisaged in paragraph (b) and performs on its behalf any act referred to in subparagraph (i), (ii), (iv), (v) or (vi) of paragraph (a); and

(v) any person who is employed by a property practitioner contemplated in paragraph (a) or (b) to manage, supervise or control the day-to-day operations of the business of that property practitioner;

(f) includes any person who is employed by or renders services to an attorney or a professional company as defined in section 1 of the Attorneys Act, 1979, other than an attorney or candidate attorney, and whose duties consist wholly or primarily of the performance of any act referred to in subparagraph (i), (ii), (iii), (iv), (v) or (vi) of paragraph (a), on behalf of such attorney or professional company whose actions will be specifically covered by the Attorneys' Fidelity Fund and not the Property Practitioners Fidelity Fund;

(g) for the purposes of section 61 and any regulation made under section 70, includes any person who was a property practitioner at the time when he or she was guilty of any act or omission which allegedly constitutes sanctionable conduct referred to in section 62,

but does not include an attorney who, on his own account or as a partner in a firm of attorneys or as a member of a professional company, as defined in

section 1 of the Attorneys Act, 1979, or a candidate attorney as defined in that section, who performs any act referred to in paragraph (a), in the course of and in the name of and from the premises of such attorney's or professional company's practice, provided that such an act may not be performed-

(i) in partnership with any person other than a partner in the practice of that attorney as defined in section 1 of the Attorneys Act, 1979; or

(ii) through the medium of or as a director of a company other than such professional company;..."

20. Section 2 of the PPA, titled "Application of Act" reads as follows:

"*This Act applies to the marketing, promotion,* ***managing****, sell, letting, financing and purchase of immovable property,* ***and any rights, obligations, interests, duties or powers associated with all relevant to such property****.*"

21. Section 3 of the PPA, titled "Objects of Act" read as follows:

"*The objects of the Act are to-*

(a) ***provide for the regulation of property practitioners****;*

(b) provide for the establishment of the Authority;

(c) provide for the powers, functions and governance of the Authority;

(d) ***provide for the protection and promotion of the interests of consumers****;*

(e) provide for a dispute resolution mechanism in the property market;

(f) provide for the education, training and development of property practitioners and candidate Property Practitioners;

(g) provide for a framework for the licensing of property practitioners;

(h) provide for a just and equitable legal framework for the marketing, managing, financing, letting, renting, sale and purchase of property;

(i) promote meaningful participation of historically disadvantaged individuals and small, micro and medium enterprises in the property market;

(j) provide for the transformation of the property market and the establishment of the Property Sector Transformation Fund;

(k) provide for the transformation of the property market that facilitates property ownership to more South Africans through structured interventions and the creation of property consumer ownership programmes in the affordable and secondary market; and

(l) create a mechanism for responding and implementation of directives received from the Minister, from time to time."

22. Section 6 of the PPA in relation to the functions of the Authority provides as follows:

"***6 Functions of Authority***

The functions of the Authority are to-

(a) regulate the conduct of property practitioners in dealing with the consumers;

(b) regulate the conduct of property practitioners in so far as marketing, managing, financing, letting, renting, hiring, sale and purchase of property are concerned;

***(c) regulate and ensure that there is compliance with the provisions of the Act**;*

***(d) ensure that the consumers are protected from undesirable and sanctionable practices as set out in section 62 and section 63**;*

(e) regulate any other conduct which falls within the ambit of the Act in as far as property practitioners and consumers in this market are concerned;

(f) provide for the education, training and development of property practitioners and candidate property practitioners;

(g) educate and inform consumers about their rights as set out in section 69; and

(h) implement measures to ensure that the property sector is transformed as set out in Chapter 4."

23. Section 25(1) and (2) of the PPA provides as follows:

"***25 Powers of inspectors to enter, inspect, search and seize***

(1) An inspector may, at any reasonable time and without prior notice, conduct an inspection to determine whether the provisions of this Act are being or have been complied with, and for that purpose, may without a search warrant-

(a) enter and inspect any business premises, except a private residence, ***of a property practitioner****;*

(b) ***require the property practitioner, manager, employee or an agent of the property practitioner to****-*

(i) produce to him or her the fidelity fund certificate ***of that property practitioner****;*

(ii) produce to him or her any book, record or other document related to the inspection and in the possession or ***under the control of that property practitioner****, manager, employee or agent; or*

(iii) furnish him or her with such information in respect of the fidelity fund certificate, book, record or other document at such a place and in such manner as the inspector may determine; and

(c) examine or make extracts from, or copies of, any such fidelity fund certificate, book, record or other document.

(2) Where ***a property practitioner*** *conducts his or her business at his or her private residence, the inspector must notify* ***the property practitioner*** *in advance and in writing before conducting the inspection in terms of subsection (1), and set out the details of the inspection.*"

24. Sections 26 to 28 of the PPA provide as follows:

"***26 Compliance notices***

(1) The Minister must, from time to time, determine-

(a) contraventions of the Act that are of a minor nature; and

(b) contraventions of the Act that are of a substantial nature.

(2) The Minister must publish the determinations referred to in subsection (1) by notice in the Gazette and the Authority must publish the determinations on its website and via any other medium it deems fit.

(3) The Minister must, by notice in the Gazette, prescribe the maximum fines in respect of each type of contravention which the Authority may determine for the purposes of subsection (5): Provided that such a maximum fine may not for a particular year exceed the amount prescribed in respect of one year of imprisonment in accordance with the Adjustment of Fines Act, 1991 (Act 101 of 1991), at any particular moment in time.

(4) The Authority may, where an inspection or investigation by an inspector indicates a contravention of this Act which is of a minor nature as determined under subsection (1), ***issue a compliance notice in the prescribed format to the person so allegedly contravening this Act, calling on that person to comply with this Act*** *within a period specified in the compliance notice, which period must be reasonable in the circumstances.*

(5) The Authority may, in the compliance notice, determine a fine to be paid ***by the person concerned if such person****, in writing, on the compliance notice acknowledges his, her or its failure to comply with this Act as stated in the compliance notice.*

(6) The fine contemplated in subsection (5) must be paid to the Authority within a period specified in the compliance notice.

(7) Any fine paid in consequence of a compliance notice accrues to the Fund, ***and the person*** *named in that notice may not be prosecuted for having committed such contravention.*

(8) Any contravention of a minor nature may not be taken into consideration when considering any application by or other proceedings against the person concerned.

27 Fine as compensation

(1) The Authority may, ***whenever a fine has been imposed on a property practitioner under this Act*** *and taking into account any amounts paid under the mandatory indemnity insurance contemplated in section 57, if any, order that any portion of the fine be applied towards the payment of compensation to any person who suffered a pecuniary loss* ***as a result of the conduct of that property practitioner****.*

(2) The Authority may, on receipt of ***a fine imposed on a property practitioner****, make the payment contemplated in subsection (1), but no such payment may be made until all appeals in respect of the imposition of the fine have lapsed or have been finalised or abandoned.*

(3) This section does not preclude any person from ***referring any dispute against a property practitioner or other person to the Authority****, but if an award is made by an Authority in favour of a person who has received payment from the Authority as contemplated in subsection (2), the Authority must take that payment into account.*

28 Lodging of complaints

(1) Any person may, in the prescribed form, lodge a complaint with the Authority ***against a property practitioner*** *in respect of financing, marketing, management, letting, hiring, sale or purchase of property.*

(2) The Authority must, in writing, within seven days acknowledge receipt thereof and inform the complainant of the case number assigned to the complaint.

(3) After receiving the complaint, the Authority may require the complainant to submit further information or documentation in relation to the complaint."

25. Section 63 of the PPA provides as follows:

"***63 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.

(3) The Authority may issue a compliance notice contemplated in section 26 ***directing a property practitioner*** *who, on or after the date of the publication of a notice contemplated in subsection (2) carries on a business practice in contravention of that notice, to rectify to the satisfaction of the Authority anything which was caused by or arose out of the carrying on of the business practice concerned, or otherwise deal with the matter as authorised by this Act or any other applicable law.*"

26. Section 70 of the PPA provides as follows:

"***70. Regulations***

(1) The Minister may, subject to subsection (2), make regulations regarding any matter that may or must be prescribed in terms of this Act or any incidental matter of a procedural or administrative nature that the Minister considers necessary to prescribe in order to achieve the objects of this Act."

27. Section 71 of the PPA provides as follows:

"***71 Penalties***

A person *convicted of an offence in terms of this Act is liable to a fine or to imprisonment for a period not exceeding 10 years*"

The Current Regulations

28. There are indications in the regulations that they are applicable to property practitioners only.

29. In the definitions, a "complainant" is defined as "any person who lodged a complaint against **a property practitioner** in terms of section 28 (1) of the Act". However, this is because section 28 limits itself to complaints against property practitioners.

30. In regulations 4 setting out the format of a compliance notice and regulation 5 setting out the format for a complaint, they too limit themselves to compliance notices to "property practitioners" or complaints against "property practitioners".

31. Whilst section 28 is limited to property practitioners, what of a compliance notice to a person other than a property practitioner – which is of course contemplated by section 26 also referring to "persons"?

32. It may of course be that the PPA when referring to "persons" is using the term interchangeable with "property practitioner" – but why then the distinction?

33. It seems the Minister when issuing the regulations was of the view that the PPA applies only to property practitioners since the regulations largely only refer to "property practitioner" *per se*. That does not however mean that the PPA necessarily only relates to property practitioners as will be discussed below.

34. However, regulation 35(1) provides that pursuant to the provisions of section 63 (1) of the Act, the following business practices are prohibited:

34.1 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):

34.1.1 receives money or any other reward in e change for a benefit, advantage or other form of preferential treatment in respect of the marketing of properties in such property development;

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

34.1.3 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 organization;

34.1.4 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;

34.1.5 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.

35. Regulation 38 of the regulations published under the PPA provides as follows:

"*38. Distinction Between Minor and Major Contraventions*

Contraventions of the Act are classified as minor or substantial, and attract the maximum fines as set out below-[1]

NO	*SECTION REFERENCE*	*CONTRAVENTION MINOR OR SUBSTANTIAL*	*MAXIMUM FINE*
3.	*41 (1)*	*Substantial*	*R 5 000*
4	*47 (2)*	*Substantial*	*R 10 000*
5.	*47 (4)*[2]	*Minor*	*R 450 per full month*
6.	*47 (5)*	*Minor*	*R 1 500*
7.	*47 (6)*	*Minor*	*R 500*
8.	*47 (7)*	*Minor*	*R 2000*

IV. THE LAW RELATING TO STATUORY INTERPRETATION

36. The law relating to the interpretation of contracts and legislation has been summarised in the well-known case of ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)*** ("*Endumeni*") at paras [18] and [25] – [26], where the Supreme Court of Appeal held as follows in this regard:

[1] The entire table is not reproduced but only the parts relevant to the brief.

[2] As is apparent, there is a duplication and conflict between regulation 38 and regulation 23.1. It is not clear which of the two regulations takes priority.

"*[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows:* ***Interpretation is the process of attributing meaning to the words used in a document****, be it legislation, some other statutory instrument, or contract,* ***having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence****. 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 appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.* ***Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. 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 document.***

. . .

[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. ***Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used.*** *However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise.* ***The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used****. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.*

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. ***Here it is usually said that the language is ambiguous, although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the***

problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. *An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.*"

37. The Constitutional Court has cited with approval the aforementioned principles in ***Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others 2019 (5) SA 1 (CC)*** where this Court held as follows at paragraphs [29] and [30]:

"*[29] There is no dispute about the principles of interpretation. The correct approach to the interpretation of documents was summarised by the Supreme Court of Appeal in Endumeni Municipality*

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. 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 appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to,

and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. 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 document.' [27] [Footnotes omitted.]"

38. Furthermore, in ***Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd 2019 (5) SA 29 (CC)*** at paragraphs [29] and [30], the Constitutional Court again endorsed the principles of interpretation as held in *Endumeni* and held as follows:

"*[29] The principles of statutory interpretation are by now well settled. In Endumeni the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation. [32] The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in legislation. [33] This process, it emphasised, entails a simultaneous consideration of —*

(a) the language used in the light of the ordinary rules of grammar and syntax;

(b) the context in which the provision appears; and

(c) the apparent purpose to which it is directed.

[30] What this court said in Cool Ideas in the context of statutory interpretation is particularly apposite. It said:

> *'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> > *(a) that statutory provisions should always be interpreted purposively;*
> >
> > *(b) the relevant statutory provision must be properly contextualised; and*
>
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).' [Footnotes omitted.]*"

V. THE FIRST ISSUE: Are HOA subject to the provisions of the PPA and are they required to comply with the provisions of the Act in general terms

39. Firstly, the name of the Act is the "Property Practitioners Act". This title of the Act is itself a clue as to whom it was intended to regulate, namely property practitioners as defined in the Act.

40. Secondly, the introduction to the Act states “to provide for the regulation of property practitioners” and this is repeated in the objects of the Act.

41. However, the introduction and objects of the Act also state that its object is consumer protection. This would include consumer protection against undesirable business practices. This would seem to give the Minister the power to issue regulations to curb any undesirable business practices in the property sector for the purposes of consumer protection.

42. To determine whether the HOA are contravening the PPA by conducting themselves in the manner set out in the background to the issues, the first step is to determine whether they fall within the definition of a “property practitioner”. If so, the question whether the PPA applies to them even if they are not “property practitioners” as defined, becomes irrelevant and academic.

43. It is clear from the definition of a property practitioner set out above, that whether or not a party is a property practitioner is dependent upon the conduct of that party. It is the holding out by a person that they are a property practitioner, which has the effect that they fall within the ambit of the definition.

44. In this regard, see the definition of '*property practitioner*' in the PPA[3] and the decision in ***Rogut vs Rogut 1982 (3) SA 928 (A)*** where the following was said:

"*As the answer lies in the interpretation of the Act, I set out the relevant provisions thereof. The long title of the Act is stated to be, inter alia, to provide for an estate agents board and estate agents fidelity fund, and for the control of certain activities of estate agents. Who is an estate agent, as statutorily defined? The definition in s 1 is a lengthy one. For present purposes it is sufficient to quote the following (the italics being mine) -*

''Estate agent' means any person who, for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person –

(i) sells or purchases immovable property,... or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a seller or purchaser therefor; or

(ii) lets or hires immovable property; or

(iii) collects or receives any moneys payable on account of a lease of immovable property...'

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[3] The similarity of the relevant parts of the definition as compared with the definition of '*estate agent*' in the EAA will be readily apparent upon a comparison of the two provisions. The changes in the introductory language are thus: … *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 ~~advertises that he~~*[3]*, on the instructions of or on behalf of any other person…*

At this stage I make three observations:

First, the opening word in the definition is 'means'. As Broome JP observed in another context in Warwick Investments (Pty) Ltd v Maharaj 1954 (2) SA 470 (N) at 472B, that word 'indicates that what follows is in the nature of a precise definition'. Obviously it is not as expansive as 'includes'.

Second, as counsel for the respondent submitted, it seems clear that the words 'for the acquisition of gain' modify the holding out or the advertising, rather than the selling, buying or letting of property. This connotes that an estate agent, as defined, is a person who is inter alia looking for business. See also the Afrikaans text, which was signed, which recites 'iemand wat, met die oog op winsbejag'.

Third, a person who merely does one or more of the acts listed in subpara (i) to (iii) does not thereby bring himself within the definition of estate agent unless he has also held himself out or advertised, for the acquisition of gain, that he is a person who does these things. I agree with Marais AJ that the contention on behalf of the appellant really came to this: if a person performs any of the acts listed in the definition, he is ipso facto holding himself out as a person who performs that act and is therefore an estate agent by definition. If this submission is sound, it would mean that the words 'in any manner holds himself out as a person who, or directly or indirectly advertises that he', are redundant and mere surplusage. One does not lightly conclude that words in a statute are redundant; certainly not when they are deliberately employed in a definition clause... If the Legislature had intended that the performance simpliciter of any act listed in paras (a) (i), (ii), (iii) and (iv) of the definition of 'estate agent' should render the person performing it subject to the Act, I would have expected it to say so'.

In the result, the key words in the definition of estate agent are 'holds out' or 'advertises'. They must precede the instructions or mandate. Without such 'holding out' or 'advertising' there cannot be an 'estate agent' as defined."

45. By parity of reasoning, if a party does not fall within the definition, then the PPA and its regulations do not apply to them where the PPA refers specifically to "property practitioners".

46. Applying the definition of "property practitioner" to the conduct of the HOA, in my view the HOA by holds themselves as a person who or which, directly or indirectly, on the instructions of or on behalf of any other person (in this case the homeowners in the association) provides services as intermediary or facilitator with the primary purpose to, or to attempt to effect the conclusion of an agreement to sell and purchase, or hire or let, as the case may be, a property or business undertaking, <u>including, if performing the acts mentioned in this subparagraph, a home ownership association</u>, conducts itself as a "property practitioners".

47. In other words, by charging fees to property practitioners (estate agents) in order to "train" or "accredit" them to work in that particular homeowners association area, the HOA are "directly or indirectly" providing services as "facilitator" with the primary purpose to effect the conclusion of an

agreement of sale or hiring and letting (as the case may be) and the definition envisages homeowners associations carrying out such conduct.

48. Of course, it may be argued that the HOA fall within the proviso that they are not engaging in this conduct "in the ordinary course of business". However, it this was so, no homeowners association would ever fall within the definition since all HOA would profess that their ordinary course of business is to administer the homeowners association and not to train or accredit estate agents working in their area. Yet, the definition specifically envisages that a homeowners association could fall within its parameters.

49. In my view the "not ordinary course of business" proviso is to prevent a once-off situation. Where the HOA conducts itself in the offending manner as part of its usual operations, then the charging of fees to "train" or "accredit" estate agents to operate in its area, becomes part of its ordinary course of business.

50. If so and if the HOA carrying out such conduct fall within the definition of a "property practitioner" then all the provisions of the PPA, including the complaint, compliance and enforcement mechanisms would also apply to the HOA.

51. However, even if I am incorrect in my opinion that the HOA conducting themselves as set out above fall within the definition of a "property practitioner", that is not the end of the matter for, as seen below, there are indications in the PPA that the provisions thereof, particularly in regard to undesirable practices, apply not only to property practitioners but to any person.

52. For example, whilst sections 25 and 28 refer only to a property practitioner, section 26 refers to "any person" and not only a "property practitioner" *per se*, whilst section 27(3) refers to the lodging of a complaint against a "property practitioner or other person" and not only a property practitioner".

53. Section 26 seems to suggest that the Authority may issue a compliance notice against "any person" and not just a "property practitioners.

54. Section 27(3) in turn seem to suggest that a person may lodge a complaint against any person and not only a property practitioner *per se*.

55. That said, the provisions of section 28 are limited to complaints against property practitioners.

56. If the intention of the legislature was that compliance notices and fines applied only to property practitioners as defined in the PPA, then surely the PPA would only refer to "property practitioners" (as it does in certain sections) and not "any person" as it does in sections 26 and 27(3).

57. It appears therefore that insofar as the Chapter 5 of the PPA dealing with Compliance and Enforcement, is applicable to all persons not complying with the provisions of the PPA and its regulations and not only property practitioners and a fine may be imposed on such person, even if they are not a property practitioner *per se*.

58. In my opinion the provisions of the PPA are applicable to the HOA if they are conducting themselves as set out above since they are then property practitioners.

59. If they are not in fact property practitioners, then in my opinion, the provisions of the PPA are not applicable to such HOA in general terms, but are applicable insofar as their conduct falls foul of the undesirable business practices as set out in regulation 35.

60. This is reinforced by the fact that section 6(c) and (d) of the PPA provides that it is the function of the Authority to ensure compliance with the provisions of the Act and the regulations and also to ensure that consumers

are protected from undesirable and sanctionable practices as set out in section 62 and section 63 of the PPA.

61. This brings us to the second issue.

VI. THE SECOND ISSUE: The application of Regulation 35 (entitled 'Undesirable Business Practices') in the context of HOA engaging in the offending activities

62. In my view and considering the provisions of regulation 35, there is no doubt in my mind that the conduct of charging fees for “training” or “accrediting” estate agents otherwise disallowing them for conducting the business of property practitioners in their homeowners’ association area, constitutes an undesirable business practice in terms of regulation 35.

63. This is because the offending conduct constitutes “effectively” excluding estate agents from their area, who do not pay the “training” or “accreditation” fees.

64. The conduct effectively offends against all the provisions of regulation 35.

65. If that is so, as set out above, in my view even if the HOA does not fall within the definition of a “property practitioner” per se, its conduct still falls

foul of the undesirable business practice in regulation 35 and this would apply to all persons conducting such undesirable business practice and not just property practitioners.

66. It would make no sense to interpret the regulation as applying only to property practitioners, yet any other person can conduct themselves in the offending manner. The point is that the Minister has deemed such conduct (by any person) as being an undesirable business practice that the consumer must be protected against. The consumer is harmed if only certain HOA "trained" or "accredited" estate agents can operate in that area and the sellers or buyers cannot choose the estate agent of their choice.

VII. THE THIRD ISSUE: Whether, if and to the extent that the conduct of a HOA falls within prohibited business practices as defined in Regulation 35, such would constitute an offence as defined in the PPA

67. It is noteworthy that there is no express provision in section 63 which indicates that a contravention of section 63 constitutes an offence.

68. However, in contrast section 66(2) specifically and expressly provides that a contravention of section 66(1) by a property practitioner constitutes an offence.

69. Furthermore, one must bear in mind the maxim *in poenis strictissima verborum significatio accipiendi est* ("in the case of penal laws the strictest interpretation of their terms should be accepted"). In other words, a strict interpretation must be accorded to legislation which may impose a penal provision.

70. Fundamental rights related to criminal law and due process in criminal proceedings are comprehensively and exhaustively entrenched in section 35 of the Constitution. This section together with constitutional provisions and other rights in the bill of rights have become the primary sources for the assessment of penal provisions enacted in the exercise of the state's "power of the sword", probably the prime example of public power.

71. The constitutional provisions have thus taken the place of the common-law maxim in *poenis strictissima verborum significatio accipiendi est* ("in the case of penal laws the strictest interpretation of their terms should be accepted").

72. Having regard to the fact that section 63 does not impose any penal provision or expressly refer to a contravention as constituting an offence, whereas other sections that do expressly refer to an offence for their contravention, such as section 66, applying a strict interpretation to section

63 militates against an interpretation that the legislature intended a contravention thereof to constitute an offence.

73. Furthermore, section 26(7) specifically states that whilst a fine may be imposed in terms of the compliance notice to the person, no such person may be prosecuted. This also militates against an interpretation that a contravention of the prohibited undesirable practice constitutes an offence.

74. It is also telling that in terms of regulation 38 which provides for minor and major contraventions and the fines imposed for such, there is no mention in respect of a fine for the contravention of an undesirable business practice in terms of section 63.

IX. THE FOURTH ISSUE: whether by requiring estate agents to pay any amounts as set out below, a HOA is by that fact in and of itself, engaging in an unlawful act

75. In my opinion, if the HOA's conduct in requiring estate agents to pay fees as aforesaid constitutes an undesirable business practice in terms of regulation 35, the HOA whilst are engaging in an act prohibited in terms of the PPA, is not necessarily engaging in an unlawful act.

76. The general test whether an act is unlawful (as opposed to merely illegal) is whether the *boni mores* of society would regard it as unlawful.

77. In my view, if the Minister regards certain conduct as an undesirable business practice and if the conduct prejudices consumers, this does not necessarily mean that it is unlawful *per se*.

78. Applying the strict interpretation as aforesaid, the legislature did not intend to visit a contravention of any undesirable business practice with illegality.

79. Nevertheless, and irrespective of non-illegality, I have no doubt that the charging of fees in terms of a prohibited business practice is unlawful and that the *boni mores* of society would consider such charging of fees as being unlawful.

X. THE FIFTH ISSUE: if and to the extent that the conduct of a HOA falls within the business practices prohibited in terms of section 63 (1) and the foregoing regulations, whether the Regulator (the Property Practitioners Regulatory Authority) would in principle have the authority to take steps against such homeowner's association

80. It seems that applying the provisions of section 26 of the PPA, that the Authority (or Regulator) has the power to issue a compliance notice to an

HOA that is engaging in the prohibited and undesirable business practice in terms of regulation 35. This is irrespective of whether the HOA is a property practitioner or not since the section also refers to a "person" and not only to a "property practitioner" as set out above.

81. Section 26(4) specifically provides that the Authority may, where an inspection or investigation by an inspector indicates a contravention of this Act which is of a minor nature as determined under subsection (1), issue a compliance notice in the prescribed format to the person so allegedly contravening this Act, calling on that person to comply with this Act within a period specified in the compliance notice, which period must be reasonable in the circumstances.

82. Section 26(5) provides that the Authority may, in the compliance notice, determine a fine to be paid by the person concerned if such person, in writing, on the compliance notice acknowledges his, her or its failure to comply with this Act as stated in the compliance notice.

83. In my opinion the Regulator (as the Authority) would therefore have the authority to take steps against the contravening HOA's.

84. This of course does not mean that any other person (such as the estate agent/s against whom the undesirable business practice is being applied)

would not be entitled to apply for interdictory relief against the contravening HOA since they would be directly affected by the undesirable business practice and would therefore have the requisite locus standi to apply for such interdictory relief.

XI. CONCLUSION

85. In conclusion, my opinion in respect of each of the issues is as follows:

85.1 Are HOA subject to the provisions of the PPA and are they required to comply with the provisions of the Act in general terms: The HOA are subject to the provisions of the PPA because they are property practitioners when engaging in such conduct and are subject to the prohibition in section 63 if they are engaging in the prohibited conduct.

85.2 The application of Regulation 35 (entitled 'Undesirable Business Practices') in the context of HOA engaging in the activities: Regulation 35 would apply to the offending activities of the HOA.

85.3 Whether, if and to the extent that the conduct of a HOA falls within prohibited business practices as defined in Regulation 35, such

would constitute an offence as defined in the PPA ("the third issue"): The conduct of the HOA does not constitute an offence.

85.4 Whether by requiring estate agents to pay any amounts as set out below, a HOA is by that fact in and of itself, engaging in an unlawful act: The conduct of the HOA in requiring payment from the estate agents is unlawful.

85.5 Whether, if and to the extent that the conduct of a HOA falls within the business practices prohibited in terms of section 63 (1) and the foregoing regulations, whether the Regulator (the Property Practitioners Regulatory Authority) would in principle have the authority to take steps against such homeowner's association: The Regulator would have authority in terms of section 26 to issue compliance notices and take the further steps provided for in Chapter 5.

G KAIRINOS S.C.

Group 21, Village Chambers
Sandown Village
Sandton