IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024-148142

In the application between:

SAKELIGA NPC	Applicant
and	
PROPERTY PRACTITIONERS REGULATORY AUTHORITY	First Respondent
MINISTER OF HUMAN SETTLEMENTS, WATER AND SANITATION	Second Respondent
MINISTER OF TRADE, INDUSTRY AND COMPETITION	Third Respondent

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned;

THATOHATSI RAMAILI

do hereby make oath and say:

1. I am the Chief Executive Officer ("CEO") of Property Practitioners Regulatory Authority ("Authority"), cited as the first respondent. I was appointed in terms of section 16 of the Property Practitioners Act No. 22 of 2019 ("the Act"). I am in terms of section 16(2) of the Act, accountable to the Board and I am responsible and accountable for the day-to-day management and operations of the Authority. By virtue of my position herein, I am duly authorised to depose to this affidavit and to oppose this application on behalf of the Authority.

N.K

2. The facts herein contained are within my personal knowledge save where the contrary appears from the context and are both true and correct. Where I make legal submissions, I do so upon legal advice that I have received from the Authority's legal representatives which I accept as correct.

3. The applicant has launched an application with this Court in which it challenges the constitutionality of certain provisions of the Act. The applicant contends that paragraph (a)(iv) to (e) of the definition of property practitioner in section 1 of the Act be declared unconstitutional and invalid to the extent of such inconsistency. Also, the applicant seeks an order that section 50(a)(x) of the Act be declared unconstitutional and invalid to the extent of such inconsistency. Lastly, the applicant seeks an order that regulation 2 of the regulations promulgated by the Minister in proclamation 47 of 14 January 2022 be declared unconstitutional and invalid to the extent of such inconsistency

4. There is no merit in this application and in the constitutional challenge mounted by the applicant against these provisions of the Act. I would demonstrate below that these provisions are indeed constitutional. In doing so, I propose to first provide the synopsis of the relevant provisions of the Act which must be read in context in order for one to appreciate the import of the impugned provisions.

5. First what ought to be appreciated is what this Act was enacted for and what purpose it serves. This Act repealed the Estate Agents Affairs Act, 1976. Its

N.K

object is first appreciated from its introductory remarks before its preamble. I reproduced the introductory remark of the Act thus:

"To provide for the regulation of property practitioners; to provide for the continuation of the estate agency affairs board as the property practitioners regulatory authority; to provide for the appointment of the members of the board and matters incidental thereto; to provide for the appointment of the Chief Executive Officer and other staff members of the authority; to provide for transformation of the property practitioner sector; to provide for the establishment of the transformation fund and establishment of the research centre on transformation; to provide for compliance with and enforcement of the provisions of the Act; to provide for the continuation of the estate agents fidelity fund as the property practitioners fidelity fund; to provide for consumer protection; to provide for the repeal of the Estate Agency Affairs Act, 1976; and to provide for matters connected therewith."

6. In the preamble, the Act encapsulates transformation of the property market as a necessary intervention that would benefit the historically disadvantaged individuals and recognises the property practitioner's important role in providing assistance to consumers when conducting property transactions.

7. In respect of the application of the Act, section 2 stipulates that the 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.

8. Section 3 provides for the objects of the Act. Because of the significance thereof, I reproduce section 3 thus:

"(A) the objects of the act are to –

N. K

(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 interest 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."

9. Section 4 deals with exemptions from the Act. Because of its relevance to this application as well I reproduce it although it is a long section. It provides as follows:

"(4)(1) Any person (hereinafter referred to as the applicant) may, subject to the provisions of this section, be exempted from compliance with any specific provision of this Act.

(2) The applicant must, in the prescribed manner and form, submit an application for exemption to the authority, accompanied by –

(a) an explanation of the reasons for the application; and
(b) any applicable supporting documents.

(3) The authority may direct the applicant to –

(a) furnish additional information which may be relevant; and

N.K

(b) *appear in person before the authority to support his or her application and provide verbal responses to questions raised by the authority.*

(4)(a) Any person may raise an objection to the authority as prescribed regarding the exemption which has been granted to a person or an entity in terms of this section.

(b) The authority must consider the objection to determine whether such objection may be sustained.

(5) The authority must consider and decide on the application, taking into account whether –

(a) the granting of the exemption is likely to impact negatively on the interests of the general public;
(b) the granting of the exemption is likely to impact negatively on competition in the property sector or the property practitioners in the streets;
(c) the granting of the exemption is likely to benefit one section of the property practitioners' industry to the detriment of another;
(d) appropriate, sufficient and effective regulatory protection of consumers rights and interests exists; and
(e) the exemption would not defeat the objects of the Act.

(6) The authority may –

(a) approve the application, together with a record of the matters contemplated in subsection (7): provided that the exemption may not exceed three years and may not be applied retrospectively;
(b) decline the application; or
(c) refer the application back to the applicant for further investigation or consideration, as the case may be.

(7) If the authority approves the application, the authority must publish the decision on its website, which must include –

(a) the provision of the Act from which exemption is granted;
(b) the person to whom the exemption applies;
(c) the date from which and the date up to when the exemption applies;
(d) any conditions that apply to the exemption;
(e) the reasons for granting the exemption;

N. K

(f) a declaration that the granting of an exemption does not create any special rights or legitimate interests which may apply to the category of persons so exempted; and

(g) a declaration that any exemption granted may be amended or withdrawn subject to the provisions of this section.

(8) Any person who is adversely affected by the decision of the authority may request the authority to provide written reasons.

(9)(a) any person may, at any time in writing, request the Minister to review any exemption granted in terms of this section.

(b) the Minister must instruct the person requesting the review to notify the authority as well as any other person specified by the Minister, for the account of the person…

(10) The authority may on good ground amend, suspend or withdraw an exemption.

(11) The authority must publish the exemption on its website."

10. The Authority is established in terms of section 5 of the Act as a juristic person, a national public entity subject to the Public Finance Management Act, 1999 and governed and acts through the board known as a Board of the Authority as contemplated in section 5(1)(2)(3) of the Act. In terms of section 5(4), the Authority must provide regulatory mechanisms in respect of the financing, marketing, managing, letting, hiring, sale, property consumer education and purchase of property, and may do all that is necessary or expedient to achieve the objects of this Act. The Authority is accountable to the Minister.

11. The functions of the authority are spelled out in section 6 which provide as follows:

"(6) The functions of the authority are to –

N.K

(a) regulate the conduct of property practitioners in dealing with the consumers;
(b) regulate the conduct of property practitioners insofar 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."

12. The Authority is governed by the board which consists of not less than 9 but not more than 12 nonexecutive members, including the Chairperson, appointed by the Minister; and the CEO, who serves on the board by virtue of his or her office as contemplated in section 7(1) of the Act.

13. The powers and duties of the board are set out in section 9 which provides as follows:

"(9) The functions of the board are to –

(a) ensure that the authority complies with this Act and any other applicable law;
(b) ensure that the authority performs its duties efficiently and effectively;
(c) provide corporate governance for the authority;
(d) determine and enforce the brought policy framework within which the authority must pursue its objects and perform its functions;

N.K

(e) ensure that the authority exercises its powers in accordance with the principles of transparency and accountability;

(f) manage the marketing, promotion, sale, lease, financing, purchasing, registration and transfer of property of the authority;

(g) advise the Minister on –

i. the efficacy of this Act;
ii. the state of transformation of the industry;
iii. prescribing of regulations;
iv. education and training of property practitioners; and
v. any other matter on which the Minister requires the advice of the board;

(h) maintain the fund and hold it in trust; and

(i) perform any other power or duty conferred on the board by this act or any other applicable law."

14. Section 10 provides for good governance and code of ethics.

15. My powers and duties as CEO are set out in Chapter 3 of the Act. Section 17 empowers me to appoint suitably qualified persons to assist me to efficiently and effectively perform my functions under this Act in accordance with the employment policy approved by the Board. I must ensure that all employees of the Authority are adequately qualified and trained for their respective positions. Section 19 empowers me to delegate in writing my functions or power to any of the staff members of the Authority subject to any qualification I may determine.

16. Also of equal importance to this application is Chapter 4 of the Act which is dedicated to transformation of property sector. Section 20 provides that:

"(20)(1) The property sector transformation chatter code as amended from time to time applies to all property practitioners.

N.K

(2) When procuring property related goods and services, all organs of State must utilise the services of property practitioners who comply with the Broad Based Black Economic Empowerment and employment equity legislation and policies.

(3) The authority must from time to time –

(a) implement and assess measures to progressively promote an inclusive and integrated property sector;
(b) implement appropriate measures and assess the state of transformation within the property sector;
(c) create such mechanisms for the continuous monitoring and evaluation of the sector performance on the transformation imperatives and granting of incentives as may be prescribed; and
(d) introduce measures to be implemented, which may include incubation and capacity building programmes to redress the imbalances of the past."

17. Section 21 deals with property sector transformation fund. It states that:

"(21)(1) The authority must, within six months of its establishment, open a property sector transformation fund into which grants contemplated in section 38 are paid.

(2) The Minister may prescribe measures to promote economic transformation by facilitating the accessibility of finance for property ownership, property development and investment in order to enable meaningful participation of historically disadvantaged individuals including women, youth and people with disabilities.

(3) The authority must utilise the property sector transformation fund in such a manner as may be prescribed, which may include the following transformation and empowering programs:

(a) principalisation programme, to promote black owned firms and principals.
(b) regularisation programme, to promote and encourage participation of the historically disadvantaged due to non-compliance.

N.K

(c) consumer awareness program, to promote awareness of property transactions and business undertaking.
(d) work readiness program, to promote and enhance participation of historically disadvantaged in the property sector.

(4) The authority must in consultation with the services seta develop special dispensation for the training and development of the historically disadvantaged which must include recognition of prior learning."

18. Section 23 deals with exemptions in respect of accounting records and trust accounts. It states that:

"(23)(1) A property practitioner whose turnover is below R2.5 million must cause his, her or its accounting records to be subjected to an independent review by a registered accountant subject to the provisions of section 54(1) to (7), applied with the necessary changes.

(2) The Minister may by notice in the Gazette –

a. determine the circumstances under which certain property practitioners may be exempted from keeping trust accounts; and
b. determine a different dispensation for the review of accounting records for those property practitioners."

19. Chapter 5 of the Act is dedicated to compliance and enforcement. It sets out the powers of inspectors, and appointment of inspectors, the powers to enter, inspect, search and seize.

20. Chapter 6 deals with finances of the Authority. Chapter 7 deals with property practitioners fidelity fund. Section 34 states that:

"(34)(1) The fund established by section 12 of the Estate Agents Affairs Act, 1976, known immediately before the commencement of this Act as

N.K

the estate agents fidelity fund, continues to operate as if it were established in terms of this Act, under the name property practitioners fidelity fund.

(2) The following must be paid into the fund:

(a) all monies paid as fees in accordance with this Act to or on account of the fund;
(b) income derived from the investment of monies in the fund in terms of section 33(2);
(c) all monies recovered by or on behalf of the fund in the exercise of any right of action conferred by this Act;
(d) all monies received on behalf of the fund from any insurance company;
(e) interest paid to the fund; and
(f) any other monies accruing to the fund from any other source."

21. The primary purpose of the fund is set out in section 35 which states that:

"(35)(1) Subject to the provisions of this chapter, the fund must be maintained and applied to reimburse persons who suffer pecuniary loss by reason of –

(a) theft of trust money committed by a property practitioner who was in possession of the fidelity fund certificate at the time of the theft; or
(b) the failure by a property practitioner to comply with section 54(1) or (3).

(2) no person has any claim against the authority as contemplated in subsection (1) unless the claimant has –

(a) within three years after the circumstances giving rise to a claim came into being, given notice to the authority of such claim as contemplated in section 37; or
(b) within the three year period contemplated in paragraph (a) after a written request was sent to him or her by the authority, furnished to the authority such proof as it may reasonably require."

N.K

22. Section 41 requires property practitioners to pay annually to the fund a prescribed application fee for a fidelity fund certificate in accordance with the provisions of section 47; and any amount that the Minister may, after consultation with the Minister of Finance and the Board, determine from time to time by notice in the Gazette.

23. Section 47 is equally important to this application. It is located within Chapter 8 of the Act, which deals with property practitioners, an application for fidelity fund certificate. Because of the significance of section 47, I reproduce it thus:

"*(47)(1) Every property practitioner, excluding property practitioner referred to in paragraph (g) of the definition of property practitioner is section 1, must, within the prescribed period and in the prescribed manner, every three years apply to the authority for a fidelity fund certificate, and such application must be accompanied by the fees contemplated in section 54.*

(2) A property practitioner referred to in paragraph (d) of the definition of property practitioner in section 1, must, within the prescribed period and in the prescribed manner, apply to the authority for a registration certificate, and such application must be accompanied by the fees contemplated in section 34.

(3) Subject to sections 43 and 52, the authority must, upon receipt of an application contemplated in subsection (1) or (2) and the relevant fees, if the applicant concerned –

(a) meets or has met all requirements provided for in or under this Act; and
(b) is not disqualified in terms of section 48 from being issued with a fidelity fund certificate, issue to the applicant concerned a fidelity fund certificate in the prescribed form, which is valid until 31 December of the year to which such application relates.

(4) A property practitioner who applies to the authority for a fidelity fund certificate or a registration certificate, after the prescribed period referred to in subsection (1) or (2), or whose application is not

N.K

accompanied by the fees referred to in section 34, must in addition to the applicable fee pay a prescribed penalty to the authority and the authority may not issue a fidelity fund certificate to the property practitioner concerned until the penalty has been paid.

(5) A property practitioner may not use or display a lapsed fidelity fund certificate.

(6) A property practitioner must, upon request from any relevant party, produce a fidelity fund certificate or certified copy thereof.

(7) A property practitioner whose contact details change during the period of validity of his, her its fidelity fund certificate, must within 14 days of such a change taking place in writing provide the authority with his, her or its new contact details."

24. Section 48 prohibits any person from rendering services of a property practitioner without fidelity fund certificate. It provides that:

"(48)(1) No person or entity may act as a property practitioner unless, in addition to any other requirements provided for in or under this Act –

(a) he or she or it has been issued with a fidelity fund certificate contemplated in section 47; or
(b) if he or she or it employs any other person as a property practitioner, that person has also been issued with the fidelity fund certificate contemplated in section 47.

(2) If an entity is –

(a) a company;
(b) a close corporation;
(c) a trust; or
(d) a partnership,

Every director of such a company, every member of such a close corporation, every trustee of such a trust and every partner of such a partnership, as the case may be, must have been issued with a fidelity fund certificate contemplated in section 47.

N.K

(3) Any person who contravenes or fails to comply with subsection (1) is guilty of an offence.

(4) A person who contravenes or fails to comply with subsection (1) must, immediately upon receipt of a request from any relevant party in writing, repay any amount received in respect of or as a result of any property transaction during such contravention.

(5) A person who fails to comply with a request contemplated in subsection (4) is guilty of an offence.

(6) The provision of this section applies irrespective of –

(a) what appellation a person or entity is described by; or
(b) whether he, she or it is registered, certified or appointed or act in terms of or under or for purposes of any other act."

25. Section 49 deals with the mandatory time period for issuing certificates. The point I am making by referencing the provisions of the Act that I have identified above is that none of these sections of the Act have been challenged by the applicant as unconstitutional. Of course, it is not the contention of the applicant that they are unconstitutional.

26. The applicant has simply isolated the definition of property practitioner in section 1 of the definition provision and section 50(a)(x) as unconstitutional without appreciating the object of the Act and its transformative imperative.

27. When this court takes into account the object of the Act as set out above, and the transformative nature of it, it would appreciate that the impugned provisions in the Act are rational as they serve legitimate governmental purpose of transforming the property sector. In achieving the necessary transformative objectives, it was necessary for the Act to prescribe a number of

N.K

disqualifications in section 50 of the Act including a requirement of a BBBEE certificate. The applicant has not explained why it only targeted section 50(a)(x) of the Act which requires compliance in respect of obtaining a valid BEE certificate but did not challenge a provision which requires production of a tax clearance certificate as unconstitutional and as inhibiting a property practitioner from exercising his or her right to freely trade and practice their protection as enshrined in section 22 of the constitution.

28. The profession of property practitioner is one that is regulated by law and in order for one to practice it must comply with the requirements set out in the Act. This is not an anomaly as there are many other professions which are regulated by law such as attorneys, doctors, chartered accountants and the like. The limitation in practicing such professions is measured against section 36 of the constitution which permits such limitation by law of general application.

29. The Property Practitioners Act is such law of general application, and it is constitutional, and the limitations it imposes in plying such trade is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

30. The property sector will not transform and achieve the imperative of our constitutional order if lip service is paid to transformation objectives by property practitioners. The disqualification based on failure to provide a valid BBBEE certificate is justified and reasonable looking at the nature of the right, which is the practice of property practitioner, the importance of the purpose of the limitation is to ensure that those who pay lip service to transformation are not

N.K

permitted to practice as property practitioners and earn an income from it in contravention of the Act. The nature and extent of the limitation is reasonable and justifiable because all what the property practitioner is required to do is to obtain a valid BBBEE certificate. There is justifiable and reasonable relations between the limitation and its purpose, which is to realise the objects of transformation set out in the preamble and other provisions of the Act which I have referred to above. There are no less restrictive means to achieve the purpose other than imposing the disqualifications in section 50, and in particular, one in section 50(a)(x).

31. Section 50 is equally important for purposes of this application as it deals with disqualification from issue of fidelity fund certificate. It stipulates various types of acts or conduct which result in one being disqualified from being issued with a fidelity fund certificate. The applicant in this application is only attacking one of the many acts or conduct which result in the disqualification. For instance, among the acts or conduct which result in disqualification from being issued with the fidelity fund certificate is if a person is not a South African citizen and does not lawfully reside in the Republic, a person who has been found guilty of contravening this Act, the Estate Agents Affairs Act, or any similar legislation in any other jurisdiction in the preceding five years.

32. The disqualification also is triggered among others if one is not in possession of a valid tax clearance certificate. If one has been found guilty by a competent tribunal or a Court of law of unfairly differentiating, distinguishing or excluding directly or indirectly anyone on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability,

N.K

religion, conscience, belief, culture, language and birth. A person who is of unsound mind and a person who has been found in any civil or criminal proceedings by a Court of law, whether in the Republic or elsewhere, to have acted fraudulently, dishonestly, unprofessional, dishonourably or in breach of a fiduciary duty, or of any other offence for which such person has been sentenced to imprisonment without the option of a fine.

33. Despite their inhibitive nature on a property practitioner to obtain a fidelity fund certificate in order to practice as property practitioner, the applicant has found these disqualifications to have passed constitutional muster. The applicant only attacks the one relating to obtaining a valid BEE certificate because it goes to the heart of transformation of the property sector. The applicant cannot attack section 50(a)(x) alone without challenging the entire Act which promotes transformation and access to the property market by previously disadvantage individuals.

34. Despite a plethora of acts or conduct which result in a disqualification from being issued with a fidelity fund certificate, the applicant has only challenged the disqualification in section 50(a)(x), which relates to the disqualification based on absence of a valid BEE certificate. There is no basis in law and fact for such attack or the singling out of the absence of a valid BEE certificate, other than the applicant indirectly seeking to challenge those provisions of the Act which are geared towards transforming the property sector and eliminating practices related to unfair discrimination and advancement of persons from previously disadvantaged backgrounds from participating on equitable basis in the property sector as property practitioner

N.K

35. The applicant also attacks regulation 2 on the basis that the Minister acted ultra vires in issuing this regulation. Regulation 2 of the regulations dated 14 January 2022 is dedicated to exemption from trust accounts and it provides that pursuant to the provisions of section 23(1) of the Act the Minister prescribes certain exemptions by property practitioners particularly when a property practitioner has never received any trust monies other than as permitted in regulation 2.4. The Minister is empowered to make regulations in terms of section 70 of the Act.

36. In terms of this section, the Minister makes regulations regarding any matter that may or must be prescribed in terms of this Act or any incidental matters of a procedural or administrative nature that the Minister considers necessary to prescribe in order to achieve the objects of the Act. The Minister is required to follow the procedure set out in section 70(2) of the Act, which is to consult the board and publish the proposed regulations for public comment and allow at least 30 days for submission of such comment. In promulgating the regulations of 2022, the Minister fully complied with the procedural requirements set out in regulation 70(2) of the Act.

37. It is odd that the applicant singles out only regulation 2 from the entire set of 2022 regulations when all of them have been gazetted in one government gazette. The attack on regulation 2 is opportunistic and baseless.

38. There is accordingly no legal basis for the applicant to attack the constitutionality of regulation 2 on grounds that the Minister acted ultra vires. In

N.K

any event section 23 empowers the Minister to issue a notice in the gazette regarding matters stated in section 23 (2) and regulation 2, which the Minister did.

39. The applicant is primarily challenging the constitutionality of the definition of property practitioner in section 1(a)(iv) as well as the definitions in section 1(b) to (e) of the Act. As I have mentioned earlier, there is nothing unconstitutional about the definition of property practitioner in section 1 of the Act. In setting out the purpose of the Act and its import, what becomes evident is that the new Act, which repealed the Estate Agency Affairs Act, was informed by the evolving nature of the property sector, which is not or no longer confined only to estate agent in the sense of only focusing on the sale and letting of property on the mandate of the other. There are other role players, who by definition and conduct are in fact performing the function of property practitioner, liable to be regulated in terms of the provisions of this Act.

40. Property practitioner is defined in section 1(a) as follows:

"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 –

(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)."

N.K

41. It is this provision that the applicant is challenging as unconstitutional. In order to appreciate the constitutionality of this provision, one has to read it with the definition in section 1(a) which makes it clear that in order for one to qualify as property practitioner, liable to be regulated in terms of this Act, such person, whether natural or juristic, must hold himself or herself or itself out as a person who directly or indirectly on instruction of somebody or on behalf of somebody and for his own gain sell or let or manages one's other property.

42. This definition, must be read also together with section 1(a)(v) which states that:

"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, the 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 ordinary course of business;

(bb) where the person is a natural person and that person in the ordinary course of business offers 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 Sheriff's 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."

43. Similarly, section 1(a)(vi) makes it plain when it provides as follows:

"Or renders any other service specified by the Minister on the recommendation of the board from time to time by notice in the gazette."

N.K

1

44. Section 1(b) makes it plain about the inclusions. It states:

"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 a remuneration manages the property on behalf of another."

45. Section 1(d)(e) also states that:

"(d) includes a trust in respect of which the trustees, 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 cooperation 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) of (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 his 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 a day-to-day operations of the business of that property practitioner."

N.K

46. The applicant does not challenge the constitutionality of section 1(f)(g) of the Act.

47. It is against this backdrop that the applicant's application should be adjudicated and therefore should fail.

48. I turn to deal with the allegations in the founding affidavit ad seriatim to the extent that it is necessary.

AD SERIATIM RESPONSES

49. Ad paragraphs 1 – 4

I note the contents of these paragraphs, save as to deny that the allegations are true and correct.

50. Ad paragraphs 5 – 8

I note the citation of the parties.

51. Ad paragraph 9

I deny that the impugned provisions are unconstitutional, irrational and I deny that they do not serve a legitimate government purpose.

52. Ad paragraph 10

52.1 I deny the allegations in this paragraph. Section 50(a)(x) of the Act is not the only one which disqualifies a person from being issued with a fidelity

N.K

fund certificate. The profession of property practitioner is permitted in terms of section 22 of the Constitution but falls into the category of those which are regulated by law. Section 22 of the constitution provides as follows: *"every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".*

52.2 As I have stated, the profession of property practitioner, falls into the category of a profession that is regulated by the Property Practitioners Act.

53. Ad paragraph 11

I deny the allegations in this paragraph. The definition of property practitioner is not overbroad. It clearly specifies persons, natural or juristic, who are regulated in terms of the Act. It is not correct that it includes persons such as owners of property selling or renting their own property. It includes property developers selling or renting out their property under the ministerial guidelines. It includes anybody who in the practice of his trade, and on the mandate of another person and for gain performs the function of a property practitioner. The definition also makes specific exclusions in order to ensure certainty and avoidance of confusion. The definition of property practitioner accords with the objective of the Act as set out section 3, and the application of the Act in section 2. Section 4 also makes exemptions from the Act of certain persons or categories of persons.

N.K

54. Ad paragraph 12

I deny the allegations in this paragraph. The fidelity fund certificate is a gateway to the practising of the profession of property practitioner. Without a fidelity fund certificate, one cannot practice. This is clear from the provisions of Chapter 7 of the Act and Chapter 8 of the Act, with particular reference to sections 47 and 48 of the Act. Withholding of a fidelity fund certificate to a property practitioner who does not meet the requirements set out in section 47 and 48 read with section 50 of the Act is not irrational. It serves a governmental legitimate purpose of regulating the profession in the manner that is to protect the public from property practitioners who do not have the requisite certificate to practice. In fact, the Act criminalises performing the function of a property practitioner without a fidelity fund certificate. Such a prohibition and disqualification is neither unconstitutional nor irrational.

55. Ad paragraph 13

A definition of property practitioner in section 1 is clear and must be given its literal meaning. It is not ambiguous and the language of it is clear and should be given effect to. If it is ambiguous, which I deny, the ambiguity does not render it unconstitutional. In such event, the purposive approach which considers the language of the legislation, its purpose and import as a whole through a unitary approach to interpretation is adopted. Once that is adopted, it is evident that the impugned provisions are rational and serve a government legitimate purpose of transforming the property sector. Save as aforesaid, I deny the allegations in paragraph 13.

56. Ad paragraph 14

I deny that regulation 2 promulgated by the Minister is invalid and I deny that the Minister acted outside his powers in terms of section 70. I deny that the Minister promulgated regulation 2 in terms of section 77 of the Act. The Minister promulgated regulation 2 in terms of section 70, which is the provision which empowers the Minister to make regulations, and section 23, which empowers the Minister to issue notices in respect of matters listed in section 23 in the government gazette. It is incomprehensible why the applicant singles out regulation 2 as ultra vires and not the remaining regulations despite that all of them were issued and gazetted by the Minister in the 2022 government gazette.

57. Ad paragraph 15

I deny that the relief sought by the applicant is one capable of being granted by this Court. In any event, the applicant has not set out the other provisions which should be impacted by the relief sought by the applicant. There are no such provisions because the applicant has specifically attacked only those provisions mentioned in the notice of motion. Besides, although in the notice of motion the applicant purported to impugn the definitions of property practitioner in section 1(a)(iv) to (e), there is no factual allegations in the founding affidavit which support the attack of section 1(d) and (e). Instead, the attack has been limited to section 1(b) and (c) only in the founding affidavit.

58. Ad paragraph 16

I have no knowledge of the applicant, and I therefore dispute its locus standi. The applicant is not affected by the definition of property practitioner in section

N. K

1, nor the disqualifications in section 50(a)(x) of the Act, and thus its rights in law are unaffected. The applicant is not a property practitioner in terms of the Act. Legal argument will be made to court at an appropriate time.

59. Ad paragraphs 17 – 22

The applicant does not profess to be operating in the property sector and thus its legal challenge to the constitutionality of the impugned provisions is still born. I dispute the legal standing of the applicant purporting to bring application on behalf of the wider community of property practitioners and in the public interest.

60. Ad paragraphs 23 – 26

I note the provisions of section 22 of the Constitution. The practice of the property practitioner is one regulated by law. Save as stated, I deny the allegations in paragraph 26.

61. Ad paragraph 27

I admit the allegations in this paragraph.

62. Ad paragraph 28

I admit the allegations in this paragraph.

63. Ad Paragraph 29

The definition in the repealed Act is defunct and thus irrelevant. The definition in the Act accords with the evolving nature of the business of property

N.K

practitioner and the need of having a transformed property sector and thus constitutional.

64. Ad paragraph 30

The old Act was unconstitutional as it was enacted without any regard to equitable participation of previously disadvantaged individuals in the property sector. In fact, it was designed to exclude them without any regard to the constitutional imperatives of transformation. It is therefore a misguided approach to use an old apartheid legislation as a yard stick in determining the constitutionality of the Act, which was enacted twenty-eight years later after the advent of our constitutional democracy. This Act is designed to transform the property sector for real.

65. Ad paragraph 31

The old Act is irrelevant. What it sought to achieve was inimical to our constitutional order and can never be used as a bench mark or model of perfection.

66. Ad paragraph 32

The Act has broadened the definition of property practitioner and not an estate agent. The Act has included other categories of persons, whether natural or juristic who operate in the property sector performing the function defined in the Act of property practitioner irrespective of how such persons choose to call themselves. There is nothing unconstitutional in broadening the definition of property practitioner and repealing the definition of estate agent.

N.K

67. Ad paragraphs 33 – 34

I deny the allegations in paragraph 33. It is not appropriate to read the definition section in section 1 (a)(i) to (vi) in isolation from the exclusion section in (1)(v)(aa) to (dd) and exemptions in section 4. Similarly paragraph (b) of section 1 cannot be read in isolation from the rest of the definition section in respect of the definition of property practitioner.

68. Ad paragraphs 35 – 38

I deny the allegations in these paragraphs. The incorrect interpretation by the applicant fails to take into account the exclusion provisions in the definition section, read together with the exemption provisions.

69. Ad paragraphs 39 – 44

I deny the allegations in these paragraphs. The incorrect interpretation by the applicant arises from misreading of the Act and importing into the Act words which are not contemplated in the Act.

70. Ad paragraph 45

It is impermissible for the applicant to use regulations in order to interpret the Act. I deny the allegations in this paragraph.

71. Ad paragraph 46

I deny allegations in this paragraph. The Act does not recognise estate agents separate from property practitioners. The definition of estate agent has been

N.K

repealed in the Act. There are no more estate agents but property practitioners in terms of the Act.

72. Ad paragraph 47

I note the quotation of regulation 39.1.1 and 39.1.2.

73. Ad paragraph 48

I deny that the definition of property practitioner is unconstitutional.

74. Ad paragraphs 49 – 52

I deny the allegations in these paragraphs.

75. Ad paragraph 53

The Act and regulations impose duties and responsibilities on property practitioners. That is what every legislation that regulates the practice of a profession do, and there is nothing unconstitutional about regulating a profession.

76. Ad paragraph 54

I admit the allegations in this paragraph.

77. Ad paragraph 55

I am not aware that section 50(a)(x) is unique. I cannot speak on behalf of other professions. What I know is that section 50(a)(x) serves a legitimate government purpose.

N.K

78. Ad paragraph 56

Section 50(a)(x) cannot become unconstitutional simply because the applicant does not know what is meant by 'valid' and 'BEE certificate'. The applicant has never asked despite that this Act was enacted in 2022 and raises the question two years later. A valid BEE certificate is a certificate issued by an accredited agent, and valid for the period specified in the certificate.

79. Ad paragraph 57

I admit the allegations in this paragraph.

80. Ad paragraphs 58 – 61

The Act does not regulate the BBBEE Act. Neither does it purport to do so. The Property Transformation Charter Code was promulgated in 2017, before the enactment of the Act. The Code is not legislation. It does not take precedence over the Act.

81. Ad paragraph 62

The Act does not criminalise persons from not having a valid BBBEE certificate. It criminalises the conduct of persons who practice as property practitioners without a fidelity fund certificate. This much is clear from section 48 of the Act which is not impugned as unconstitutional by the applicant.

82. Ad paragraph 63

The allegations in this paragraph are incorrect. The whole of section 50 is a disqualification section, from (a)(i) to (x), and not only (a)(x). A valid BEE

N.K

certificate is a reference to a BBBEE certificate under the BEE Act. Section 50(a)(x) does not criminalise or proscribe a property practitioner who does not have a valid BEE certificate. The criminal provision is in section 48 which is not under challenge. Also, section 48 criminalises and or proscribe any person from acting as property practitioner without a fidelity fund certificate.

83. Ad Paragraph 64

The absence of a definition of what constitutes a valid BEE certificate does not render the impugned provision unconstitutional.

84. Ad paragraph 65

84.1 I deny the allegations in this paragraph. In any event the allegation of selective application of the provision does not render the provision unconstitutional.

84.2 What was said at the Webinar held on 13 March 2024 does not render the provision unconstitutional. The applicant has not attacked the conduct of the Authority as unconstitutional but has squarely attacked identified provisions of the Act. What was said at the Webinar is irrelevant to the constitutional challenge.

85. Ad paragraph 66

The Authority is obliged to issue a fidelity fund certificate to a property practitioner who has complied with the provisions of section 47 and has no discretion to refuse if the requirements in section 48 are met. However, the

N.K

Authority does not have a discretion to issue a fidelity fund certificate to a property practitioner who is prohibited under section 48 and disqualified under section 50.

86. Ad paragraph 67

I admit that annexure X5 emanated from the Authority. I deny that the Authority is unable to make sense of how to deal with section 50(a)(x).

87. Ad paragraph 68

The legal obligation is not confined to section 50(a)(x). It extends to other obligations imposed in the Act, which the applicant has no difficulty with. I deny that the results are meaningless.

88. Ad paragraphs 69 – 73

I deny the allegations in these paragraphs.

89. Ad paragraphs 74 – 77

I deny the allegations in these paragraphs.

90. Ad paragraph 78 - 79

I confirm annexure X6 as the prescribed application form but deny the overbroad allegations.

91. Ad paragraph 80

The form must be read in conjunction with the Act and not in isolation.

N.K

92. Ad paragraph 81

A reference to estate agents has been repealed in the Act.

93. Ad paragraph 82 – 83

I deny that the employed denominations create untold confusion. Save as stated I deny the remainder of the allegations.

94. Ad paragraphs 84 – 85

I do not see the relevance of the allegations in paragraphs 84 to 85, given that the constitutional challenge is confined to specified provisions unrelated to training.

95. Ad paragraphs 86 – 89

I confirm annexure X7 as press statement. I see no relevance of allegations in paragraphs 86 and 87 relating to education and training and regulations relating to training because same are not under attack in this application. The prohibition from trading as property practitioner is in sections 48 and 50.

96. Ad paragraphs 90 – 92

I deny that the provisions of section 50(a)(x) prohibit the choice of trade, occupation or profession of all persons who are included in the definition of property practitioners. Those property practitioners who wish to be issued with fidelity fund certificate must comply with all the requirements in section 50, and not only section 50(a)(x).

N.K

constitutional rather than unconstitutional. It is only when upon any other construction the impugned provision is not capable of achieving constitutionality that the court would declare it unconstitutional. The impugned provisions are constitutional, and on proper construction, they pass constitutional muster.

100. Ad paragraph 100 – 101

I deny the allegations in these paragraphs.

101. Accordingly, the application must be dismissed with costs.

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn before me at MIDRAND on this the 31 day of **MARCH 2025**, the regulations contained in Government Notice N0. 1648 dated 19 August 1977 (as amended) having been complied with.

NKULULEKO KHABA AGA (SA)
COMMISSIONER OF OATHS
ASSOCIATE GENERAL ACCOUNTANT AG(SA) SAICA
UNIT 9 LEOGEM BUSINESS PARK
44 RICHARDS DRIVE, HALFWAY HOUSE
MIDRAND, 1685
(010) 822 7722

COMMISSIONER OF OATHS

N.K