CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBERS: CCT283/16, 293/16 and 294/16

CCT283/16

In the matter between

CHANTELLE JORDAAN	First Applicant
NEW ADVENTURES CONSULTING & SERVICES (PTY) LIMITED	Second Applicant
CLASS OF AFFECTED MUNICIPAL SERVICE CONSUMERS	Third Applicant
F M KEKANA	Fourth Applicant
M R MALEBOLOA	Fifth Applicant
S R MALEBOLOA	Sixth Applicant
M MAMOTSAU	Seventh Applicant
BILLIE ANN LIVANOS	Eighth Applicant
LEAH HENDERSON	Ninth Applicant
CLIFTON DUNES INVESTMENTS 317 (PTY) LIMITED	Tenth Applicant
GEMMA DIAMONDS (PTY) LIMITED	Eleventh Applicant
OAK PLANT RENTALS (PTY) LIMITED	Twelfth Applicant
STEPPING THE WORLD (PTY) LIMITED	Thirteenth Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	First Respondent
EKURHULENI METROPOLITAN MUNICIPALITY	Second Respondent
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent

CCT293/16

In the matter between

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Applicant

and

CHANTELLE JORDAAN	First Respondent
NEW ADVENTURES CONSULTING & SERVICES (PTY) LIMITED	Second Respondent
CLASS OF AFFECTED MUNICIPAL SERVICE CONSUMERS	Third Respondent
F M KEKANA	Fourth Respondent
M R MALEBOLOA	Fifth Respondent
S R MALEBOLOA	Sixth Respondent
M MAMOTSAU	Seventh Respondent

CCT294/16

In the matter between

EKURHULENI METROPOLITAN MUNICIPALITY	Applicant

and

BILLIE ANN LIVANOS	First Respondent
LEAH HENDERSON	Second Respondent
NEW ADVENTURES CONSULTING & SERVICES (PTY) LIMITED	Third Respondent
CLIFTON DUNES INVESTMENTS 317 (PTY) LIMITED	Fourth Respondent
GEMMA DIAMONDS (PTY) LIMITED	First Respondent
OAK PLANT RENTALS (PTY) LIMITED	First Applicant
STEPPING THE WORLD (PTY) LIMITED	Second Applicant

and

TUHF LIMITED	First Amicus Curiae

and

THE BANKING ASSOCIATION OF SOUTH AFRICA Second Amicus Curiae

and

eTHEKWINI METROPOLITAN MUNICIPALITY Third Amicus Curiae

and

JOHANNESBURG ATTORNEYS ASSOCIATION Fourth Amicus Curiae

FILING NOTICE

BE PLEASED TO TAKE NOTICE that the following documents are filed herewith:

1. Written Submissions of Fourth *Amicus Curiae*.

DATED at EDENVALE on the 9th day of JUNE 2017

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EKURHULENI METROPOLITAN MUNICIPALITY	Second Respondent
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent

CCT293/16

In the matter between

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M MAMOTSAU	Seventh Respondent

CCT294/16

In the matter between

EKURHULENI METROPOLITAN MUNICIPALITY	Applicant

and

BILLIE ANN LIVANOS	First Respondent
LEAH HENDERSON	Second Respondent
NEW ADVENTURES CONSULTING & SERVICES (PTY) LIMITED	Third Respondent
CLIFTON DUNES INVESTMENTS 317 (PTY) LIMITED	Fourth Respondent
GEMMA DIAMONDS (PTY) LIMITED	First Respondent
OAK PLANT RENTALS (PTY) LIMITED	First Applicant
STEPPING THE WORLD (PTY) LIMITED	Second Applicant

and

TUHF LIMITED	First Amicus Curiae

and

THE BANKING ASSOCIATION OF SOUTH AFRICA Second Amicus Curiae

and

eTHEKWINI METROPOLITAN MUNICIPALITY Third Amicus Curiae

and

JOHANNESBURG ATTORNEYS ASSOCIATION Fourth Amicus Curiae

WRITTEN SUBMISSIONS OF FOURTH AMICUS

INTRODUCTION

1. The above Honourable Court admitted the Fourth Amicus ("the JAA") on 6 June 2017 and directed that it file written submissions relating to the following issues raised in its application for admission as amicus:

    1.1 For whom does the conveyancer act in the conveyancing transaction?

    1.2 Whose responsibility is it to obtain the s 118(1) certificate?

    1.3 Is there a duty to disclose historical debt to the purchaser and if so, where does this duty lie (conveyancer, seller, municipality, etc)?

    1.4 How if at all do issues of confidentiality and privacy relate to a duty to disclose the debt?

2. The following additional considerations are relevant to understand the context in which conveyancers carry out their duties in relation to transferring immovable property:

2.1. The nature and extent of the conveyancer's mandate to transfer the property as the seller's agent.

2.2. The ability of conveyancers to obtain accurate information from the municipality that will enable them to discharge their duty (should it be found to exist).

2.3. The duty of conveyancers to act in the best interests of both parties.

2.4. What conveyancers must do when a conflict arises.

3. Furthermore, the question of whether to impose a duty on a conveyancer to disclose the seller's historical debt to the purchaser need not arise if:

3.1. this Honourable Court finds that a purchaser cannot be held liable by the municipality for the seller's historical debt (inasmuch as the municipality cannot terminate the purchaser's electricity/water supply for non-payment of the historical debt, or refuse to supply electricity/water for non-payment of the historical debt, or attach and sell the purchaser's property for non-payment of the historical debt);

3.2. there is no historical debt (or the municipality advises the conveyancer that there is no historical debt);

3.3. there is historical debt but the seller agrees to pay the historical debt before transfer or the offer to purchase requires that the seller obtain a "full" or "historical" clearance in order to pass transfer;

3.4. the seller has already disclosed the historical debt to the purchaser, or the municipality has already disclosed the historical debt to the

purchaser (or if either of those parties is under a duty to disclose this debt);

3.5. the purchaser is otherwise aware of the historical debt and has agreed to accept the property subject to that historical debt.

4. Therefore, the majority of submissions that follow only pertain in situations where:

4.1. the purchaser can be liable for the historical debt in some way;

4.2. the seller and municipality have not disclosed such debt to the purchaser, nor are they under a duty to do so;

4.3. there is historical debt as disclosed to the conveyancer by the municipality which the seller has refused to pay and the offer to purchase/sale agreement does not require it be paid before transfer; and

4.4. the purchaser is not otherwise aware of the existence or extent of the historical debt and has not agreed to accept the property subject to it.

WHO DOES THE CONVEYANCER ACT FOR?

5. Conveyancers are typically appointed by the seller, but they can also be appointed by the purchaser. Regardless of who appoints, the conveyancer is the agent of the seller in transferring the property to the purchaser.[1] The conveyancer is authorized in writing to do this by virtue of the power of attorney signed by the seller instructing that transfer be passed on certain

[1] *Vaalz v Registrar of Deeds, Namibia : In re Nőckel's Estate* 1993 (4) SA 353 (NmHC)

conditions. However, the conveyancer owes a duty to the buyer and seller to act in both of their best interests. [2]

The Extent of the Conveyancer's Mandate

6. The conveyancer is not the seller's agent in relation to every single aspect of the transaction. Conveyancers are appointed to attend to the work necessary to transfer the property in the Deeds Office. For example, a conveyancer's mandate does not include:

6.1. *doing everything necessary* to obtain compliance certificates such as electrical compliance certificates and rates clearance certificates;

6.2. the disclosures made by the seller before the offer to purchase/sale agreement was entered into;

6.3. dealing with disputes that arise between the seller and purchaser in relation to the existence of defects in the property (such as a leaking roof, or damp, or a lack of approved council plans);

6.4. dealing with the seller's disputes with the municipality in relation to amounts claimed for rates/taxes; and

6.5. obtaining the seller's refund from the municipality (caused by the payment of the rates clearance figures, because municipalities always call for advance payment of at least 60 days to be made before the rates clearance certificate is issued).

7. As an example, where a seller is obliged to pass transfer, and requires a levy clearance or rates clearance certificate to do so, the conveyancer will apply for the certificate on the seller's behalf. However, the conveyancer is

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[2] *Bruwer and Another v Pocock & Bailey Ingelyf and Another* (H84/2006, 22/2009) [2009] ZAWCHC 167, at para 26.

not obliged to make payment on the seller's behalf unless the seller has placed the conveyancer in funds to do so.

8. Similarly, if a dispute arises in relation to the amount payable by the seller to the body corporate, homeowner's association or municipality to obtain such a certificate, the conveyancer is not obliged to resolve that dispute on the seller's behalf.

9. When it comes to dealing with disputes that arise between the seller and purchaser in relation to the existence of defects in the property, such as a leaking roof, or damp, or a lack of approved council plans, the situation is no different.

9.1. The conveyancer is not the seller's agent in relation to disclosures or representations made by the seller in relation to the property. The conveyancer is only mandated to transfer the property according to the conditions of the sale agreement/offer to purchase and prevailing laws.

9.2. The conveyancer is under no duty to make any disclosures to the purchaser that the seller might have failed to make.

9.3. The conveyancer is under no duty to try and resolve the dispute between the parties.

RESPONSIBILITIES IN APPLYING FOR AND OBTAINING A RATES CLEARANCE CERTIFICATE

10. In relation to application for a rates clearance certificate, if instructed, it is the **conveyancer's duty** to, on behalf of the seller:

10.1. make application for rates clearance figures – which might be "abridged" figures (in terms of section 118(1) which clear only amounts incurred in the two year period prior to application) or "full"

or "historical" figures, which clear everything owed, as the seller directs;

10.2. present them to the seller for payment;

10.3. if the seller places the conveyancer in funds, make payment to the municipality; and

10.4. obtain the rates clearance certificate.

11. It is lawful for a seller to pass transfer based on an abridged clearance and it is lawful for a conveyancer to comply with a seller's instruction to pass transfer on an abridged clearance.

12. It remains the **seller's responsibility** to:

12.1. instruct the conveyancer to apply for figures;

12.2. place the conveyancer in receipt of the funds necessary to pay the figures;

12.3. deal with any disputes with the municipality in relation to the amounts billed to them by the municipality (which might include any debt remaining after transfer that has not been paid before transfer);

12.4. obtain their refund from the municipality after transfer; and

12.5. deal with any disputes that might arise with the purchaser if the historical debt was not disclosed before signature. This might occur before or after transfer.

CONVEYANCERS' ABILITY TO ASCERTAIN EXISTENCE AND EXTENT OF HISTORICAL DEBT

13. It can be notoriously difficult for a seller to ascertain the true extent of their own indebtedness to the municipality. Ample evidence of this has already been placed before this Court in this regard. It would be even more difficult (if not impossible) for a conveyancer to do so.

14. A conveyancer can apply for rates clearance figures on the seller's behalf, but cannot know whether those figures are correct or not.

15. In addition, some municipalities do not even include details of the historical debt on their rates clearance figures. Some only provide details of the section 118(1) amount required in order to obtain a rates clearance certificate. In cases like this, conveyancers would need to make a separate application to the municipality for additional details of what historical debt (if any) were owing.

16. It might be possible in some instances for a conveyancer to make enquiries with the municipality in order to ascertain whether the figures are correct or not, but in many instances it will not be possible because:

    16.1. the municipality may refuse to give the conveyancer any information pertaining to the seller's accounts;

    16.2. if the conveyancer can get the seller's invoices, the conveyancer might not have the expertise to understand or analyse those invoices for accuracy; and

    16.3. if the conveyancer can get the seller's invoices, the conveyancer might be relying on incorrect information provided by the municipality, because the municipality may have incorrectly assessed the charges.

17. This Honourable Court is enjoined to consider further that the municipality is not required to render 'full and final' figures at the time of clearance. The amounts that the municipality represents as owing by the seller at that time, can change substantially, for a number of reasons:

17.1. if a municipality has incorrectly billed a seller, it can adjust its accounts to correct the mistake, for up to 3 years (in the case of electricity and water charges) and up to 30 years (for rates, sewer and refuse charges). This is permissible in terms of the common law and the Prescription Act of 1969;

17.2. a municipality often only concludes rating valuation/categorization objections/appeals/reviews after properties have been transferred, the result of which is that changes are made to the charges billed to the seller's rates account long after transfer. This is lawful in terms of the Local Government: Municipal Property Rates Act of 2004;

17.3. municipalities often consolidate and transfer credits between accounts (in terms of the municipality's power to consolidate accounts), the result of which is that even if a conveyancer were advised today by the municipality that there was no historical debt, a transfer of credit by the municipality may mean that tomorrow there is historical debt. This is lawful in terms of S 102 of the Local Government: Municipal Systems Act, as confirmed by the Supreme Court of Appeal recently in the Pearson case[3].

18. It is thus respectfully submitted that conveyancers can apply for and obtain copies of rates clearance figures from the municipality, but that these figures are not reliable as a true reflection of what the seller owes, or might later be owing, to the municipality.

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[3] *P A Pearson (Proprietary) Limited v eThekwini Municipality and Others (241/2016) [2017] ZASCA 63 (29 May 2017).*

19. It is further respectfully submitted that it would be very difficult (if not impossible) for conveyancers to make enquiries and on the basis of those enquiries to certify the amount owed by the seller.

DUTY OF CONFIDENTIALITY AND DUTY TO OBSERVE PRIVACY OF THE SELLER

20. In the case of *S v Safatsa And Others*[4] the court held that:

> The law came to recognise that for its better functioning it was necessary that there should be freedom of communication between a lawyer and his client for the purpose of giving and receiving legal advice and for the purpose of litigation and that this entailed immunity from disclosure of such communications between them....
>
> Whilst legal professional privilege was originally confined to the maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship, it is now established that its justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice.... The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself....
>
> The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would

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[4] 1988 (1) SA 868 (A), at 886

otherwise be impaired: see Waugh v British Railways Board [1980] AC 521 at 535, 536....

The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation....

Speaking for myself, and with the greatest of respect, I should have thought it evident that if communications between legal advisers and their clients were subject to compulsory disclosure in litigation, civil or criminal, there would be a restriction, serious in many cases, upon the freedom with which advice or representation could be given or sought. If a client cannot seek advice from his legal adviser confident that he is not acting to his disadvantage in doing so, then his lack of confidence is likely to be reflected in the instructions he gives, the advice he is given and ultimately in the legal process of which the advice forms part.[5]

21. The rulings of the Law Society of the Northern Provinces state that:

An attorney who has received a mandate by a client is under an absolute duty not to disclose any information of a confidential nature which has come to his/her knowledge by virtue of the mandate, and to exercise the utmost good faith towards/her client not only as long as the mandate lasts but even after the termination of the mandate.[6]

22. Revealing the seller's historical debt to the purchaser would be a breach of a conveyancers' duty of confidentiality to the seller. However, not revealing the

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[5] S v SAFATSA AND OTHERS 1988 (1) SA 868 (A), at 886

[6] Rulings of the LSNP, at page 45

existence of the historical debt could be to the detriment of the purchaser. This creates a conflict for the conveyancer.

What a conveyancer must do when a conflict arises

23. The rulings of the Law Society of the Northern Provinces state that:

> Where the interests of clients are in conflict the attorney can only act for the parties with conflicting interests at his peril, and the onus of showing that the conflicting interests did not prevent him from doing his/her duty did not prevent him from doing his/her duty to both clients, rests firmly on the attorney.
>
> Where an attorney is instructed by different parties and a conflicting interest either arises or seems likely to arise, he/she should at once terminate his/her mandate for one party if not both. As soon as litigation is probable the attorney must see that one at least of his/her clients is separately represented, and if he/she would be embarrassed in representing either one in litigation by reason of the knowledge which he/she had acquired of the other one's case, he/should see both clients are separately represented.[7]

24. A conveyancer cannot continue to act for both parties if there is a conflict, namely where the conveyancer cannot continue acting in the best interests of both parties simultaneously. A conveyancer in such a situation is bound to withdraw as attorney for one or both.

SHOULD THERE BE A LEGAL DUTY ON CONVEYANCERS TO DISCLOSE HISTORICAL DEBT TO PURCHASERS?

25. In the context of negligent omissions, the court in the case of *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*[8] stated:

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[7] Rulings of the LSNP, at page 45-6
[8] 2006 (3) SA 138 (SCA)

Wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms...

It is sometimes said that the criterion for the determination of wrongfulness is 'a general criterion of reasonableness', ie whether it would be reasonable to impose a legal duty on the defendant.

26. It would be unreasonable to impose a duty on conveyancers to disclose historical debt for the following reasons:

26.1. conveyancers are normally appointed by sellers and act as agents for sellers;

26.2. although the conveyancer is the seller's agent for the purposes of passing transfer, the conveyancer is not the seller's agent for every aspect of the transaction, and especially not in relation to making disclosures to the purchaser that the seller could have made when entering into the sale agreement/offer to purchase;

26.3. conveyancers owe a duty of confidentiality to the seller. This requires that the conveyancer not disclose the existence or extent of the seller's historical debt to the purchaser;

26.4. conveyancers are legally obliged to pass transfer on an abridged clearance if the seller instructs them to do so;

26.5. conveyancers are obliged to act in the best interests of both parties, but if this is not possible and conveyancers find themselves in a conflict situation, they must either refer one of the parties to another attorney, or withdraw entirely and let another conveyancer handle the transaction.

26.6. in some municipal areas, the rates clearance figures obtained by the conveyancer do not reflect the historical debt and in cases where they do, these figures are often not reliable as a reflection of the sellers' "true" liability to the municipality;

26.7. it would be very difficult (if not impossible) for conveyancers to make enquiries to ascertain whether the amounts disclosed by the municipality are accurate or not;

A DUTY ON MUNICPALITIES TO DISCLOSE HISTORICAL DEBT

27. Municipalities are best placed to determine the existence and extent of historical debt incurred by sellers. They also have an interest in recovering this debt.

28. If Municipalities inform purchasers of historical debt, conveyancers will not be called upon to breach the confidence of sellers. This will avoid creating a situation where conveyancers are obliged to withdraw to avoid a conflict of interest.

29. Therefore, if there is a duty to notify purchasers that there is historical debt, then it should be Municipalities rather than conveyancers that bear this duty.

MARK OPPENHEIMER
BRIDGE GROUP, SANDTON
9 June 2017