

SOUTH AFRICA / JUDGMENT

National Home Builders Registration Council (NHBRC) v Botes NO and Others (18094/2006) [2008] ZAGPHC 301 (20 August 2008)

[2008] ZAGPHC 301

COURT

High Courts - Gauteng

BEFORE

Vorster AJ

CASE / FILE NUMBER

18094/2006

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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 20/08/2008

Case number: 18094/2006

UNREPORTABLE

In the matter between:

NATIONAL HOME BUILDERS REGISTRATION
COUNCIL
(NHBRC) Plaintiff
And
DANIEL RUDOLPH
JANSEN
BOTES N.O. First Defendant
SUSANNA BOTES
N.O. Second
Defendant
STOOM ELEKTRIESE
DIENSTE TZANEEN CC Third
Defendant
THE GREATER TZANEEN
MUNICIPALITY Fourth
Defendant

JUDGMENT

Vorster AJ:

1. The parties have agreed on a stated case for adjudication in terms of Rule 33(1).
2. The agreed statement of facts is part of the record of pleadings in this case. I do not find it necessary to repeat it in detail here. The dispute between the parties concerns the interpretation of the definition of "home builder" in Section 1 of the Housing Consumers Protection Measures Act, No. 95 of 1998 ("the Act"). The crisp question which is at issue is whether "home builder" includes, as a matter of interpretation of the Act, a trust.
3. The first and second defendants are trustees of the Industria Family Trust. The trust was duly established on 18 February 1998 and has subsequently acquired Erf 3048, Tzaneen, Extension 59. After having submitting building plans to the fourth defendant, which have been approved by it, the trust constructed or caused to be constructed four dwelling units on the property. The said dwelling units were constructed as an investment for and on behalf of the trust for purposes of lease. Lease agreements have in fact been concluded with lessees by the trust.
4. The fourth defendant was joined in the action purely as a possible interested party and no relief is sought against it. Mr Ellis, who appeared for the plaintiff, informed me during argument that the plaintiff withdraws its action against the third defendant and tenders its wasted costs.
5. A "home builder" is defined in Section 1 of the Act as "a person who carries on the business of a home builder". The concept of "business of a home builder" is defined in Section 1 of the Act as including inter alia "to construct or to undertake to construct a home or to cause a home to be constructed". A "home" is defined in Section 1 of the Act as meaning "any dwelling unit constructed or to be constructed by a home builder... for residential purposes or partially for residential purposes...".
6. It is clear that the dwelling units constructed by or on behalf of the trust on the aforesaid Erf falls squarely within the definition of "home" in Section 1 of the Act. The question which was debated in argument between the plaintiff on the one hand and the first and second

defendants on the other hand centred around the question whether the trust falls within the definition of "home builder" in Section 1 of the Act. If the trust is not a home builder then it follows that the activity of constructing the dwelling units on the Erf in question cannot fall within the definition of "business of a home builder" in Section 1 of the Act. The relief claimed by the plaintiff against the defendants is based on a finding that the trust is a home builder as defined in the Act.

7. It is trite law that a trust is not a legal or juristic persona.

Braun v Blann & Botha N.N.O. and Another [1984] ZASCA 19; 1984 (2) SA 850 (AD)

Commissioner of Inland Revenue v Freedman and Others N.O.O [1992] ZASCA 190; 1993 (1) SA 353 (AD)

8. In argument both parties were *ad idem* that a trust is not a legal persona. I am in agreement with that proposition. A trust is incapable of having rights and obligations

other than in the name of its trustees *qua* trustees. The trustees in their capacities as such are the owners of the trust property and likewise they are in that capacity liable to fulfil the obligations of the trust. It follows that the reference to "person" in the definition of "home builder" in Section 1 of the Act does not include a trust. The person referred to in the definition is somebody who carries on a business of a home builder which clearly implies the legal ability to act in its own name and to be the holder of rights and subject to obligations. A trust has none of those characteristics apart from its trustees.

9. The plaintiff referred me to the definition of "person" in Section 2 of the Interpretation Act, No. 33 of 1957, which includes in the definition of "person" in Section 2 (c) "any body of persons corporate or unincorporated". The submission is that the trustees, being natural persons, executing their functions as trustees under the trust, are capable of

conducting the business of a "home builder" as defined in the Act and that therefore the definition of "business of a home builder" includes the actions of the trustees in the instant case. I cannot agree with this submission for the reasons which follow below.

10. The business of a home builder can only be done by a home builder. That is clear from the definition of "home builder" in Section 1. If a trust is not a home builder because it is not a person it inevitably follows that it cannot conduct the business of a home builder which is by definition something which the person of a home builder as defined does in terms of Section 1.
11. The Act must be interpreted having regard to the purpose of the Act and the intention of the legislator as it is to be found in the various relevant provisions of the Act, to arrive at the correct meaning of the expressions used therein. The reference to "any body of persons corporate or unincorporated" in Section 2(c) of the Interpretation Act does not assist the plaintiff. A trust is not a body of persons and is not referred to in the definition in the Interpretation Act as being part of the concept of "person".
12. Finally, the plaintiff submitted that it would amount to an absurdity if a trust is not covered by the Provisions of the Act as it would open the door to trusts to ignore the prescripts of the Act with impunity. I am not persuaded that such absurdity follows from a correct interpretation of the Act. The legislator did not include in the concept of "person" in the Act any reference to a trust. That was an omission which resulted in the absurdity which the plaintiff submits is a basis to interpret the Act as including in the definition of "home builder" at trust as "a person who carries on the business of a home builder". I cannot agree with that submission. In effect it amounts to the amplification of the provisions of the Act to

remedy a casus omissus which a court cannot do.

13. In the result I find that the plaintiff has not proved that the activities of the first and second defendants, acting as trustees of the Industria Family Trust to erect four dwelling units on the property are governed by the provisions of the Act. In the result the plaintiff's claims against the first and second defendants are dismissed with costs.
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Prepared on 14 October 2026 · Esheria