

SOUTH AFRICA / JUDGMENT

National Home Builders Registration Council v Adendorf and Others (406/2018) [2019] ZASCA 20; 2019 (5) SA 317 (SCA) (26 March 2019) [2019] ZASCA 20

COURT

Supreme Court of Appeal

BEFORE

Leach, Saldulker, Mbha, Dlodlo, Eksteen

CASE / FILE NUMBER

406/2018

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 406/2018

In the matter between:

NATIONAL HOME BUILDERS REGISTRATION APPELLANT

COUNCIL

and

MICHIEL WESSEL ADENDORF FIRST

RESPONDENT

CHRISTIAAN DIEMONT SECOND

RESPONDENT

WESSEL ADENDORFF THIRD

RESPONDENT

PETRUS JACOBUS ADENDORFF FOURTH

RESPONDENT

THE MINISTER OF HUMAN SETTLEMENTS FIFTH

RESPONDENT

OF THE REPUBLIC OF SOUTH AFRICA

Neutral citation: National Home Builders Registration Council v Michiel Wessel Adendorff & others (406/2018/)

[2019] ZASCA 20 (26 March 2019)

Coram: Leach, Saldulker and Mbha JJA and Dlodlo and Eksteen AJJA

Heard: 26 February 2019

Delivered: 26 March 2019

Summary: Housing - whether a trust is a 'home builder' in terms of sections 1 and 10(1) of the Housing Consumers Protection Measures Act 95 of 1998.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Muller J sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the court below is set aside and in its stead is substituted the following order:

‘(a) It is declared that trusts are home builders as envisaged in ss 1 and 10(1) of the Housing Consumers Protection Measures Act 95 of 1998.

(b) It is declared that at all material times the first to the fourth respondents in their capacities as trustees of Mike’s Trust carried on the business of a home builder in terms of that Act.

(c) No order is made in regard to costs.’

Saldulker JA (Leach, Mbha, Dlodlo and Eksteen concurring):

[1] The preamble to the Housing Consumers Protection Measures Act 95 of 1998 (the Act) provides for the protection of housing consumers. The purpose of the Act is to promote housing consumer rights and improve the structural quality of homes in the interests of housing consumers and the home building industry.

[2] The appellant, the National Home Builders Registration Council (the NHBRC), is an organ of state established in terms of s 2 of the Act to regulate the home building industry. It sought certain declaratory and interdictory relief in the Limpopo Division of the High Court, Polokwane (the High Court), against the first to fourth respondents, both in their personal capacities and in their representative capacities as trustees of Mike’s Trust (the Trust). The claims arise out of the Trust’s construction of homes at Portion 3 of Erf 799, Pietersburg located at 46 Devenish Street, Polokwane Limpopo Province, (the property), as it was not registered as a home builder in terms of the Act, read with the rules and regulations promulgated under the Act. This the appellant contended constituted a breach of the Act.

The High Court (Muller J) dismissed the application and found that a trust is excluded from the definition of home builder in ss 1 and 10 of the Act, and is not required to register as a home builder in terms of the Act. This appeal is with the leave of the court below. The first to the fourth respondents abide by the decision of this court.

- [3] The question that confronts us in this appeal is whether on a proper interpretation of the statute, a trust engaged in the building of homes is ‘a person’ as contemplated in s 10(1) of the Act. It arises for determination against the following factual

backdrop.

- [4] During 2013 an NHBRC inspector whilst conducting a routine inspection discovered that the trustees of the Mike’s Trust were constructing a sectional title housing development on the property for the benefit of the Trust. It is common cause that, initially the Trust registered as a ‘home builder’ in terms of section 10 of the Act, for a period of one year, commencing on 24 July 2013 until 24 July 2014, but failed to renew its registration. The Trust continued with the construction of new homes on the property, whilst not registered as a home builder. It was served with notices of non-compliance by the appellant, but refused to comply. Consequently the appellant launched the present application against the trustees, which is the subject matter of this appeal.

- [5] The primary contention advanced by the Trust, is that since a trust is not a person, it is not required to register as a home builder in terms of the Act. The question therefore is not whether the Trust should be afforded juristic personality (it is well established that it is not a person[1]) but whether a trust is included in the ambit of the Act to which registration as a home builder applies.

- [6] I turn to consider the purpose and the objectives of the Act. The Act is consumer-protection legislation, having as its object the protection of consumers against home builders who construct homes with structural defects, to provide consumers with information about competent builders, and to give effect to the rights of consumers. Thus the Act requires registration of home builders and the enrolment of houses being built to ensure that the aims and objects of the Act are optimally achieved.

- [7] Bearing that in mind, I turn to deal with the relevant provisions of the Act:

‘1 Definitions

Business of a home builder means-

- (a) to construct or to undertake to construct a home or to cause a home to be constructed for any person;
- (b) to construct a home for the purposes of sale, leasing, renting out or otherwise disposing of such a home;

...

1A Application of Act

- (1) This Act applies to any home builder.
- (2) This Act does not apply to a person who uses his or her own labour to build a home for his or her occupation if the home is part of an approved PHP Project.[2]

3 Objects of Council

The objects of the Council shall be;

- (a) to represent the interests of housing consumers by providing warranty protection against defects in new homes;
- (b) to regulate the home building industry;
- (c) to provide protection to housing consumers in respect of the failure of home builders to comply with their obligations in terms of this Act;
- (d) to establish and to promote ethical and technical standards in the home building industry;
- (e) to improve structural quality in the interests of housing consumers and the home building industry;
- (f) to promote housing consumer rights and to provide housing consumer information;
- (g) to communicate with and to assist home builders to register in terms of this Act;
- (h) to assist home builders, through training and inspection, to achieve and to maintain satisfactory technical standards of home building;
- (i) to regulate insurers contemplated in section 23 (9) (a); and
- (j) in particular, to achieve the stated objects of this section in the subsidy housing sector.

...

10 Registration of home builders.

- (1) No person shall
 - (a) carry on the business of a home builder; or
 - (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,

unless that person is a registered home builder.

- (2) No home builder shall construct a home unless that home builder is a registered home builder.
- (3) The Council shall register a home builder, on application in the form and manner prescribed by the Council, if the Council is satisfied that the home builder . . . '

- [8] Thus, in terms of the Act, no ‘person’ shall carry on the business of a home builder unless that person is registered as a home builder. A ‘person’ is not defined in the Act but a home builder is defined as a ‘person’ who carries on the business of a home builder. Further s 10(1) makes no reference to a trust. However, if a trust were to be regarded as a person for purposes of the Act, its registration as a home builder would be mandatory for it to carry on the business of a home builder. In order to determine whether this is the case, the Act has to be interpreted in the light of the surrounding circumstances.[3] In particular it is necessary to have regard to the overall purpose of the Act and its core function, which indisputably is to protect the public by requiring the registration of home builders, thus ensuring that consumers are not exposed to unscrupulous and incompetent home builders, building contractors and developers or to the potential risk of defective housing.
- [9] Moreover, the fact that the legislature makes no express provision for the inclusion of a ‘trust’ in s 10(1) of the Act does not mean that it was intended to be excluded. There can be no cogent reason for the legislature to exclude a trust that owns property, and is building a home, from the provisions of the Act, where the manifest purpose of the Act is the protection of the housing consumer, and maintaining the minimum standards required of home builders.
- [10] That the legislature intended the Act to apply to trusts which carry on business by constructing homes is clearly shown by s 9 and 21 of the Act which read:

‘9 Access to information

- (1) The Council shall keep up and provide access to an information database on the home builders registered, suspended and deregistered in terms of this Act.
- (2) The database contemplated in section 9 (1) shall include-
 - (a) the names and identity numbers of the directors, members, trustees or partners of such companies, close corporations, trusts, partnerships or sole traders;
 - (b) the number of homes enrolled by such home builders;
 - (c) the number of complaints, considered valid by the Council and requiring on-site conciliation, received from housing consumers;
 - (d) the grading of those home builders; and
 - (e) any other information deemed appropriate by the Council to assist housing consumers to assess the track record of a home builder.
- (3) The Council shall provide access to the information database services referred to in subsections (1) and (2)

21 Offences

- (1) Any person who

- (a) knowingly withholds information required in terms of this Act or furnishes information that he or she knows to be false or misleading; or
- (b) contravenes section 10 (1) or (2), 13 (7), 14 (1) or (2), 18 (1) or (2) or 19 (5), . . .

and every director, trustee, managing member or officer of a home builder who knowingly permits such contravention, shall be guilty of an offence and liable on conviction to a fine not exceeding R25 000, or to imprisonment for a period not exceeding one year, on each charge.

- (2) Notwithstanding anything to the contrary in any other Act, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this Act.' (My emphasis.)

- [11] It becomes readily apparent as to what is meant by the word 'person' in s 10(1) when one considers the wording of ss 9 and 21, set out hereinbefore, where there are specific references made to 'trustees' and a 'trust'.

There is only one ineluctable conclusion, which is that the legislature intended that a 'trust' be included as 'a

person' in s 10(1) of the Act for purposes of registration and enrolment. Section 9 of the Act requires the NHBRC to maintain and provide access to an information database on the home builders registered, suspended and re-registered in terms of the Act. The database must include the names and identity of 'the directors, members, trustees or partners of such companies, close corporations, trusts, partnership or sole traders'. This is clearly for the benefit of housing consumers seeking information about the reputation of home builders. Section 21 of the Act, deals with the offences for criminal liabilities of a 'director, trustee, managing member or officer of a home builder' who knowingly permits a contravention by a home builder. These references to trusts and trustees cannot be regarded as unnecessary surplusage. They indicate clearly that the Act was intended to apply to trusts.

- [12] There can thus be no reason for a trust not to register as a home builder. The Act is intended to apply to any person, entity or institution in the business of building homes for residential purposes. Even if a person is constructing a residential dwelling for his or her own occupation, the Act nevertheless applies unless and until such person is exempted. The general purport of the Act was intended to cover all home builders. To exclude trusts from the ambit of the Act would result in a consequence which is arbitrary and unjust. There would be no reason to exclude the operation of the Act merely because the construction is conducted by this enterprise through a trust as an alter ego rather than, say, a company.

- [13] The respondents relied on two unreported judgments of the Gauteng Division, Pretoria, viz: National Home Builders Registration Council (NHBRC) v Botes NO & others[4] and National Home Builders Registration Council (NHBRC) v Van Rooyen & others[5] to justify their stance in declining to register the trust as a home builder. In both matters that court held that a trust is not covered by the provisions of the Act. For the reasons set out above, they were both decided incorrectly.

[14] When the appellant commenced these proceedings, it sought interdictory relief against the trust. The construction of the homes

has now been completed, and in these circumstances the appellant did not persist in seeking an order in that regard. It is however

entitled to a declarator in the form of the order set out below.

[15] In view of all the foregoing, the appeal succeeds. As this appeal is in the public interest, the appellant sought no order as to costs.

[16] The following order is made:

H K Saldulker

Judge of Appeal

APPEARANCES:

For Appellant: A G Sawma SC (with him I B Currie)

Instructed by:

Moodliyar & Bedhesi Attorneys

c/o M N Hoosen Attorneys, Polokwane

c/o Harun Ebrahim Attorneys

c/o Phatshoane Henney Attorneys, Bloemfontein

For Fifth Respondent: RPA Ramaweale SC

Instructed by:

State Attorney, Polokwane

c/o State Attorney, Bloemfontein

[1] A trust is an accumulation of assets and liabilities and sui generis in nature. See *Land & Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA) paras 10 and 11.

[2] PHP Project is defined in s 1 of the Act as follows: 'A housing project approved in terms of Chapter 8 of Part 3 of the National Housing Code: Housing Subsidy Scheme: People's Housing Process.'

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'A housing project approved in terms of Chapter 8 of Part 3 of the National Housing Code: Housing Subsidy Scheme: People's

Housing Process.’

[3] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA); Cool Ideas 1186 (CC) v Hubbard & another

[2014] ZACC 16; 2014 (4) SA 474 (CC).

[4] National Home Builders Registration Council (NHBRC) v Botes NO & others [2008] ZAGPHC 301.

[5] National Home Builders Registration Council (NHBRC) v Van Rooyen & others [2006] ZAGPHC 170.

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