

SOUTH AFRICA / JUDGMENT

National Home Builders Registration Council v Andendorf NO and Others (1640/2015) [2018] ZALMPPHC 5 (14 February 2018) [2018] ZALMPPHC 5

COURT

Limpopo High Court, Polokwane

BEFORE

G C Muller

CASE / FILE NUMBER

1640/2015

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REPUBLIC OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

REPORTABLE:

YES

OF

INTEREST TO THE JUDGES: NO

CASE

N0:1640/2015

In the matter

between:

NATIONAL

HOME BUILDERS

REGISTRATION APPLICANT

COUNCIL

AND

MICHAEL

WESSEL ANDENDORF

N.O FIRST

RESPONDENT

CHRISTIAAN

DIEMONT

N.O SECOND

RESPONDENT

WESSEL

ANDENDORF

N.O THIRD
RESPONDENT
PETRUS
JACOBUS ANDENDORF
N.O FOURTH
RESPONDENT
THE
MINISTER OF HUMAN SETTLEMENT OF
THE
REPUBLIC OF SOUTH
AFRICA THIRD
PARTY

JUDGMENT

MULLER J:

[1] This is a third application wherein the question arose whether a trust is a "person" as envisaged by the provisions of The Housing Consumer Protection Measures Act, Act 95 of 1998 ("hereinafter the Act"). It was held, on two previous

occasions, that a trust is not a "person" for purposes of the Act.[1]

[2] The respondents, in their opposing papers also took the point that the provisions of section 10, 14, 14A, 18 and 21 of the Act are unconstitutional. Because of the constitutional issue which was raised, the Minister of Human Settlement was joined, as a third

party. On the day of the hearing adv Ramawele SC and Tshivhase appeared on behalf of the third party. Counsel for the respondents

informed the court when the application commenced that the constitutional issue raised by them is abandoned and tendered the costs of the third party. It was not necessary for counsel for the third party to make any submissions during argument on the constitutional issues. They were consequently given leave to be excused from further attendance. The application then proceeded on the disputed issues between the applicant and the respondents. The principle issue was whether a trust is a person, which in terms of the Act, has to register as home builder in terms of section 10.

[3] The applicant is the National Home Builders Registration Council. It is common cause that the trustees of the Mike's Trust, acting as such, were developing a property situated in Polokwane by erecting dwelling sectional title units for the benefit of the trust. The trust registered as "a home builder" under the Act, but failed to renew its registration. The failure of the trust to re-register prompted the applicant to launch the present application in terms of section 20 of the Act.[2]

- [4] The applicant seeks orders against the trust, alternatively the trustees, further alternatively against the trustees in their

personal capacities. The relief claimed is wide ranging in that a declarator is sought that the conduct of the trust, alternatively, the conduct of the respondents representing the trust, further alternatively, the respondents in their personal capacity in constructing, alternatively, causing the construction of homes at Portion 3 of Erf 799 Polokwane located at 46 Devenish Street Polokwane Limpopo Province, contravenes the Act. Interdictory relief pending compliance with section 10, 14 and 14A of the Act read with the rules and regulations promulgated under the Act is also claimed.

- [5] It is argued by the respondents that the relief sought has become academic as the building works have since been completed and the buildings are rented to tenants who are presently in occupation. The argument cannot be accepted. It is correct that it is common cause that the buildings have been completed since the application was launched, but the declaratory relief remains relevant.

- [6] The main contention of the respondents are that their conduct do not fall within the scope of the Act since the Mike's Trust is not "a person" and is therefore not required to register as a home builder in terms of the Act. I will commence to answer this crucial aspect. The Act applies to any home builder[3] which is defined in section 1 of the Act as:

"(a) a person who carries on the business of a home builder;

or

(b) an owner builder who has applied for exemption in terms of section 10A."

"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 purpose of sale, leasing renting out or otherwise disposing of such a home;

(c) to sell or to otherwise dispose of a home contemplated in paragraph (a) or as a principal; or

(d) to conduct any other activity that may be prescribed by the Minister for purposes of this definition ."

- [7] Section 10 of the Act provides that:

"(1) No person shall-

(a) carry on the business of a home builder; or

(b)...

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."

[8] The ordinary grammatical meaning must be given to the words of the statute unless to do so will result in absurdity. The judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] is not in discord with the provisions of the Interpretation Act with regard to the approach generally to be adopted when interpreting

legislation:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[9] The Constitutional Court in *Cool Ideas 1186 CC v Hubbard and Another*[5] had occasion to interpret section 10(1)(b) of the Act, although in a different context.[6] In doing so the court analysed the scheme of the Act. It is thus unnecessary for me to undertake the same exercise, save to confirm that the purpose of the Act, as stated in the preamble, is to protect housing consumers and to provide for the establishment of a National Home Builders Registration Council[7] in Chapter 1. The object is to regulate the building industry by means of the NHBRC.[8] It does so by requiring registration of home builders with the NHBRC.[9] The protection of housing consumers is enhanced by the compulsory inclusion in contracts of sale or construction of warranties provided by home builders and also for enrolment of home builders with the council before commencement of construction.[10] Section 20 provides for relief which the Council may claim for non-compliance with the Act. The central question to be determined is if a trust is home builder which is required to register with the NHBRC.

[10] Unless a statute provides otherwise a trust is not a legal person. It is a legal institution sui generis. The assets and liabilities of a trust vests in the trustees. A trustee is the owner of the trust property for purposes of administration of the trust but qua trustee he/she has no beneficial interest in the trust property.[11] However, that does not bestow upon a trustee a personal interest in the trust property to the extent that the trust property will devolve on his heirs.[12] No rights and obligations vested in a trust as such. A trust is not recognized as a persona or an entity.[13]

[11] In Commissioner for Inland Revenue v Emary NO[14] supra the court was called upon to decide whether a deceased estate is "a person" for purposes of section 74 of the Income Tax Act,[15] which, at the relevant time, did not contain a definition of "person". Embarking upon that exercise the court called in aid the definition of "person" in the Interpretation Act. With reference to the definition of "person" in the Interpretation Act, it concluded:

"The Act does not define "person". In so far as the context allows, the definition in sec 2(x) of the Interpretation Act, 33 of 1957, would accordingly apply. That definition does not purport to be exhaustive. It includes amongst persons, apart from the local authorities mentioned therein, companies incorporated or registered as such under any law, and any body of persons corporate and unincorporated. It does not exclude any other entity which by common law is a juristic person. But it is not without significance that the entities expressly included are entities which consist of persons or which have persons underlying their existence.

The concept of a legal persona consisting of or based upon things and without membership of any natural persons, is not unknown in our common law or in our statute law....

The specific inclusion of well-known juristic persons of more common occurrence, such as registered companies and bodies of persons corporate, and the omission of any reference to the less known and more exceptional category of such persons, rather suggests that they do not form part of the ordinary statutory concept of a person, and are not to be included unless, as stated in section 2 of the Interpretation Act, "the context otherwise requires or unless in the case of any law it is otherwise provided".[16]

[12] A trust, is an accumulation of assets and liabilities, similar to a deceased estate.[17] The Interpretation Act provides a definition of "person":

"2. Definitions.-The following words and expressions shall, unless the context otherwise requires or unless in the case of any law it is otherwise provided therein, have the meanings hereby assigned to them respectively, namely-

"person" includes-

- (a) any divisional council, municipal council, village management board, or like authority; (a) any company incorporated or registered as such under any law;
- (b) any body of persons corporate or unincorporated."

[13] In the absence of a definition of "person" in the Act, cognizance has be taken of the provisions of the Interpretation

Act[18] to attribute meaning to the words used in the Act, insofar as the context and purpose allows. Section 1 of the Interpretation Act states:

"The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act, in the Republic or in any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein."

[14] It may be taken that the legislator is acquainted with the actual state of the law and also with the interpretation by the courts in relation trusts in a similar context.[19]

[15] The Act contains no definition of a "person." The inclusion of a trust in the definition of "person" cannot simply be inferred, unless a trust is included in the scope of the Act as a juristic person. To achieve that purpose trusts are specifically defined in other Acts to include trusts as juristic persons for purposes of those Acts.[20] The impression gained, from the inclusion of definitions which define trusts as juristic persons in those Acts, is that the legislature is fully aware that trusts are not legal persona, but that it is necessary to specifically include trusts in statutory provisions as juristic persons, if that purpose is to be achieved.

[16] Counsel for the applicant drew attention to section 9(1) and 9(2)(a) of the Act[21] and argued that the section clearly requires the NHBRC to maintain and provide an information database of home builders which include trusts registered, suspended and deregistered in terms of the Act. And that requirement, so the argument goes, indicates that trusts are home builders and are required to register as such.

[17] The argument cannot be upheld. The definition of a home builder makes no reference to a trust. All that is required by the provisions of section 9(1) is that the NHBRC must keep a database of all home builders registered, suspended or deregistered. The provision by itself cannot be interpreted to mean that a trust is regarded as a home builder together with other entities that are obliged to register as home builders. That could easily have been achieved by providing a definition of "person" and the inclusion of a description of a trust in that definition. Nor can it be inferred from other words used in the Act. All it says is that all the entities,[22] names and identity numbers of the directors, members, trustees, or partners of such companies, close corporations, trusts, partnerships or sole traders, if registered, suspended , or deregistered in terms of the Act, be included in the database. A trustee of a trust may register as a home builder, if he/she is so inclined. But if it has done so, the NHBRC is obliged to keep the information on its database.

- [18] Counsel also referred to the penal provisions of section 21 of the Act[23] and argued that the reference to a trustee in subsection 21(1)(b), is a very clear indication that trusts are included in the Act. Section 21, as far as its provisions relate to section 10(1) or (2), envisages a statutory offence if a person failed to register as a home builder before construction commences. It is stated emphatically in *Cool Ideas*[24] that the section 10 requires registration of persons or entities[25] that carry on the business of home builder, and those that have entered into an agreement with a housing consumer in respect of the sale of a house or construction of a house. As with the interpretation of section 10, it is not permissible to extract one word from section 21 and then to rely on it to support the interpretation which the applicant contends for. A trust is therefore excluded from the ambit of section 10 as a trust is not "persons or entities" which are required to register. A trust, by its very nature, is not an entity having a real or distinct existence.[26]
- [19] Section 13(7) provides that a home builder may not demand or receive from a housing consumer any deposit for the construction or sale of a house unless an agreement in terms of section 13(1) and (2) has been concluded. Nor may a home builder receive any consideration unless the provisions of section 14(1) or (2) have been complied with. Section 14(1) provides that a home builder may not commence the construction of a home, if the home falls within a certain category of homes unless the home builder has been enrolled with the NHBRC. Section 14(2) states that a home builder shall not commence construction of a home the acquisition of which will be financed solely from the proceeds of a state housing subsidy unless the home builder has been enrolled with the NHBRC.
- [20] Section 21 uses the words "any person".[27] The word "any" is an indefinite term of wide and unqualified generality, unless restricted by the context in which it is used.[28] In my judgment the words "any person" in section 21(1)(a) refer only to natural persons. It is evident from the use of the words "he or she". A trust, not being a person, is incapable of furnishing or withholding information. Natural persons are capable of knowingly withholding information and are able to furnish information knowing to be false.[29] Juristic persons act through their directors or members.
- [21] Section 21(1)(b), however, is not restricted to natural persons only, but include juristic persons also. A distinction is to be drawn between "any person" referred to in section 21(1)(a) (which is restricted to natural persons) and "any person" referred to in section 21(1)(b). A home builder referred to in section 21(1)(b) need not be a natural person. Insofar as the offence may be committed by a home builder which is a juristic person, every director, trustee, managing member or officer of that particular home builder who knowingly permitted a contravention is also guilty of that statutory offence. For section 10, 13(7) and 14 to be contravened a home builder need to be a person or an entity. The reference to "trustee" in section 21(1)(b) does not refer to a trust which is not a home builder.[30]

- [22] The provisions of section 18(1) provide that financial institutions, as money lenders to housing consumers, have to satisfy themselves that the home builder is registered in terms of the Act. Section 18(2) provides, in addition, that any conveyancer attending to registration of the property shall ensure that the home builder is registered with the NHBRC. The failure to comply with section 18(1) and (2) constitutes a criminal offence in each case. Neither of these two offences have any relevance to a trust being a home builder.
- [23] Section 19(5), finally, makes it a criminal offence for a person to hinder, obstruct, interfere or withhold information from an inspector. Similarly, a trust, as such, is not capable of doing what is prohibited by section 19(5).
- [24] The present application was launched in 2015 and is premised on the proposition that both judgments of Southwood J and Vorster AJ supra[31] were wrongly decided. I am not convinced that they are wrong. It is very disquieting that the correctness of those judgments are attacked, despite the acquiescence of applicant since 2006, without demur.[32] It is in the public interest that orders of court be certain and final so that members of the public may arrange and conduct their

affairs accordingly.[33]

In the result, the following order is made.

ORDER:

1. The application is dismissed with costs.
2. The respondents are ordered to pay the costs of the third party inclusive of the costs of two counsel.

G C MULLER

JUDGE OF THE HIGH COURT LIMPOPO

DIVISION: POLOKWANE

APPEARANCES

For Applicant: Adv AG Sawma SC.

For Respondents: Adv M Naude.

For Third Party: Adv RPA Ramawele SC.

: Adv TT Tshivashe.

DATE HEARD: 12 December 2017.

DATE DELIVERED: 14 February 2018.

- [1] National Home Builders Registration Council (NHBRC) v Botes (18094/2006) [2008] ZAGPHC 170 (20 August 2006); National Home Builders Registration Council (NHBRC) Van Rooyen and Others (11273/2006) [2006] ZAGPHC 17 (20 April 2006).
- [2] s 20 also makes provision for interdictory relief to stop construction of a home or to direct a home builder to comply with the provisions of the Act.
- [3] s 1A. The 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. The reference in section 1A to a person as male or female cannot be overlooked when interpreting its provisions.
- [4] 2012 (4) SA 593 (SCA) 13 and 18.
- [5] 2014 (4) SA 474 (CC) para 29-37.
- [6] The Constitutional Court was not required to give meaning to the word "person" in the definition but dealt with the registration of a home builder with reference to the wording of s 10(1) and (2) of the Act.
- [7] Hereinafter the "NHBRC".
- [8] s 3.
- [9] Chapter III s 10-13.
- [10] Chapter IV.
- [11] Kohlberg v Burnett NO and Others 1986 (3) SA 12 (AD) 25G-I.
- [12] Brown v Blann and Botha NNO and Another 1984 (2) SA 850 (AD) 859 E-H.
- [13] Commissioner for Inland Revenue v Friedman and Others NNO [1992] ZASCA 190; 1993 (1) SA 353 (AD) 369J-370I.
- [14] 623G-625D.
- [15] Act 31 of 1941.
- [16] 623G-624C; In Commissioner for Inland Revenue v MacNeilie's Estate 1961 (3) SA 833 (AD) 840E-G it was held that a trust is excluded from the ambit of s 2 of the Interpretation Act.
- [17] Theron NNO v Loubser NO 2014 (3) SA 323 (SCA) para 5. Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA) para 10; Commissioner for Inland Revenue v Emary NO 1961 (2) SA 621 (AD) 624C; Commissioner for Inland Revenue v MacNeilie's Estate supra 840G-H.
- [18] Act 33 of 1957.
- [19] De Wet NO v Jurgens 1970 (3) SA 38 AD 51E.

[20] The Consumer Protection Act 68 of 2008 defines a juristic person to include "a trust as defined in the Trust Property (Control) Act, 1988 (Act 57 of 1988)"; The National Credit Act 34 of 2005 defines a juristic person to include "a partnership, association or other body of persons, corporate or unincorporated,

or a trust if- (a) there are three or more individual trustees; or

(b) the trustee is itself a juristic person". See also s 1 Financial Institutions (Protection of Funds) Act 28 of 2001. According to the heads of argument presented by the third party steps had been taken to include trusts in the Act.

[21] 9(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. 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;

[21] 9(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.

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;

[22] Commissioner for Inland Revenue v Friedman and Others NNO supra n 14 at 369J-370I.

[23] 21 (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.

[23] 21 (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.

[24] Para 34.

[25] My emphasis.

[26] Para 34. The Collins Concise Dictionary (1982) described an entity as: "something having real or distinct existence."

Hutchinson Concise Encyclopedic Dictionary (1992): "something with a distinct existence; a thing's existence in itself."

[27] s 18(2) refers to "any conveyancer ..." The word "any" is therefore restricted by the context to only conveyancers.

[28] Commissioner for Inland Revenue v Ocean Manufacturing Ltd [1990] ZASCA 66; 1990 (3) SA 610 (AD) 618G-I.

[29] It is not without significance that the words "any person" in s 21(1)(a) is restricted by the use of the words "he or she" which is a reference to natural persons.

[30] Fn 22.

[31] Fn 1.

[32] Counsel appearing on behalf of the applicant informed the court from the bar that the applicant did not apply for leave to appeal in either of the two previous applications.

[33] Naidoo v Cavendish Transport Co (Pty) Ltd 1956 (3) SA 244 (N) 248A; Van Wyk v Unitas Hospital [2007] ZACC 24; 2008 (2) SA 472 (CC) para 31.

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