

SUMMARY OF THE JUDGMENT

MUST A HOME BUILDER THAT IS A TRUST REGISTER WITH THE NHBRC?

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

There has been a handful of judgments dealing with the requirement imposed on home builders to register with the National Home Builders Council. In this matter, the Court was asked to decide whether or not a Trust fell within the relevant definitions that determined that no 'person' shall carry on the business of a home builder unless that person was registered as a home builder with the Council. The Supreme Court of Appeal dealt thriftly with the arguments of the Trust that it was not a 'person' for purposes of this legislation.

The Judgment can be viewed [here](#).

FACTS

During 2013, whilst conducting a routine inspection, an inspector of the National Home Builders Registration Council (NHBRC) discovered that the trustees of the Mike's Trust (the Trust) were constructing a sectional title housing development on a property, for the benefit of the Trust. It was common cause that initially the Trust registered as a 'home builder' in terms of section 10 of the Housing Consumers Protection Measures Act 95 of 1998 (the Act), for a period of one year from 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 accordingly served with notices of non-compliance by the inspector, but refused to comply. Consequently the NHBRC launched proceedings against the trustees of the Trust.

The Trust argued in essence 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 was whether the Trust is included in the ambit of the Act to which registration as a home builder applies.

The relevant provisions in the Act read as follows:

'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 . . .'*

HELD:

- The preamble to 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. By virtue of the Act, the NHBRC is established as an organ of the state to regulate the home building industry.
- 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.

- The provisions of the Act must be interpreted bearing the aforementioned in mind. 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 section 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 light of the surrounding circumstances. 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.
- The fact that the legislature makes no express provision for the inclusion of a 'trust' in section 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.
- In fact, to exclude trusts from the ambit of the Act would result in a consequence which was arbitrary and unjust.

The appeal therefore succeeded.

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