

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2020/21621

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES / NO

[9 September 2020]

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SIGNATURE

In the matter between:

THE NATIONAL HOME BUILDERS REGISTRATION COUNCIL APPLICANT

and

LUCAS MAKUBELA 1ST RESPONDENT

THE HOME BUILDER EMPLOYED AT STAND 1270 2ND RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] This is an urgent application in terms of which the applicant seeks an order inter-alia, interdicting and restraining the respondents' from performing any building and construction related activities at the property known as stand [...], Heidelberg, Extension 12, Gauteng, pending compliance by the respondents with the provisions of Section 10 and 14A of the Housing Consumers Protection Measures Act 95 of 1998 (the Act).
- [2] The National Home Builders Registration Council (the NHBRC), is an organ of state established in terms of section 2 of the Act to regulate the home building industry. Its objects are set out in section 3 of the Act and include representing 'the interests of housing consumers by providing warranty protection against defects in new homes(section 3(a)); regulating the home building industry (section 3(b).); providing protection to owners of homes 'in respect of the failure of home builders to comply with their obligations' in terms of the Act (section 3(c)); and 'to establish and to promote ethical and technical standards in the home building industry(Section 3(d).)
- [3] The first respondent, Mr Lucas Makumbela, is the registered owner of Erf [...], Heidelberg ext. 12 (the property). The second respondent is cited as the builder at the property.

- [4] An NHBRC inspector, Ms Makume, whilst conducting a routine inspection on 10 June 2020 in the area, attended at the property where she observed building works taking place. She approached the workers at the site, who refused to provide any information about the building contractor but provided her with a telephone number of the owner, who was identified as "Lucas". She phoned the owner and confronted him about the fact that the builder at the site had not been registered with the applicant, and the property had not been enrolled prior to commencement of the building works, as is required in terms of section 10 read with section 14 of the Act.
- [5] The first respondent then came to the site and spoke to Makume. He did not deny any of the non-compliances complained of and undertook to ensure that these non-compliances were rectified immediately. On 17 June 2020 and having now established that the owner had still not complied with his undertaking to her, Makume returned to the site and found a contractor on site that was in the process of delivering building materials.
- [6] Makume issued a notice of non-compliance but was unable to deliver it as the contractor delivering the building materials indicated that he could not accept service thereof on behalf of the owner. Makume was only able to return to the property on 6 August 2020. Makume also

issued out a second report of administrative non-compliance with the Act. The matter was subsequently referred to the applicant's attorneys of record.

[7] In the answering affidavit, the first respondent admits that he is the builder responsible for the building works, and the owner of the property. He contends that he is in fact registered with the NHBRC as a builder and accordingly complies with the provisions of section 10 of the Act, since 6 February 2020. The applicant accepts this fact as correct, but maintains that this does not affect the application, as the applicant has failed to comply with section 14 of the Act.

[8] The first respondent contends that, some days after having been served with this urgent application, on 28 August 2020, he filed an application for exemption as owner builder as contemplated in section 29 of the Act. In addition, he contends that the purpose of the Act would not be undermined if an owner builder were allowed to build before making application for exemption, because consumers do not need protection from an owner builder as they do from a homebuilder.

[9] Importantly, section 14(1) of the Act, which lies at the heart of this application, provides:

“A home builder shall not commence the construction of a home falling within any category of home that may be prescribed by the Minister for the purposes of this section unless-

- (a) the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner;
- (b) the Council has accepted the submission contemplated in paragraph (a) and has entered it in the records of the Council; and
- (c) the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder.’

[10] Accordingly, in terms of section 14 of the Act, a homebuilder may not begin to build a home before he, she or it has submitted the prescribed documents, information and fee to the NHBRC, the NHBRC has accepted these, has entered this in its records, and has issued a certificate of proof of enrolment. A contravention of section 14 of the Act constituted an offence as provided for in section 21(1)(b) of the Act. Section 29, in turn, provides for exemption of certain provisions of the Act, and provides specifically that the Council of the applicant under exceptional circumstances approve this. Accordingly, the mere submission of an application for exemption does not exempt an owner builder from compliance with section 14 of the Act. In order to be exempt, the Council must first grant one an exemption.

[11] It is trite that courts have a duty to ensure that the doctrine of legality is upheld and to grant recourse at the instance of public bodies charged with the duty of upholding the law in instances where there

are transgressions. As Majiedt JA (as he then was) stated in *Lester v Ndlambe Municipality and Another*¹ :

“...the law cannot and does not countenance an ongoing illegality which is also a criminal offence. To do so, would be to subvert the doctrine of legality and to undermine the rule of law”.

It follows, accordingly that the unauthorized and illegal conduct of the respondents in unlawfully erecting a building structure without the necessary exemption is *contra bonos mores* and contrary to public policy, and cannot be condoned by the court.

[12] Order

12.1 The first respondent is interdicted and restrained from performing or causing the performance, of any building and construction related activities at the property known as Stand 2870, Heidelberg, Extension 12, Gauteng, pending compliance by the first respondent with the provisions of section 14(A) of the Housing Consumer Protection Measures Act 95 of 1998.

12.2 The first respondent is ordered to pay the costs of the application.

¹ 2015 (6) SA 283 (SCA) at [23]. (See also *Standard Bank of South Africa Ltd v Swartland Municipality* 2010(5) SA 479 (WCC); *Standard Bank of South Africa Limited v Swartland Municipality* 2011 (5) SA 257 (SCA)).

T P MUDAU
[Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Hearing: 3 September 2020

Date of Judgment: 9 September 2020

APPEARANCES

For the Applicant: Adv. S G Gouws

Instructed by: Verveen Attorneys

For the Respondent: Adv. C Grant

Instructed by: Meijer Attorneys