**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 99/13

In the matter between:

**COOL IDEAS 1186 CC** Applicant

and

**ANNE CHRISTINE HUBBARD** First Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** Second Respondent

**Neutral citation:** *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16

**Coram:** Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

**Heard on:** 5 February 2014

**Decided on:** 5 June 2014

**Summary:** Housing Consumers Protection Measures Act 95 of 1998 – section 10(1) – requires registration of home builder to receive consideration for work done – no infringement of unregistered home builder's rights to property and to access to courts

Application to have arbitration award made an order of court – statutory prohibition precluding court from making arbitral award an order of court – would amount to a court sanctioning an illegality

## ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the South Gauteng High Court, Johannesburg):

1. The applications for condonation are granted.

2. The application for leave to appeal is granted.

3. The appeal is dismissed with costs, including the costs of two counsel.

## JUDGMENT

MAJIEDT AJ (Moseneke ACJ, Skweyiya ADCJ, Khampepe J and Madlanga J concurring):

*Introduction*

[1] In most instances a home is the most valuable asset in a person's estate. The Legislature sought to protect housing consumers by enacting the Housing Consumers Protection Measures Act[1] (Housing Protection Act). This matter concerns the interpretation of section 10(1)(b) of the Act. Related thereto, it questions whether that provision infringes Cool Ideas' right not to be arbitrarily deprived of property in terms of section 25 of the Constitution and its right to have access to courts in terms of section 34 of the Constitution. I must at the outset record that no relief was sought

[1] 95 of 1998.

either in the courts below or in this Court to have the section struck down as constitutionally invalid.

[2] The applicant, Cool Ideas 1186 CC (Cool Ideas), a duly registered close corporation primarily engaged in property development, seeks leave to appeal against a judgment of the Supreme Court of Appeal. The majority in that Court upheld an appeal against a judgment of the South Gauteng High Court, Johannesburg (High Court) which granted Cool Ideas' application to have an arbitration award in its favour against the first respondent, Ms Anne Christine Hubbard, a home owner, made an order of court in terms of section 31 of the Arbitration Act.[2] The second respondent is the Minister of Justice and Constitutional Development (Minister), cited because the relief sought might implicate the constitutionality of legislation. The Minister took no part in the proceedings in the High Court, the Supreme Court of Appeal or in this Court.

*Condonation*

[3] Cool Ideas applies for condonation of the late filing of its application for leave to appeal in this Court as well as for the late lodging of its summary of substantial facts. There was opposition only to the first application, but this was abandoned at the hearing.

[2] 42 of 1965.

[4] The explanation proffered for the failure to comply with the time limits is satisfactory and no prejudice has ensued. It is consequently in the interests of justice to grant both applications.

*Background*

[5] On 13 February 2006 Cool Ideas and Ms Hubbard entered into a building contract. Cool Ideas undertook to construct a residence for Ms Hubbard for consideration of R2 695 600.[3] Cool Ideas enlisted the services of Velvori Construction CC (Velvori) to execute the building project. At the time that it entered into the building contract, Cool Ideas was not registered as a home builder in terms of section 10 of the Housing Protection Act. However, Velvori was duly registered as a home builder with the capacity to undertake the construction of a home. The building project was also enrolled by Velvori as required by section 14[4] of the Housing Protection Act.

[6] The project commenced, payments were made and received and the building works achieved practical completion in October 2008. Ms Hubbard then raised

[3] Cool Ideas subdivided a piece of land to which it had obtained rights and sold a portion of it to Ms Hubbard.

[4] Section 14 reads:

> "(1) 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."

certain issues regarding the quality of elements of the building works, refused to make the final payment due on the building project and claimed payment of R1 200 000 as the cost of remedial work. Ms Hubbard invoked the arbitration clause contained in the building contract and initiated arbitration proceedings to seek payment for contractual damages from Cool Ideas.

[7] On 12 February 2010 the parties agreed to the appointment of an arbitrator, Mr Charles Cook, an architect, to determine the dispute. Ms Hubbard claimed compensation on the basis of defective workmanship, relocation costs, penalties and certain compliance-type certificates. Cool Ideas counterclaimed for the portion of the contract sum which remained outstanding, namely an amount of approximately R550 000. The arbitration agreement, among other things, recorded that:

> "The arbitration will be held in terms of the Arbitration Act 42 of 1965. The arbitrator's award shall be final and binding. There shall be no appeal against the arbitrator's award".

[8] The arbitration proceedings culminated on 15 April 2010 in an award in favour of Cool Ideas. The relevant part of the award reads that "[Ms Hubbard] is to pay the Respondent [Cool Ideas] the sum of R550 211 inclusive of VAT".[5]

[5] The terms of the order, in relevant part, are:

> "32.2. Interest to be paid by the Claimant on R1 101 333.36 from 7 November 2007 to the date of payment at the rate of 2% greater than the minimum lending rate charged by the Claimant's bank to its client, compounded monthly, the start date being 7 November 2007;
>
> 32.3. Costs are awarded in favour of the Respondent;
>
> . . .

[9] Ms Hubbard failed to satisfy the arbitration award. On 16 November 2010 she wrote to Cool Ideas contending that it was not entitled to claim remuneration under the building contract because it was not registered as a home builder in terms of the Housing Protection Act. She contended that Cool Ideas was not entitled to apply to have the award of the arbitrator made an order of court, since it would receive remuneration in direct conflict with the provisions of the Housing Protection Act.

[10] Cool Ideas was of the view that it was not necessary to register as a home builder in terms of the Housing Protection Act because that Act required both the enrolment of a building project that was subject to its provisions and the registration of a home builder. Cool Ideas contended that, in doing so, it distinguishes between two categories of home builders. The first is where the home builder has the capacity to undertake the physical construction of the home, as did Velvori. The second is where the home builder does not have this capacity and has to appoint a subcontractor. Cool Ideas argued that it falls into this latter category. It also averred that, upon enquiry to the National Home Builders' Registration Council (NHBRC), Cool Ideas was informed that it was not necessary for it to register as a home builder before commencing construction.

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32.5. Any amounts due and remaining unpaid by the due date as set out in paragraph 32.2 herein shall accrue interest as for a judgment date at the rate of 15.5% per annum compounded monthly from the date due for payment."

[11] Subsequently, Cool Ideas applied to the High Court to make the arbitral award an order of court in terms of section 31[6] of the Arbitration Act.

*High Court*

[12] Ms Hubbard opposed the application and averred that, in terms of section 10(1) of the Housing Protection Act, Cool Ideas was not entitled to carry on the business of a home builder or to receive any consideration in terms of any agreement with a person defined as a housing consumer. Section 10(1) reads as follows:

> "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."

[13] Between the delivery of the answering affidavit and the replying affidavit during the High Court proceedings, Cool Ideas applied for and was registered as a home builder in terms of section 10(6)(b)[7] of the Housing Protection Act.

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[6] "Award may be made an order of Court—

> (1) an award may, on application to the court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
>
> (2) the court to which the application is so made, may, before making the award an order of the court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.
>
> (3) an award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect."

[7] "The Council may, in addition to any other category that the Council may deem appropriate, in the registration of home builders distinguish between—

> (a) home builders themselves having the capacity to undertake the physical construction of homes or to manage the process of the physical construction of homes; and
>
> (b) home builders who in the normal course need to enter into agreements with other home builders in order to procure the capacity referred to in paragraph (a)."

[14] During the High Court proceedings, Ms Hubbard submitted that the arbitral award was incapable of enforcement and that it was void from the outset. She made neither a case for a remittal of the dispute to the arbitrator in terms of section 32(2) of the Arbitration Act, nor for setting aside of the arbitrator's decision in terms of section 33. The High Court was of the view that Ms Hubbard raised her defence in a manner which had the effect of an appeal in that the arbitrator erred on a point of law.

[15] Cool Ideas submitted that Ms Hubbard was precluded from raising new issues for the first time. In this regard counsel placed reliance on *York Timbers*[8] and *Lufuno Mphaphuli.*[9] The High Court upheld this submission and stated that, had the issue been raised as an exception at the arbitration stage, Cool Ideas would have been afforded the opportunity to deal with the point and the arbitrator may well have allowed an amendment. The question of non-registration could then have been traversed during the arbitration.

[16] The High Court held that there is no authority for the proposition that section 31(1) of the Arbitration Act confers a discretion on the court to refuse the application if it finds the award to be incorrect.

[8] *South African Forestry Co Ltd v York Timbers Ltd* 2001 (4) SA 884 (T).

[9] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (*Lufuno Mphaphuli*).

[17] The High Court held further that a significant feature of this case was that by the time Cool Ideas wished to make the arbitral award an order of court, it had registered as a home builder in terms of the Housing Protection Act. In this regard the High Court cited section 14A(1) which is headed "Late enrolment and non-declared late enrolment". It reads:

> "Where a home builder—
>
> (a) in contravention of section 14 submits an application for the enrolment of a home to the Council after construction has started; or
>
> (b) does not declare the fact that construction has commenced at the time of enrolment and the Council becomes aware of that fact,
>
> the Council shall require the home builder to satisfy the Council that the construction undertaken at the time is in accordance with the NHBRC Technical Requirements and shall take prudent measures, contemplated in section 16(1), to manage the risks pertaining to the fund."

[18] The High Court held that the Housing Protection Act envisions a situation where late registration is permissible after the building has commenced and therefore the peremptory provisions of section 10 are to be read with those in section 14A.

[19] The High Court further held that the work was done by Velvori, a registered home builder as required by the Housing Protection Act. To preclude Cool Ideas from its claim at that stage would be giving effect to form over substance. The substance of its claim at that stage was that it was a registered home builder and that at the time it executed the building work it did so in cooperation with the subcontractor, Velvori.

[20] The High Court made the arbitral award an order of court in accordance with section 31 of the Arbitration Act. Ms Hubbard appealed to the Supreme Court of Appeal.

*Supreme Court of Appeal*

[21] The majority in the Supreme Court of Appeal held that the purpose of section 10 was to protect consumers.[10] It held that section 10(7) required that both Cool Ideas and the subcontractor had to be registered as home builders in terms of the Housing Protection Act. That section reads as follows:

> "A home builder registered in terms of subsection (6)(b) shall be obliged, for the purposes of the physical construction of homes, to appoint a home builder registered in terms of subsection (6)(a)".

[22] While section 10 did not nullify the contract between Ms Hubbard and Cool Ideas, it nevertheless disentitled unregistered home builders from receiving consideration. Importantly, section 21[11] creates an offence for non-compliance with section 10(1) and (2) of the Housing Protection Act. Enforcing the arbitral award, in

[10] *Hubbard v Cool Ideas 1186 CC* [2013] ZASCA 71; 2013 (5) SA 112 (SCA) (Supreme Court of Appeal judgment).

[11] Section 21 reads:

> "(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 a provision of section 10(1) or (2), 13(7), 14(1) or (2), 18(1) 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."

the majority's view, would be to give effect to an unlawful situation and provide legal sanction to the mischief the Housing Protection Act seeks to prevent. The majority rejected the High Court's finding that the Housing Protection Act envisioned a situation where late registration is permissible after the building has commenced in terms of section 14A. In respect of the arbitration award, the majority rejected the proposition on behalf of Cool Ideas that due deference should be shown to arbitration awards by our courts. In doing so, the majority emphasised that it was not seized with the question whether an arbitration award should be set aside, but rather with the enquiry whether it is legally tenable to make an arbitration award an order of court where to do so would amount to sanctioning the breach of a clear statutory prohibition. The appeal was upheld with costs. Willis JA, dissenting, took the contrary view that a refusal to make the arbitral award an order of court would lead to an unjust result.

*Issues for determination*

[23] The issues for determination in this Court are:

(a) the interpretation of section 10(1)(b) of the Housing Protection Act;

(b) whether Cool Ideas has been arbitrarily deprived of its property;

(c) whether the building contract remains valid;

(d) whether equity considerations are applicable; and

(e) whether a refusal to make the arbitral award an order of court constitutes a denial of the right of access to courts.

*In this Court*

*Jurisdiction and leave to appeal*

[24] Cool Ideas predicated its application initially on this Court's jurisdiction as it existed prior to the Constitution Seventeenth Amendment Act[12] (Amendment Act), which commenced on 23 August 2013. Later it changed tack and amended its notice of motion to seek a determination of a non-constitutional issue in terms of the extended general jurisdiction brought about by section 167(3)(b)(ii)[13] of the Amendment Act. The primary issue for determination is the correct interpretation of section 10(1)(b) of the Housing Protection Act. However, two constitutional issues were raised in the original application to deal with this issue, namely: (a) that section 10(1)(b) of the Housing Protection Act amounts to an arbitrary deprivation of property as envisaged in section 25(1) of the Constitution;[14] and (b) that the Supreme Court of Appeal's refusal to make the arbitration award an order of court infringed Cool Ideas' right of access to courts in terms of section 34 of the Constitution.[15]

[25] Apart from the fact that the original application for leave to appeal had been filed in this Court on 30 July 2013, almost one month prior to the commencement of

[12] 72 of 2012.

[13] Section 167(3)(b)(ii) in its amended form now reads as follows:

> "The Constitutional Court . . . may decide . . . any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by the Court".

[14] Section 25(1) read as follows:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[15] Section 34 reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum."

the amended section 167(3)(b)(ii), there is no need for this Court to exercise its extended general jurisdiction (assuming it could do so), since constitutional issues plainly arise here. It is therefore not necessary to decide whether this Court has extended jurisdiction in terms of the amended section.[16]

[26] It is furthermore in the interests of justice to decide these constitutional issues, since they arise as a consequence of the Supreme Court of Appeal's majority judgment. This matter requires us to interpret section 10(1)(b) of the Housing Protection Act and to subject it to scrutiny through the lens of the rights contained in sections 25(1) and 34 of the Constitution. These issues were not directly raised in the Supreme Court of Appeal. There are reasonable prospects of success and leave to appeal should consequently be granted.

*The merits*

[27] The interpretation of section 10(1)(b) of the Housing Protection Act requires a careful consideration of the scheme of the Act and its objects measured against the rights embodied in sections 25 and 34 of the Constitution. The nub of the dispute concerns the question whether section 10(1)(b) should be interpreted, as Cool Ideas contends, to mean that an unregistered home builder can receive payment for work done as long as registration has been effected by the time that payment is sought. Put differently, Cool Ideas contends that registration is not a prerequisite for a home

[16] *Ferris and Another v Firstrand Bank Limited and Another* [2013] ZACC 46; 2014 (3) SA 39 (CC); 2014 (3) BCLR 321 (CC) at para 8.

builder to commence (and complete) construction, as long as registration has been effected by the time the home builder seeks payment.

*Proper meaning of section 10(1)(b) of the Housing Protection Act*[17]

[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.[18] There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;[19]

(b) the relevant statutory provision must be properly contextualised;[20] and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).[21]

I turn to an analysis of the legislative scheme of the Housing Protection Act, against the backdrop of these principles.

[17] The provisions of section 10(1) are set out in [12] above.

[18] See *SATAWU and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 37; *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) (*S v Zuma*) at paras 13-4; and *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 543.

[19] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZACC 48; 2014 (3) BCLR 265 (CC) at paras 84-6 and *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 5.

[20] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) at para 24; *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) at para 39; and *Bhana v Dőnges NO and Another* 1950 (4) SA 653 (A) at 664E-H.

[21] *Garvas* above n 18 at para 37.

*The scheme of the statute*

[29] The purpose of the Housing Protection Act is to protect housing consumers. This appears from the name and preamble of the statute.[22] Unsurprisingly, this aspect was not in issue before us. The entire legislative scheme is predicated upon a building contract between a registered home builder and a housing consumer being concluded. The statute is not capable of being construed as permitting after-the-fact registration of a home builder when construction has already commenced (or may even have been completed) when it seeks payment from the housing consumer. It is necessary to discuss in some detail the various provisions of the Housing Protection Act which support this conclusion.

[30] Section 3 sets out the objects of the NHBRC. The ultimate objective is the regulation of the building industry[23] through, amongst other things, the protection of the housing consumer and maintaining minimum standards for home builders. The protection is optimally achieved in requiring the registration of home builders upfront and not during the course of or at the end of construction. The impugned provision must therefore be interpreted thus. To hold otherwise would be to defeat the primary objective of the statute. The contrary argument would in effect leave a housing consumer who is faced with defective workmanship on his or her house unprotected in

[22] The preamble to the Housing Protection Act states:

> "To make provision for the protection of housing consumers; and to provide for the establishment and functions of the National Home Builders Registration Council; and to provide for matters connected therewith."

[23] Section 3(b).

respect of a civil remedy in terms of the Housing Protection Act until such time as the home builder registers with a view to recovering payment for its services rendered, should such a home builder ever choose to do so.

[31] Section 5 sets out the wide-ranging powers of the NHBRC. Section 13 contains important safeguards in favour of the housing consumer. Unless there has been compliance with certain provisions,[24] a home builder is prohibited from demanding or receiving from a housing consumer a deposit for the construction of a home.[25] I deal with these sections in more detail below.

[32] Chapter V deals with legal enforcement and, in a similar vein, affords housing consumers extensive protection through the imposition of the requirement on home builders to register with the NHBRC. Lastly, section 21 creates statutory offences for contravention of section 10(1) and (2). It provides for sentences of a fine not exceeding R25 000 or imprisonment for a period not exceeding one year, on each charge.

[33] These provisions lead one to the ineluctable conclusion that the statute envisions registration of a home builder before construction commences. Moreover, the relevant section itself says so in plain language.[26] These prohibitions are stark and

[24] Section 13(1) and (2).

[25] Section 13(7)(a).

[26] See above [12].

explicit. Equally clear is the purpose of these provisions (as is the case with the statute as a whole), namely to protect housing consumers.

[34] The possibility of belated registration, advanced by Cool Ideas, would be inimical to the clear objective of the legislation. It would also violate the clear language and meaning of section 10(1)(b). Much emphasis was laid on behalf of Cool Ideas on the use of the word "receive" in section 10(1)(b) in support of this converse proposition. That emphasis is misplaced. Section 10(1)(a) and (b) and 10(2) must be read together and, as stated, contextually and purposively with regard to the statute as a whole. This section requires the registration of persons or entities that carry on the business of a home builder, and those that have entered into an agreement with a housing consumer in respect of the sale or construction of a house. In this instance, it is not permissible to extract one word from the section and then to rely upon it as support for the interpretation which Cool Ideas contends for in circumstances where it plainly controverts not only the plain, unambiguous text of section 10(1) and (2), but also the clear purpose of that section and of the statute as a whole.

[35] The further submission that Cool Ideas' non-registration was in any event cured by the fact that Velvori – which did the actual construction work – had been duly registered as a home builder, is devoid of merit. This is so given the plain and unequivocal requirement in section 10(7).[27]

[27] See above [21].

[36] It is of some significance that while, as the majority in the Supreme Court of Appeal correctly observed, section 14A allows for the late enrolment of a home after construction has commenced, there is no corresponding relaxation of the registration requirement to be found in section 10(1)(b). This too evinces a clear intention by the Legislature that registration should occur prior to and not during or at the end of construction.

[37] Accordingly, the interpretation given by the Supreme Court of Appeal to section 10(1)(b) of the Housing Protection Act, namely that registration is a prerequisite for building works to be undertaken by a home builder, must be upheld. Failure to register would result in the home builder being ineligible to seek consideration for work done in terms of a building agreement. It is convenient to discuss whether this interpretation amounts to an arbitrary deprivation of Cool Ideas' property. I think not.

*Arbitrary deprivation of property*

[38] The starting point of this enquiry must be whether there has been a deprivation of Cool Ideas' property.[28] It is common cause that there has been deprivation – Cool Ideas would not be able to enforce a claim based on unjustified enrichment, for the reasons mentioned below.[29] The outstanding balance of R550 000 would thus remain unpaid. This Court held in *Opperman* that the right to restitution of money

[28] See above n 14.

[29] Joubert et al (eds) *LAWSA* (reissue) vol 9 at para 209(d) and the cases cited there.

paid based on unjustified enrichment constitutes property for purposes of section 25(1) of the Constitution.[30]

[39] The next question is whether the deprivation of Cool Ideas' right to sue on unjustified enrichment is arbitrary. The answer to this question is inextricably linked to the discussion of the purpose of the Housing Protection Act, the legislative scheme as a whole and the interpretation of section 10(1)(b), set out above.

[40] In *FNB v CSARS*,[31] this Court set out the test for arbitrariness. It held that there will be an arbitrary deprivation of property if the law referred to in section 25(1) lacks adequate reason for the deprivation in question or is procedurally unfair.[32] Ackermann J then laid down guidelines for determining the requirement of sufficient reason for the deprivation.[33] In essence they entail an analysis of the means employed and the ends sought to be achieved as well as a consideration of the nature of the property and the extent of the deprivation.

[41] This approach was referred to with approval in *Opperman*.[34] As was the case in *Opperman*, the deprivation in this matter is not merely partial in nature. It deprives the unregistered home builder, Cool Ideas, of its right to payment and there must

[30] *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) (*Opperman*) at para 63.

[31] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB v CSARS*).

[32] Id at para 100.

[33] Id.

[34] *Opperman* above n 30 at paras 68-72.

consequently be compelling reasons for it. Proportionality between the means and the end would therefore have to feature prominently in this enquiry.[35] But, unlike *Opperman*'s factual matrix and ultimate findings, here the means justify the end, that is, there is a rational connection between the depriving statutory provision and its purpose. The purpose of the legislation has been set out above and is not in issue.

[42] There can be no doubt that the protection of housing consumers is a necessary and legitimate legislative objective. The means of protection is through the establishment of a fund to compensate housing consumers for defective work by home builders. Registration is a prerequisite for the construction of a home. Registration, quite apart from its protection objective, is also aimed at bringing home builders into the statutory fold of the NHBRC with all its wide-ranging powers and, secondly, to contribute towards the funding of the NHBRC through registration fees.

[43] The crisp issue is whether the penalisation for failure to register, namely the deprivation of consideration for services rendered by the home builder, is proportionate to the purpose of protecting housing consumers, that is, do the means of deprivation justify the ends of protection? I think they do. The purpose for deprivation is compelling. Moreover, it is a simple process of registration which is required. There is nothing overly complicated or onerous. The important consequences brought about by registration have been dealt with above. It is not necessary to regurgitate them. It would suffice to reiterate their importance by

[35] See *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC) at para 49.

demonstrating the invidious position a housing consumer who has unwittingly contracted with an unregistered home builder would find herself in. There would be no safeguards under section 13, which places certain important obligations on the home builder and which also provides evidentiary aid to the housing consumer by way of the deeming provisions in section 13(2)(a). Most importantly, the housing consumer would have no recourse to the NHBRC Fund and no claim for restitution against the unregistered home builder. The deprivation effected by section 10(1)(b) is aimed at a limited target, namely those home builders who fail to register.

[44] I am satisfied that section 10(1)(b) is aimed at achieving a legitimate and important statutory purpose and that there is a rational, proportional connection between the statutory prohibition and its purpose. There is accordingly no arbitrariness in the deprivation and thus no violation of section 25 of the Constitution. I turn next to a discussion of whether the underlying building contract remains valid.

*The continued validity of the building contract*

[45] By invoking the arbitration clause in terms of the building contract, the parties entered into a separate arbitration agreement on 3 April 2009[36] (it will be recalled that the building contract had been concluded on 13 February 2006). This fell outside of the ambit of the building contract. My Colleague Jafta J does not draw this distinction. The arbitrator derives his powers not from the building contract (as Jafta J

[36] Clause 14.1 of the building contract reads:

> "Any dispute arising between the parties out of and during the currency of the contract or upon termination thereof may be referred to arbitration."

appears to suggest), but from the arbitration agreement. The arbitrator himself acknowledged this fact.[37] It is noteworthy that at the time of the commencement of the arbitration agreement on 12 February 2010, Cool Ideas was still not registered as a home builder for the purposes of section 10 of the Housing Protection Act.[38]

[46] Although I find below that the building contract remained valid, a distinction needs to be drawn between the building contract and the arbitration agreement.[39] It is the contents of the arbitration agreement that are before this Court. The arbitration agreement required the arbitrator to arbitrate on alleged defective work by Cool Ideas which occurred whilst Cool Ideas was engaged in the construction of a home for Ms Hubbard. Both the arbitration agreement and the building contract are subject to the legislative framework of the Housing Protection Act.

[47] The Supreme Court of Appeal correctly found that the underlying building contract remains valid, notwithstanding its finding that Cool Ideas was not entitled to payment due to its failure to register as required by section 10(1)(b). It reasoned, correctly so, that the prohibitions in section 10(1) and (2) are not directed at the

[37] As appears from paragraph 4 of the arbitral award which reads:

> "The terms and conditions of my appointment as Arbitrator were set down in a document headed Arbitration Agreement dated 3rd April 2009 reference CDC/va/1459 (the Arbitration Agreement) and ultimately agreed to and signed by the parties".

[38] Cool Ideas only registered as a home builder in terms of the Housing Protection Act after it applied to the High Court to have the arbitral award confirmed as an order of court.

[39] See in this regard *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd and Others* [1993] 3 ALL E.R. 897 where the Court, in upholding an appeal in which it determined whether an arbitration clause is a separate and autonomous contract, held that, "as a matter of practice, the principle [of severability of an arbitration clause from the principle agreement which contains it] has been sustained by the terms and implications of arbitration conventions and rules". (Parenthesis in original.) See also *David Taylor & Son v Barnett Trading Co* [1953] 1 ALL E.R. 843.

validity of construction contracts, but at the unregistered home builder who is barred from receiving any consideration for work done absent any prior registration as a home builder. There is nothing in the legislative scheme which suggests that the building contract is invalidated by these statutory prohibitions.

[48] I have already set out the main provisions of the Housing Protection Act. The legislative scheme rests upon a written building contract between a registered home builder and a housing consumer.[40] Section 13(1) places a statutory obligation upon the home builder to ensure that a written agreement is concluded and that the formalities in that regard are met.[41] Section 13(2)(a) lends further assistance to the housing consumer as against the home builder by importing deeming provisions into the written agreement against the latter, enforceable in a court.[42] And, of some

[40] See above [29].

[41] "A home builder shall ensure that the agreement concluded between the home builder and a housing consumer for the construction or sale of a home by that home builder—

(a) shall be in writing and signed by the parties;

(b) shall set out all material terms, including the financial obligations of the housing consumer; and

(c) shall have attached to the written agreement as annexures, the specifications pertaining to materials to be used in construction of the home and the plans reflecting the dimensions and measurements of the home, as approved by the local government body: Provided that provision may be made for amendments to the plans as required by the local government body."

[42] "The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court that—

(a) the home, depending on whether it has been constructed or is to be constructed—

(i) is or shall be constructed in a workmanlike manner;

(ii) is or shall be fit for habitation; and

(iii) is or shall be constructed in accordance with—

(aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and

(bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1)".

significance is the fact that these provisions in section 13 may not be waived.[43] It is difficult to conceive how, given this importance of the written building contract in the legislative scheme, the entire agreement must be invalidated by the conclusion that an unregistered home builder is not entitled to seek payment for work done in terms of section 10(1)(b). It would be tantamount to a futile exercise if the Legislature were to enact a statutory prohibition against the remuneration of an unregistered home builder when the entire legislative scheme renders the building contract between the housing consumer and the home builder void from the outset. For this reason I find myself in respectful disagreement with Jafta J where he states that there is "nothing in the text of section 10(1), or other sections of the Act, which indicates that the underlying contract should remain unaffected."[44] It is inconceivable that the Legislature would specifically enact a provision such as section 13 to protect consumers but then render their contract invalid – a provision which stipulates various protective measures for the benefit of housing consumers. These include enforceable warranties by way of the deeming provision in section 13(2). These may not be waived. The Legislature is not likely to have provided for their inclusion in a building contract if the very same enactment renders the building contract invalid.

[49] The Housing Protection Act is, for good reasons, nuanced in its purpose and scheme. The underlying building contract must remain extant in order to render protection to the housing consumer in respect of what has already been erected and to

[43] Section 13(6) reads:

> "Any provision in an agreement contemplated in subsection (1) that excludes or waives any provision of this section shall be null and void."

[44] See [96] of the judgment of Jafta J.

the home builder for what has already been received. The parties are therefore entitled to retain what has been done or given, as the case may be. No restitution is legally tenable in these circumstances, as would have been the case with an invalid agreement. Thus, Cool Ideas would not be entitled to file suit against Ms Hubbard for unjustified enrichment, since the material element of performance without legal basis (*sine causa*) is lacking – the building agreement remains a valid *causa*.

[50] It is of considerable importance to note that both parties approached the matter in this Court and in the courts below on the basis that the underlying building contract remained valid. The statements[45] by Jafta J that Ms Hubbard had challenged the arbitral award on the basis that it is invalid because the building contract itself is invalid are, with respect, not borne out by the extract quoted by Jafta J in his judgment,[46] or by any other part of the record. On the contrary, in response to the averment by Cool Ideas in its founding affidavit in this Court that the Supreme Court of Appeal correctly found that the building contract remains valid, Ms Hubbard stated as follows in her opposing affidavit:

> "I do not dispute that the failure on the part of Cool Ideas to have registered as a home builder in terms of the Housing [Protection] Act did not in itself render our building agreement void."

Counsel for both parties argued the matter before us on this basis, and correctly so.

[45] See [73] of the judgment of Jafta J.

[46] At [72].

[51] In summary: the underlying building contract remains valid and extant. This is so even though Cool Ideas is in law precluded from seeking consideration for the work done, due to its failure to register as a home builder prior to the commencement of the building works.

*Equity considerations*

[52] Cool Ideas contended that it would be inequitable for Ms Hubbard to be absolved from complying with the arbitrator's award and from paying the outstanding approximately R550 000 due to Cool Ideas. I am of the view that equity considerations do not apply. But even if they do, as my Colleague Froneman J suggests, the law cannot countenance a situation where, on a case by case basis, equity and fairness considerations are invoked to circumvent and subvert the plain meaning of a statutory provision which is rationally connected to the legitimate purpose it seeks to achieve, as is the case here. To do so would be to undermine one of the essential fundamentals of the rule of law, namely the principle of legality. The following dictum by Kentridge AJ in *S v Zuma* is apposite:

> "[I]f the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."[47]

It is for this reason that I am in respectful disagreement with Froneman J in his interpretation of section 10(1)(b) and the reasoning behind it. The plain import of section 10(1)(b) is that regardless of how much work has been done by the unregistered home builder, no consideration is payable by the housing consumer.

[47] *S v Zuma* above n 18 at para 18.

*Does the refusal to make the arbitral award an order of court infringe Cool Ideas' right of access to courts?*

[53] The majority in the Supreme Court of Appeal refused to make the arbitral award an order of court on the basis that to do so would amount to sanctioning an illegality and would subvert the legitimate purpose of the section by lending the court's imprimatur to the very mischief which the statute seeks to prevent. Our law has long recognised that any act performed contrary to the direct and express prohibition of the law is void and of no force and effect.[48] Making the arbitral award an order of court would undoubtedly amount to the court sanctioning the illegality which section 10(1)(b) imposes.

[54] Moreover, section 21 of the Housing Protection Act provides that non-compliance with the particular section constitutes a criminal offence. It is imperative to take cognisance of the fact that we are not concerned here with the setting aside of the arbitrator's award on one of the three grounds listed in section 33 of the Arbitration Act, namely: misconduct by the arbitrator, gross irregularity in the proceedings, or where an arbitral award has been improperly obtained. Nor are we concerned with a remittal to the arbitrator in terms of section 32. This matter concerns the provisions of section 31 of the Arbitration Act in terms whereof an arbitral award may be made an order of court.[49]

[48] *Schierhout v Minister of Justice* 1926 AD 99 at 109. See also *Hoisain v Town Clerk, Wynberg* 1916 AD 236.

[49] See above n 6.

[55] What we are seized with here is therefore not the correctness or otherwise of the arbitral award, but with the question whether the award ought to be made an order of court if the court order would be contrary to a plain statutory prohibition. What is more, as stated at the outset, there is no challenge to the section's constitutional validity. It cannot be expected of a court of law in such circumstances to disregard a clear statutory prohibition – that would be inimical to the principle of legality and the rule of law. To do so would amount to undermining the purpose of the legislation.

[56] That is not to say that a court can never enforce an arbitral award that is at odds with a statutory prohibition. The reason is that constitutional values require courts to "be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently."[50] Courts should respect the parties' choice to have their dispute resolved expeditiously in proceedings outside formal court structures. If a court refuses too freely to enforce an arbitration award, thereby rendering it largely ineffectual, because of a defence that was raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out-of-court means of finally resolving the dispute.

[57] So it will often be contrary to public policy for a court to enforce an arbitral award that is at odds with a statutory prohibition. But it will not always be so. The

[50] *Lufuno Mphaphuli* above n 9 at para 235.

force of the prohibition must be weighed against the important goals of private arbitration that this Court has recognised.[51]

[58] Against this backdrop I turn to consider whether this particular arbitral award is contrary to public policy. In my view it is. Courts are themselves subject to the fundamental principle of legality as they are bound to uphold the Constitution[52] and, as stated, to make the arbitral award an order of court in the present instance would undermine that very principle. Cool Ideas has placed extensive reliance on *Lufuno Mphaphuli*[53] and the principle of party autonomy in voluntary arbitrations.[54] While these are important considerations, I fail to see how they assist Cool Ideas here. Generally speaking, party autonomy in voluntary arbitrations will not trump the principle of legality where the enforcement of the arbitral award would constitute a criminal offence, as is the case here. I turn next to a brief discussion of *Lufuno Mphaphuli* to demonstrate why – although its reasoning is not irrelevant here – it is distinguishable from the present case.

[59] *Lufuno Mphaphuli* concerned a private arbitration between Lufuno Mphaphuli & Associates (Pty) Ltd (Mphaphuli), an electrical infrastructure contractor company, and Bopanang Construction CC (Bopanang), a close corporation engaged in similar business. Differences arose between the parties in respect of performance in terms of

[51] Id at para 236.

[52] Sections 1(c) and 165(2).

[53] Above n 9.

[54] Reference was made in this regard to Christie "Arbitration: Party Autonomy or Curial Intervention: The Historical Background" 1994 *SALJ* 143.

a written agreement in terms whereof Mphaphuli had engaged the services of Bopanang as a subcontractor to undertake certain work on its behalf for Eskom in rural Limpopo. The dispute was referred to arbitration before Mr Andrews, the respondent, a quantity surveyor and project manager. The arbitrator found for Bopanang, who sought to have the award made an order of court in terms of section 31(1) of the Arbitration Act. Mphaphuli opposed this application and launched a separate application in terms of section 32(2) of the Arbitration Act for the review and setting aside of the award and for remittal to the arbitrator. Bopanang succeeded in the High Court, but Mphaphuli did not; its applications for condonation failing for, inter alia, lack of merits in the main action. Mphaphuli met with the same fate in the Supreme Court of Appeal. In this Court the central issues were the interaction between the section 34 right of access to courts and private arbitrations as well as the question whether, and to what extent, parties who enter into an arbitration agreement are to be taken to have waived their constitutional right to a fair and impartial hearing and, lastly, the role of courts in confirming or setting aside arbitration awards. The statements in *Lufuno Mphaphuli* must be seen in their proper perspective. This is so because *Lufuno Mphaphuli* concerned the setting aside of an arbitration award in terms of section 33(2) of the Arbitration Act. As the majority in the Supreme Court of Appeal correctly held, it is important to remind oneself that this is not the case before us. We are concerned with whether making an arbitration award an order of court is permissible in circumstances where to do so would be to sanction a clear statutory prohibition. Some of the same considerations apply in this context. A court's refusal to enforce an arbitration award will also erode, to some extent, the

utility of the arbitration process. But where a court is called upon actively to facilitate an illegality there is a need for greater caution.

[60] The refusal to make the arbitral award an order of court for the strongly persuasive reasons advanced by the majority in the Supreme Court of Appeal is required by public policy in this case. The court would otherwise be contravening a clear statutory criminal prohibition enacted for a particularly laudable and important purpose: the protection of housing consumers.

[61] At common law an arbitral award should not be executed if the particular matter is repugnant to arbitration.[55] Furthermore, Cool Ideas sought to draw an analogy with the Recognition and Enforcement of Foreign Arbitral Awards Act[56] and the UNCITRAL Model Law on International Commercial Arbitration.[57] But, to the extent that those instruments have any applicability here, they tell against Cool Ideas. Both empower a court to refuse to enforce an arbitral award if to do so "would be contrary to public policy" in South Africa. For the reasons I have given, enforcing this arbitral award in violation of a statutory prohibition backed by a criminal sanction would be contrary to public policy. This is also the approach adopted by academic

[55] Voet 4.8.24.

[56] 40 of 1977. Section 4(1)(a)(ii) reads:

> "A court may refuse to grant an application for an order of court in terms of section 3 if the court finds that . . . enforcement of the award concerned would be contrary to public policy in the Republic".

[57] 1985. Article 36(1)(b)(ii) provides:

> "Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only if the court finds that . . . the recognition or enforcement of the award would be contrary to the public policy of this State."

writers. Thus, for instance, Butler and Finsen argue that if an arbitral award is "illegal or contrary to public policy" a court may not enforce it.[58]

[62] In the premises, Cool Ideas' reliance on the infringement of its section-34 right is misconceived. Its access to courts was not denied by the Supreme Court of Appeal majority but, in truth and in fact, the principle of legality, so fundamental to our constitutional project, was correctly upheld. Cool Ideas has been afforded a full and proper opportunity to have all the issues ventilated in the High Court and in the Supreme Court of Appeal. The section-34 challenge must consequently fail.

*Costs*

[63] In this instance I see no reason to deviate from the standard rule that costs should follow the result. Accordingly, Ms Hubbard is entitled to the costs of this application, including the costs consequent upon the employment of two counsel.

*Order*

[64] The following order is made:

1. The applications for condonation are granted.
2. The application for leave to appeal is granted.
3. The appeal is dismissed with costs, including the costs of two counsel.

[58] Butler and Finsen *Arbitration in South Africa: Law and Practice* (Juta & Co Ltd, Cape Town 1993) at 263.

JAFTA J (Zondo J concurring):

[65] I have read the judgment of my Colleague Majiedt AJ (main judgment). While I agree with the order proposed and some of the reasons underpinning it, I am unable to agree with some of the findings made. I do not agree that on 3 April 2009, Cool Ideas and Ms Hubbard concluded a separate arbitration agreement.

[66] I also disagree with the finding that the contract between the parties remains valid. In my view, properly construed, the prohibitions in section 10(1)(a) and (b) read with section 21(1)(b), nullify the contract even though no specific reference is made to it in those provisions. Flowing from this finding, my approach to the matter differs from the main judgment.

*Background*

[67] The primary question is whether the arbitration award should have been made an order of court for purposes of enforcement. The award arose from a building contract concluded by the parties in February 2006. In terms of that contract, Cool Ideas undertook to build a residential house for Ms Hubbard, who undertook to pay R2 695 600 for the construction. Furthermore, the parties agreed that any dispute arising from the contract would be submitted to arbitration. Clause 14 of the contract provided:

"Arbitration

14.1 Any dispute arising between the parties out of and during the currency of the contract or upon termination thereof may be referred to arbitration.

14.2 The arbitrator shall be appointed at the request of either party by the president for the time being of the Master Builders Association having jurisdiction in the area or by the president of the Building Industries Federation (SA), whose decision will be final and binding on both parties".

[68] Cool Ideas did not carry out the construction itself, but subcontracted Velvori Construction CC to build the house. At the relevant time, Velvori Construction was registered in terms of the Housing Protection Act but Cool Ideas was not.

[69] As is usual in contracts of this kind, disputes arose that led to claims being made by each party against the other. Ms Hubbard claimed the sum of R1 231 300.50 which she said was the cost of remedial work as she complained that there were defects in the building. Cool Ideas counterclaimed the balance of the contract price which was in the amount of R550 211, plus VAT and interest at an agreed rate.

[70] Mr Charles Cook, an architect and valuer, was appointed as the arbitrator. The disputes were submitted to the arbitrator for determination. In October 2010, the arbitrator issued an award in favour of Cool Ideas. In terms of the award, Ms Hubbard was ordered to pay the amount claimed by Cool Ideas. She was also directed to pay the costs occasioned by the arbitration.

[71] But Ms Hubbard failed to pay. In order to enforce the award, Cool Ideas approached the High Court requesting that the award be made an order of court.[59] In opposing the application, Ms Hubbard contended that enforcing the award would effectively be enforcing a criminal act because, when she and Cool Ideas concluded the building contract, Cool Ideas was prohibited from carrying on the business of a home builder or receiving any consideration in terms of an agreement with a housing consumer like her.

[72] Ms Hubbard's defence was pleaded in these terms:

> "[I]t was discovered . . . that [Cool Ideas], whom I contracted to construct my home, was not registered as a home builder in terms of the [Housing Protection Act].
>
> *The effect of the above*, so I am advised, *is that [Cool Ideas] is not entitled to carry on the business of a home builder, or to receive any consideration in terms of any agreement with a person, defined as a housing consumer* in terms of the [Housing Protection Act], in respect of the sale or construction of a home.
>
> . . .
>
> The result of the above is, so I am advised, that [Cool Ideas] was not entitled to claim any payment from me, let alone an amount totalling R1 228 522.09 (one million two hundred and twenty eight thousand five hundred and twenty two rand and nine cents) which consists of an amount of R1 064 746 (one million and sixty four thousand seven hundred and forty six rand) for 'work done' and the remainder consisting of interest charged upon such an amount.
>
> . . .
>
> I confirm, as I have alluded to hereinbefore, that the award of the arbitrator effectively seeks to order the performance of a prohibited or criminal act, in that it purports to order me to make payment to an entity who carries on the business of a home builder, as defined in the [Housing Protection Act], in relation to an agreement in respect of the construction/sale of a home, while such an entity is not registered in

[59] This application was instituted in terms of section 31 of the Arbitration Act.

> terms of the [Housing Protection Act] as required by such an Act." (Emphasis added.)

[73] It is apparent from Ms Hubbard's plea that she challenged the validity of the award on the basis that the building contract she had entered into with Cool Ideas was, itself, invalid because Cool Ideas carried on the business of a home builder and demanded to be paid consideration under the contract whilst it was not registered in terms of the Housing Protection Act. Thus the building contract was impugned on the ground that two prohibitions in section 10(1) of the Housing Protection Act were violated.

[74] The High Court rejected the defence raised by Ms Hubbard and made the arbitration award an order of court. However, the Supreme Court of Appeal overturned the High Court's order and replaced it with an order dismissing the application with costs.

*Order of court*

[75] As mentioned, the main issue here is whether the arbitration award should be made an order of court. Making it an order of court is a prelude to enforcing it in the manner that a judgment of a civil court is enforced. Section 31 of the Arbitration Act regulates the process of making an arbitration award an order of court. It provides:

> "(1) An award may, on application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

> (2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.
> (3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect."

[76] But converting an award into a court order does not follow as a matter of course. A court is entitled to refuse to make an award an order of court if the award is defective. Section 33 of the Arbitration Act sets out the defects which would justify the refusal. Section 33(1) provides:

> "Where—
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
> (c) an award has been improperly obtained,
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[77] It is apparent from section 33(1) that an award which has been improperly obtained cannot be made an order of court. Impropriety may arise from a number of circumstances, including illegality. If an award is tainted by illegality, it may not be made an order of court and may not be enforced in our courts. It is a basic principle of our law that a court can never lend its aid to the enforcement of an illegal act. An act that has been performed in violation of a statutory prohibition may, generally, have no legal consequences. In *Schierhout*, Innes CJ observed:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect."[60]

[78] Here, Ms Hubbard resisted the request to make the award an order of court on the basis that it was tainted by illegality. She contended that the building contract, in terms of which the arbitrator was appointed and the arbitration process was undertaken, was itself void because, at the time of its conclusion, Cool Ideas was not registered. It is common cause that Cool Ideas was not registered at the time that the building contract was concluded.

[79] In her plea, Ms Hubbard submitted that two prohibitions in section 10(1) of the Housing Protection Act were breached when the building contract was concluded. The first prohibition is to the effect that no person shall carry on the business of a home builder. The second is to the effect that no person shall receive consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home.

*Issues*

[80] Owing to the defence advanced by Ms Hubbard, the following issues arise:

(a) whether in concluding the building agreement with her, Cool Ideas violated section 10(1) of the Housing Protection Act;

(b) if so, whether the breach nullified the agreement;

[60] *Schierhout* above n 48 at 109.

(c) if the contract remained valid, whether, despite the breach, Cool Ideas was entitled to payment for the work done on Ms Hubbard's house; and

(d) if it was entitled to payment, whether the arbitration award ought to be made an order of court.

*Illegality*

[81] The illegality which is the bedrock of Ms Hubbard's defence depends mainly on the interpretation of section 10(1) of the Housing Protection Act. I agree with the main judgment that the purpose of the Housing Protection Act, including section 10, is to protect housing consumers like Ms Hubbard. It achieves this purpose through a scheme that requires every home builder, such as Cool Ideas, to be registered in terms of the Act before it can carry on the business of a home builder. In addition, prior registration is necessary for a home builder before receipt of any consideration in terms of a building contract. And a home builder who subcontracts another home builder to carry out the construction of a home must be registered before the subcontract is concluded.[61]

[61] Section 10 of the Housing Protection Act, in relevant part, provides:

> "(6) The Council may, in addition to any other category that the Council may deem appropriate, in the registration of home builders distinguish between—
>
> (a) home builders themselves having the capacity to undertake the physical construction of homes or to manage the process of the physical construction of homes; and
>
> (b) home builders who in the normal course need to enter into agreements with other home builders in order to procure the capacity referred to in paragraph (a).
>
> (7) A home builder registered in terms of subsection (6)(b) shall be obliged, for the purposes of the physical construction of homes, to appoint a home builder registered in terms of subsection (6)(a)."

[82] Section 10(1) provides:

> "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."

[83] A careful reading of the subsection reveals that it stipulates two prohibitions. First, it forbids any person from carrying on the business of a home builder unless that person is a registered home builder. The use of the word "unless" in the context of the section makes plain that registration as a home builder must precede carrying on the business and receipt of consideration. The phrase "carry on the business of a home builder" requires a little more elaboration. It is not in dispute that Cool Ideas is a home builder envisaged in the Housing Protection Act. Nor can it be gainsaid that Ms Hubbard is a housing consumer in terms of the same Act.

[84] The Housing Protection Act defines "business of a home builder" as—

(a) constructing or undertaking to construct a home or causing a home to be constructed for any person;

(b) constructing a home for the purposes of sale, leasing, renting out or otherwise disposing of such home;

(c) selling or otherwise disposing of a home contemplated in paragraph (a) or (b) as a principal; or

(d) conducting any other activity that may be prescribed by the Minister for the purposes of this definition.[62]

[85] It is clear from this wide definition that, when Cool Ideas entered into a building contract and undertook to construct a house for Ms Hubbard, Cool Ideas carried on the business of a home builder. Even when it later subcontracted Velvori Construction to build the home, Cool Ideas was still carrying on the business of a home builder.

[86] The facts of the case also show that Cool Ideas received payment for the construction of Ms Hubbard's house and what it claimed at the arbitration was the balance of the contract price. At the time Cool Ideas received part of the payment, it was not registered. It was registered after the arbitration award was issued.

[87] Therefore, both prohibitions on which Ms Hubbard relied for her defence were violated. The first violation occurred when the building contract was concluded. The second violation of the first prohibition happened at the time when Cool Ideas subcontracted Velvori Construction. The infringement of the second prohibition arose when Cool Ideas received payment for work done on Ms Hubbard's home. However, in respect of the balance that is the subject matter of the arbitration award, receipt of the money has not occurred and Cool Ideas has now been registered.

[62] Section 1(i) of the Housing Protection Act.

[88] In terms of section 21 of the Housing Protection Act, these breaches constitute criminal offences.[63] Each contravention carries a penalty of a fine not exceeding R25 000 or imprisonment for a period not more than one year.

[89] The answer to the question whether the arbitration award should be made an order of court depends on whether, despite non-compliance with section 10(1), Cool Ideas should derive benefit from the building contract. This in turn requires us to examine the effect of acting contrary to the prohibitions in section 10(1) when the contract was concluded. Put differently, whether the validity of the contract was not affected by the non-compliance.

*Validity of the building contract*

[90] The general principle of our law is that an act performed contrary to a statutory prohibition is invalid and has no legal effect. In explaining the principle in *Schierhout,* Innes CJ said:

> "[W]hat is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done – and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act."[64]

[63] Section 21(1) provides:

> "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."

[64] *Schierhout* above n 48 at 109.

[91] However, the question whether non-compliance with a statutory prohibition would nullify an act is determined with reference to the language of the statute concerned.[65] But it is important to note that where a statutory provision under consideration amounts to a prohibition such as the ones contained in section 10(1) of the Housing Protection Act, an act performed contrary to it would be invalid, unless it is clear from the statute that, in the light of its scope and object, invalidity was not intended. In other words, it is the prohibition which "operates to nullify the act" performed contrary to it.

[92] In *Lupacchini*,[66] the Supreme Court of Appeal rejected a view of academic writers to the effect that a trustee who is still to receive authorisation from the Master has capacity to sue or to be sued on behalf of the trust, despite the provision that such trustee "shall act in that capacity only if authorised thereto in writing by the Master." The Supreme Court of Appeal held that legal proceedings which were instituted by a trustee before authorisation were invalid. The Court reasoned:

> "I regret that I can find no indications that legal proceedings commenced by unauthorised trustees were intended to be valid. On the contrary, the indications seem to me all to point the other way. Unless it were to be the case that all transactions performed in conflict with the section are to be treated as valid – which clearly cannot be the case, because otherwise the Act would be altogether ineffective – then I find nothing to distinguish its effect on legal proceedings. Indeed, it would

[65] *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) and *Messenger of the Magistrates' Court, Durban v Pillay* 1952 (3) SA 678 (A).

[66] *Lupacchini NO and Another v Minister of Safety and Security* [2010] ZASCA 108; 2010 (6) SA 457 (SCA) (*Lupacchini*).

> seem to me that the case is even stronger for finding legal proceedings to be a nullity."[67]

[93] The authorities referred to suggest that the building contract concluded by Cool Ideas and Ms Hubbard, in contravention of section 10(1)(a) of the Housing Protection Act, was invalid. But the Supreme Court of Appeal here held that the contract remained valid. That Court stated:

> "Sections 10(1) and (2) do not in terms invalidate the agreement between the home builder and the housing consumer. Quite the contrary – I think it is clear that, consistent with the overall purpose of the Act, the validity of that agreement is unaffected by an act of the home builder in breach of those sections. The prohibition in those sections is not directed at the validity of particular agreements but at the person who carries on the business of a home builder without a registration. They thus do no more than disentitle a home builder from receiving any consideration. That being so a home builder who claims consideration in conflict with those sections might expose himself or herself to criminal sanction (section 21) and will be prevented from enforcing his or her claim."[68]

[94] The first flaw in the reasoning advanced for the finding that the building contract is not affected by the breach is that the prohibition is directed at the home builder and not the agreement. While this is true, it does not shed light on whether non-compliance nullifies the contract. Indeed, in *Lupacchini* the prohibition was directed at the trustee and not the act he or she performed. Yet, the Court held that the act was invalid owing to the trustee acting contrary to the prohibition.

[67] Id at para 22.

[68] Supreme Court of Appeal judgment above n 10 at para 11.

[95] The second flaw in the reasoning of the Supreme Court of Appeal in the present case lies in the fact that it approached the matter on an unduly narrow footing. The Court erroneously confined itself to the prohibition in section 10(1)(b) and reasoned that this prohibition does no more than disentitle Cool Ideas from receiving consideration. In this regard, the Supreme Court of Appeal was mistaken. It is apparent from Ms Hubbard's plea, quoted in the judgment of the Supreme Court of Appeal, that she relied on the prohibitions in both section 10(1)(a) and (b).[69] The prohibition in section 10(1)(a) directly affects the contract because it prohibited Cool Ideas from undertaking to build a house for Ms Hubbard.

[96] It was this narrow approach that influenced the Supreme Court of Appeal to conclude that an unregistered home builder who claims consideration contrary to section 10 exposes himself or herself to criminal sanction and would be prevented from enforcing his or her rights. I find nothing in the text of section 10(1), or other sections of the Act, that indicates that the underlying contract should remain unaffected. It will be recalled that the present contract embodies the undertaking by Cool Ideas to build a home for Ms Hubbard. It was the same undertaking that constituted a contravention of section 10(1)(a) and amounted to a criminal offence in terms of section 21.

[97] As the main judgment observes, section 10 must be read as a whole. More importantly, section 10(1)(b) cannot be interpreted separately. It must be construed

[69] Id at para 6.

together with section 10(1)(a) because they are integral parts of one provision. They share features. Both lay down prohibitions which forbid unregistered home builders from performing certain acts. The key feature in both sections is the registration of a home builder.

[98] A contract concluded in contravention of the prohibition in section 10(1)(a) cannot be regarded as valid. The fact that the unregistered home builder may not enforce his or her rights is irrelevant. An illegal contract cannot confer rights on the home consumer privy to it. Allowing the home consumer to enforce his or her rights under such a contract would amount to giving legal effect to a prohibited act. In *Pottie*, Fagan JA pointed out that—

> "[t]he usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent."[70]

[99] In our democratic order, it is the duty of courts to apply and enforce legislation like the Housing Protection Act.[71] If the validity of legislation is not impugned, there can be no justification for not enforcing it, let alone giving legal effect to prohibited conduct.

[70] *Pottie v Kotze* 1954 (3) SA 719 (A) at 726H-727A.

[71] Section 165(2) of the Constitution provides:

> "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

[100] In *Taljaard*,[72] the Supreme Court of Appeal held that a contract of mandate concluded with an estate agent who had no fidelity fund certificate was valid because section 34A of the Estate Agency Affairs Act[73] does not in terms invalidate the contract of mandate of an estate agent who acts in conflict with section 26 of that Act. Bearing in mind that section 34A was introduced in 1998 in response to the High Court judgment in *Noragent* which held that non-compliance with section 26 did not invalidate the contract of mandate,[74] the Supreme Court of Appeal in *Taljaard* held that, if the Legislature intended the contravention to invalidate the contract, it could expressly have said so in the amendment.

[101] The finding in *Taljaard* was based on two reasons. First, the provision itself does not invalidate the contract. Second, if invalidity were contemplated and in view of *Noragent*, the amendment would have expressly provided for that. In *Taljaard*, the Supreme Court of Appeal did not explain why that Court adopted an approach that was at variance with its earlier decisions. A court is bound to follow its earlier decisions unless it is convinced that they are clearly wrong. As illustrated earlier, that Court in 1926 laid down the principle that "a thing done contrary to the direct prohibition of the law is void and of no effect."[75] This principle was affirmed in later decisions of that Court in *Pottie*,[76] and recently in *Lupacchini*,[77] which was written by the same Judge who wrote *Taljaard*.

[72] *Taljaard v TL Botha Properties* [2008] ZASCA 38; 2008 (6) SA 207 (SCA).

[73] 112 of 1976.

[74] *Noragent (Edms) Bpk v De Wet* 1985 (1) SA 267 (T) at 271I-272D.

[75] *Schierhout* above n 48.

[76] Above n 70.

[102] The invalidity of an act performed contrary to a statutory provision does not flow from the express terms of the prohibition but from the fact that the impugned act was performed contrary to a prohibition in a statute. When the Legislature wants to put an end to a particular conduct, it prohibits it. As was observed in *Pottie*, a court cannot give legal sanction to an act prohibited by the Legislature. Therefore, in *Taljaard*, the Supreme Court of Appeal erred in holding that the contract of mandate concluded contrary to the prohibition in section 34A was valid. The principle that what is done in breach of a statutory prohibition is invalid may be departed from only if it is clear from the language of the relevant legislation that invalidity was not envisaged. It is not necessary for the prohibition to say non-compliance with it would lead to invalidity.[78]

[103] In *Metro Western Cape*, the Appellate Division reaffirmed the principle in these terms:

> "It is a principle of our law that a thing done contrary to the direct prohibition of the law is generally void and of no effect; the mere prohibition operates to nullify the act. . . . If therefore on a true construction of section 3 the contracts in question are rendered illegal, it can make no real difference in point of law what the other objects of the ordinance are. They are then void *ab initio* and a complete nullity under which neither party can acquire rights whether there is intention to break the law or not."[79]

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[77] Above n 66.

[78] *Standard Bank v Estate Van Rhyn* 1925 AD 266.

[79] *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) (*Metro Western Cape*) at 188A-B.

[104] Unlike in *Metro Western Cape* where the underlying contracts were regarded as valid because they did not regulate the business between the trader and his customer, here the building contract governed the prohibited business of a home builder. The prohibitions in section 10(1) are the tools chosen by the Legislature to protect housing consumers. To hold that the building contract is valid would seriously undermine this purpose. Furthermore, to hold the contract valid but enforceable only at the instance of the consumer would result in an injustice and unequal treatment of the parties. While Ms Hubbard may notionally enforce her rights under the contract, Cool Ideas may not. This may lead to the deprivation of property under section 25 of the Constitution, alluded to by Froneman J in his judgment. I can find nothing in the language of the Housing Protection Act that suggests this sort of injustice was intended.

[105] The principle that a thing done contrary to the direct prohibition of the law is void admits of one exception. This exception applies where it is clear from the language of the law in which the prohibition is contained that invalidity of the act performed contrary to the prohibition was not envisaged.[80] Consistent with this principle, the main judgment holds that section 13 of the Housing Protection Act reveals that non-compliance with the prohibition in section 10(1)(b) was not intended to invalidate the building agreement between the home builder and the housing consumer.[81]

[80] Id at 188F-G and *Pottie* above n 70 at 727H.

[81] Main judgment at [48].

[106] I disagree. Section 13 does not address the consequences of acting contrary to the prohibitions in section 10(1). Instead, section 13 introduces implied terms into building contracts and prescribes the requirements of a valid building contract.[82] These requirements are set out in section 13(1). They are:

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[82] Section 13(1) and (2) provides:

> "(1) A home builder shall ensure that the agreement concluded between the home builder and a housing consumer for the construction or sale of a home by that home builder—
>
> (a) shall be in writing and signed by the parties;
>
> (b) shall set out all material terms, including the financial obligations of the housing consumer; and
>
> (c) shall have attached to the written agreement as annexures, the specifications pertaining to materials to be used in construction of the home and the plans reflecting the dimensions and measurements of the home, as approved by the local government body: Provided that provision may be made for amendments to the plans as required by the local government body.
>
> (2) The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that—
>
> (a) the home, depending on whether it has been constructed or is to be constructed—
>
> (i) is or shall be constructed in a workmanlike manner;
>
> (ii) is or shall be fit for habitation; and
>
> (iii) is or shall be constructed in accordance with—
>
> (aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and
>
> (bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1);
>
> (b) the home builder shall—
>
> (i) subject to the limitations and exclusions that may be prescribed by the Minister, at the cost of the home builder and upon demand by the housing consumer, rectify major structural defects in the home caused by the non-compliance with the NHBRC Technical Requirements and occurring within a period which shall be set out in the agreement and which shall not be less than five years as from the occupation date, and notified to the home builder by the housing consumer within that period;
>
> (ii) rectify non-compliance with or deviation from the terms, plans and specifications of the agreement or any deficiency related to design, workmanship or material notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than three months as from the occupation; and

(a) the building contract must be in writing and signed by the parties;

(b) it must set out all material terms, including the financial obligations of the housing consumer; and

(c) the specifications pertaining to the material to be used in the construction and the plans approved by a local authority must be annexed to the contract.

[107] Importantly, section 13(3) tells us the consequences of not complying with these requirements. It provides:

> "The failure to comply with a provision of subsection (1)(a) and (c) shall not render an agreement referred to in that subsection invalid."

[108] This section makes it plain that non-compliance with requirements (a) and (c) does not invalidate the agreement. On the approach of the main judgment, section 13(3) is superfluous because the scheme of the Housing Protection Act indicates that non-compliance with the Act does not invalidate the building contract. An interpretation that says the contract is invalid owing to non-compliance would be at odds with the legislative scheme.[83]

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(iii) repair roof leaks attributable to workmanship, design or materials occurring and notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than 12 months as from the occupation date."

[83] Main judgment at [47].

[109] Notably, in saving the contract from invalidity, section 13(3) makes no reference to requirement (b). This suggests that a contract which does not set out all material terms, including the financial obligations of the consumer, is invalid. This is implicit from section 13(3) which deliberately excludes requirement (b). The express terms of section 13 are at odds with the legislative scheme determined by the main judgment. It is apparent from section 13 that the Housing Protection Act envisaged that non-compliance with some of its provisions would render the building contract invalid.

[110] The main judgment holds that the extract quoted in [72] does not support the assertion that Ms Hubbard pleaded both prohibitions in section 10(1) as the bases for contending that Cool Ideas was not entitled to claim payment from her. In the first place, that extract is taken from paragraph 6 of the judgment of the Supreme Court of Appeal which records expressly that the extract is taken from the affidavit of Ms Hubbard, filed in the High Court in opposing the arbitration award being made an order of court.

[111] Secondly, the plain reading of the extract shows that Ms Hubbard states that Cool Ideas was not registered as a home builder. And in the italicised words, she contends that the effect of non-registration was that Cool Ideas was not entitled to carry on the business of a home builder or to receive any consideration in terms of any agreement with a person, defined as a housing consumer in terms of the Housing Protection Act. As a result of this, she concludes that Cool Ideas was not

entitled to claim any payments from her. It is difficult to appreciate how it can be said that the extract does not rely on both prohibitions in section 10(1)(a) and (b) when Ms Hubbard's affidavit uses the words of section 10(1)(a) and (b). The fact that, in the affidavit filed by her in this Court, she says that she does not dispute the validity of the building contract is irrelevant.

[112] Even if what she says in her affidavit in this Court were to be treated as a concession, it would change nothing. This is because a concession wrongly made by one of the parties is not binding on a court, if it relates to a point of law.[84]

[113] Furthermore, the main judgment holds that the parties concluded a separate and new arbitration agreement on 3 April 2009.[85] I cannot agree. The question whether Cool Ideas and Ms Hubbard have concluded a separate agreement entails a factual enquiry. That has not been established. On the contrary, it is apparent from the judgment of the Supreme Court of Appeal that in referring their disputes to arbitration, the parties acted in terms of clause 14 of the building agreement.

[114] The arbitration agreement was not self-standing. Instead, it was an integral part of the building contract. Clause 14.1 expressly says that disputes arising from the building agreement would be referred to arbitration. It does not say that the parties would enter into a further agreement but stipulates that disputes arising from the

[84] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) and *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC).

[85] Main judgment at [45].

building agreement, during its currency and after its termination, would be referred to arbitration.

[115] Although the word "may" is used in the clause, it does not signify that the parties were not bound by the terms of the clause. As part of a contract intended to be binding, clause 14 obliged the parties to act in accordance with its terms. Once there were disputes which the parties could not resolve, clause 14 precluded them from approaching a court. Instead, the clause obliged them to take such disputes to arbitration. Acting in terms of the clause, Cool Ideas and Ms Hubbard referred their disputes to arbitration. That much is clear from the judgment of the Supreme Court of Appeal.

[116] To facilitate arbitration, clause 14.2 obliged the parties to request that an arbitrator be appointed, not by them, but by the person identified in the clause. Clause 14.2 stipulates that the arbitrator would be appointed by the president of the Master Builders Association, where there is one, or by the president of the Building Industries Federation (SA). His or her decision would be final and binding on both parties. Therefore, there was absolutely no need to conclude a separate arbitration agreement.

[117] In the circumstances, I hold that the building contract that was concluded in contravention of section 10(1)(a) is invalid.

*Effect of the invalid contract on the arbitration award*

[118] The process of taking the dispute to arbitration was rooted in the building contract. When the parties appointed the arbitrator and submitted their disputes to him, they acted in terms of the arbitration clause in the contract. The arbitrator too derived his power to determine those disputes from the building contract. Therefore, the invalidity of that contract vitiates the entire arbitration process. Consequently, the arbitration award was invalid because it was made in terms of an invalid contract.

[119] It is not necessary to address the other submissions advanced by Cool Ideas because they were premised on the mistaken assumption that the building contract was valid.

[120] It is for these reasons that I support the order proposed in the main judgment.

FRONEMAN J (Cameron J, Dambuza AJ and Van der Westhuizen J concurring):

*Introduction*

[121] I have had the privilege of reading the judgments of my Colleagues Majiedt AJ (main judgment) and Jafta J (concurring judgment). I cannot agree with their conclusion that the appeal must be dismissed. I would allow the appeal.

[122] My central difference with the main judgment lies in the constitutional issue that needs to be determined. The main judgment reaches the constitutional aspect

relating to the enforcement of private arbitration awards by courts only towards the end, and then only in the narrow form of whether a refusal to make the arbitral award an order of court violates section 34 of the Constitution.[86] It also finds equity considerations not to be applicable.[87]

[123] In *Lufuno Mphaphuli*, this Court held that section 34 does not apply directly to private arbitrations.[88] I thus agree with the main judgment that the applicant's right of access to courts has not been infringed.[89]

[124] But that is not all that *Lufuno Mphaphuli* decided. It also dealt with the relevance of the Constitution to the terms and enforcement of arbitration agreements.[90] It held that in determining whether a provision of an arbitration agreement is contrary to public policy the spirit, purport and objects of the Bill of Rights will be of importance,[91] and it emphasised the importance of fairness in the arbitration process.[92] Importantly too, *Lufuno Mphaphuli* dealt with the relevance of the Constitution to the judicial scrutiny of arbitration awards.[93] It held that "the values of our Constitution will not necessarily best be served by interpreting section 33 [of the Arbitration Act]

[86] See [53]-[62] of the main judgment.

[87] At [52].

[88] *Lufuno Mphaphuli* above n 9 at para 218.

[89] See [62] of the main judgment.

[90] *Lufuno Mphaphuli* above n 9 at paras 219-23.

[91] Id at para 220.

[92] Id at para 221.

[93] Id at paras 224-36.

in a manner that enhances the power of courts to set aside private arbitration awards".[94]

[125] When parties enter into private arbitration agreements they make value choices about how they want to exercise their rights under the Constitution[95] and the extent of interference or control they wish courts to have over the private process.[96] These choices are material and relevant in determining what public policy in the enforcement of a particular private arbitration award should be. The Arbitration Act also recognises these choices and accepts their legitimacy in seeking to give effect to arbitration awards.

[126] Public policy in the interpretation, application and enforcement of contracts embraces issues of fairness.[97] Fairness "is one of the core values of our constitutional order".[98] When the enforcement of arbitration awards on the basis of public policy is at stake, fairness lies at the heart of the enquiry, not at its periphery.

[127] The primary issue at stake is whether a private arbitration award may be enforced contrary to a statutory provision. The main judgment says, No, not in this case, and fairness plays little or no role in determining whether it may. I disagree.

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[94] Id at para 235. Although the reference is to section 33 of the Arbitration Act 42 of 1965 it is clear that O'Regan ADCJ regarded with approval the "pleasing symmetry" of the same standards for refusing to make an award an order of court as for setting aside the award. See paras 227 and 232.

[95] Id at para 216.

[96] Id at para 219.

[97] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 73.

[98] *Lufuno Mphaphuli* above n 9 at para 221.

*Lufuno Mphaphuli* tells us that public policy in accordance with the spirit, purport and objects of the Bill of Rights, fairness in the arbitration process, and the personal choices of the parties play a material and relevant part in determining the issue. When due weight is given to these considerations, nothing stands in the way of enforcement of the award here, even on an acceptance of the correctness of the main judgment's interpretation of the Housing Consumers Protection Measures Act[99] (Housing Protection Act or the Act).

[128] I am in any event not convinced that this interpretation is correct. The inevitable result of the reasoning of the main judgment is that Cool Ideas will be deprived of its right to payment for work fairly and properly done. That will amount to deprivation of property under section 25 of the Constitution. The provisions of the Housing Protection Act should be interpreted in a manner that avoids that result. It can properly and reasonably be interpreted in that way.

[129] The concurring judgment of Jafta J avoids engagement with the central issue of enforcement of a private arbitration award in the face of a statutory provision by finding that the building contract, which includes the arbitration clause, is invalid and can, for that reason, not be enforced at all. This nevertheless has the effect that a court can never enforce an arbitral award if that would be contrary to a statutory provision. For the reasons already summarised,[100] I do not agree. In addition, this was not the basis upon which the parties approached the Court. Had this approach been raised, the

[99] 95 of 1998.

[100] See above [127].

question of severability of the arbitration clause from the rest of the building contract would have been at the forefront of the enquiry.[101] To the extent, however, that the concurring judgment finds that to hold the building contact valid but enforceable only at the instance of the consumer would result in an injustice and unequal treatment of the parties,[102] I agree. Our disagreement is in what must be done to avoid that injustice and unequal treatment. I consider the injustice and unequal treatment to be a compelling reason for enforcing the arbitration award.

[130] In the first part of the reasoning that follows I accept, as a starting point, the correctness of the interpretation of the Housing Protection Act in the main judgment. The next step in determining whether enforcement will be against public policy, is to weigh that interpretation against the parties' choice of private arbitration and the fairness to them individually in its effect. Viewed from this perspective public policy is not undermined by the enforcement of the arbitration award. For convenience I refer to this part as the arbitration approach.

[131] In the second part I assess whether section 10(1)(b) of the Housing Protection Act should not, in any event, be interpreted in a manner that is less restrictive of Cool Ideas' right to property.[103] That can, I hope to demonstrate, properly and reasonably be done. I will refer to this part as the interpretation approach.

[101] Compare *Lufuno Mphaphuli* above n 9 at para 220 and *North East Finance (Pty) Ltd v Standard Bank of South Africa* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) at paras 18-23.

[102] See [104] of the concurring judgment.

[103] Section 25 of the Constitution.

[132] Would the outcome, on either perspective, deprive Ms Hubbard of any of the protections that she should enjoy under the Housing Protection Act? The answer is No.

[133] It is time to substantiate these assertions. I will do so in the following order. First some brief reference to the facts needs to be made in order to give proper context to the question of fairness between the parties and the potential prejudice to Ms Hubbard if the arbitration award is enforced. I will then move to the discussion of the arbitration approach and the interpretation approach before concluding.

*Fairness or prejudice to Ms Hubbard?*

[134] When building started on Ms Hubbard's home it was being done by a registered builder, Velvori. The only reason why Cool Ideas did not itself register earlier was because it understood from a letter by the National Home Builders Registration Council (Council) that it was not necessary to do so. Ms Hubbard herself invoked the arbitration clause in the building contract and thereby triggered the arbitration proceedings. She did so in order to claim money back from Cool Ideas. Instead, the arbitrator found that she actually owed Cool Ideas more money. The award of the arbitrator amounted to an award for Cool Ideas to be reimbursed for the balance of the contract price, for items it had bought for Ms Hubbard. She does not allege that the arbitration process was unfair, nor does she allege that the actual findings of the arbitrator in relation to the building disputes were unfair or wrong. When she learnt that Cool Ideas had not registered as a home builder, she sought to avoid payment of

what she owed. Registration occurred before judgment was granted in the High Court. What Ms Hubbard sought in those proceedings was not the Act's protection to attain proper building or correction of building works by Cool Ideas, but to escape payment of what she had been fairly found to owe to Cool Ideas.

*The arbitration approach*

[135] *Lufuno Mphaphuli* was the first and, until now, the only case where this Court has dealt with the Constitution's applicability to private arbitrations. The judgment expressly endorsed "the value of arbitration as a speedy and cost-effective process".[104] It saw its task as follows:

> "The Court has had to consider the relationship between private arbitration and the Constitution, the proper scope of section 34 of the Constitution and the approach to the interpretation of section 33(1) of the Arbitration Act in the light of the Constitution. All these are constitutional matters of substance falling within the jurisdiction of this Court and which, given the need to provide guidance in this regard, it is in the interests of justice for this Court to entertain. The application of these principles to the facts of this case, even if arguably not concerning a constitutional issue itself, concerns a matter connected to a decision on a constitutional issue which it is in the interests of justice to decide."[105]

[136] The Court further enumerated the virtues of private arbitration in its flexibility, cost-effectiveness, privacy and speed. In determining the proper constitutional approach to the arbitration process, the Court bore in mind that litigation before

[104] *Lufuno Mphaphuli* above n 9 at para 223.

[105] Id at paras 237-8.

ordinary courts "can be a rigid, costly and time-consuming process".[106] This led it to conclude that "it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes."[107] It also found, generally, that "courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently."[108]

[137] In this judgment, I accept the logical and necessary corollary of the approach in *Lufuno Mphaphuli*. I hold that where parties choose private arbitration as the means of resolving disputes between them, courts should respect and encourage that choice. In practical terms, here, that means that the Court should, for powerful reasons of fairness, license and enforce the outcome of Ms Hubbard's private arbitration with Cool Ideas.

[138] In *Lufuno Mphaphuli* the Court viewed its discussion and application of the principles regulating the interaction between the Constitution and private arbitration awards as properly within its jurisdictional remit. Due regard must be given to the precedential force of the decision. It is for this reason that I disagree with the finding in the main judgment that the issues in *Lufuno Mphaphuli* have little bearing on the central issue in this case and that it is distinguishable on the facts and the law.[109]

[106] Id at para 197.

[107] Id.

[108] Id at para 235.

[109] See [58]-[59] of the main judgment.

[139] *Lufuno Mphaphuli* laid down the following principles about the applicability of the Constitution to private arbitration awards:

(a) Section 34 of the Constitution[110] does not apply directly to private arbitrations, primarily because they do not require public hearings.[111]

(b) Indirect application of section 34 was not finally considered but it was stated that "mindful of the role courts have in giving effect to arbitration agreements . . . section 34 may have some relevance to the interpretation of legislation or the development of the common law."[112]

(c) Arbitration agreements that contain provisions that are contrary to public policy in the light of the values of the Constitution will be null and void to that extent. In determining whether a provision is contra bonos mores, the spirit, purport and objects of the Bill of Rights will be of importance.[113]

(d) In interpreting an arbitration agreement it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend to be fair. The arbitration agreement "should thus be interpreted, unless its terms expressly suggest otherwise, on the basis that the parties intended the arbitration proceedings to be conducted fairly. Indeed, it

[110] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[111] *Lufuno Mphaphuli* above n 9 at paras 213-4 and 216-8.

[112] Id at para 215.

[113] Id at para 220.

may well be that an arbitration agreement that provides expressly for a procedure that is unfair will be contra bonos mores."[114]

(e) Insofar as the interpretation of section 33(1) of the Arbitration Act, which permits an arbitration award to be set aside, is concerned—

> "the values of our Constitution will not necessarily best be served by interpreting section 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view . . . the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration."[115]

[140] The majority judgment of the Supreme Court of Appeal[116] and the main judgment proceed from the basis that the building contract and the arbitration agreement between the parties are valid, but that Cool Ideas may nevertheless not claim or enforce payment for any work done, be it in any ordinary court or by way of arbitration. That result is, on any standard, prejudicial and unfair to Cool Ideas.

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[114] Id at para 221.

[115] Id at para 235.

[116] Supreme Court of Appeal judgment above n 10. The judgment is based on an acceptance of the validity of the building contract, which includes an arbitration clause. It expressly rejected as irrelevant arguments presented to it relying on the equities of the case and that due deference should be given to arbitration awards.

[141] From *Lufuno Mphaphuli* we know that the determination of public policy in deciding whether an arbitration award should be enforced should be done in accordance with the spirit, purport and objects of the Bill of Rights. We also know that it requires courts to ensure fairness in the arbitration process, and that the personal choices of the parties in opting for arbitration must be given proper regard.

[142] The loss of the right to claim performance under the contract amounts, in terms of this Court's decision in *Opperman*, to the deprivation of property under section 25 of the Constitution.[117] If the building contract was held to be invalid, Cool Ideas may, in terms of the common law, have an enrichment claim: the *condictio ob turpem vel iniustam causam* (enrichment arising from a transfer made for an illegal or immoral purpose).[118] By clothing the contract with validity, this result is avoided, but at some cost.[119] Even if one accepts, as the main judgment does, that the deprivation is not arbitrary in terms of statutory and constitutional interpretation,[120] it does not mean that this consideration automatically determines the issue as far as the enforcement of the arbitration award is concerned. The choice of arbitration as a dispute-resolution

[117] *Opperman* above n 30 at para 63.

[118] See *Jajbhay v Cassim* 1939 AD 537 at 545 and 547-8. See also *First National Bank of Southern Africa Ltd v Perry NO and Others* [2001] ZASCA 37; 2001 (3) SA 960 (SCA) at paras 21-5.

[119] I was unable to find any case where an admittedly valid private contract or agreement (in terms of the applicable legislation) was found to be unenforceable by reason of the effect of the same legislation. The application of the principle in *Wynberg* above n 48 has been largely in the field of public law. See *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) at para 9; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] ZASCA 28; 2008 (3) SA 1 (SCA) at paras 22-3; and *Potchefstroom se Stadsraad v Kotze* 1960 (3) SA 616 (A) at 632G. See also *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 480A-D where the Court distinguished the facts before it from those in *Wynberg* and held the principle in that case could not be applied.

[120] See [148]-[168] below on the approach to interpretation.

mechanism indicates the contrary, namely that the parties elected to protect their respective rights to property under the Constitution through that process. If one determines public policy in accordance with the spirit, purport and objects of the Bill of Rights then the potential deprivation of Cool Ideas' property must count as a reason for not finding the enforcement of the award to be contrary to public policy, rather than the opposite.

[143] On the premise that fairness plays no role in determining public policy when deciding whether private arbitration awards should be enforced by courts, both the majority judgment in the Supreme Court of Appeal and the main judgment fail to give further consideration to other factors that may be material and relevant when stricter control of private arbitration awards is envisaged. To reiterate: public policy in the interpretation, application and enforcement of contracts generally invokes the notion of fairness.[121] The fairness of the terms of an arbitration agreement is an important factor in considering their enforcement.[122]

[144] Material and relevant factors in this regard include that: the parties chose private arbitration instead of civil proceedings; Ms Hubbard initiated arbitration proceedings; the building was done by Velvori, which was registered from the start as a builder; the arbitration process was fair and not challenged as making wrong or unfair findings; the amount ordered by the arbitration award, payable to Cool Ideas, mainly related to compensation for additional personal choice items ordered by

[121] *Barkhuizen* above n 97. See also [126].

[122] See [124] and [139](d) above.

Ms Hubbard which were not included in the original contract price; Cool Ideas acted in good faith at all times by enquiring whether it should register; it did register before judgment when told it was necessary; and last, but not least, Ms Hubbard, not Cool Ideas, is the recalcitrant debtor.

[145] It must also be remembered that one of the arguments for the interpretation that the Housing Protection Act did not render the building contract and the arbitration agreement invalid was to ensure that the warranties in section 13(2) of the Act would not be lost to a building consumer. On the facts here, enforcement of the arbitration award would not have deprived Ms Hubbard of that protection. In addition, the threat of criminal prosecution for late registration still hangs over Cool Ideas. Enforcement of the arbitration award will not, on an acceptance of the main judgment's interpretation of the Housing Protection Act, undermine the protection afforded by the Act to building consumers and the criminal sanction for non-compliance will remain. The only effect non-enforcement will have is to allow Ms Hubbard to escape payment of what has been fairly found to be owed to Cool Ideas. That is an impermissible use of the provisions of the Act.[123]

[146] The conclusion I reach is that there was no unfairness in the arbitration process, nor in its outcome. There is nothing substantive, in the sense of prejudice to Ms Hubbard, that would justify a court in finding that public policy should override

[123] Compare *Oilwell (Pty) Ltd v Protec International Ltd and Others* [2011] ZASCA 29; 2011 (4) SA 394 (SCA) and *Barclays National Bank Ltd v Thompson* [1985] ZASCA 50; [1985] 2 All SA 355 (A).

the personal choice made by the parties to enforce their agreement by way of private arbitration.

[147] This is sufficient reason for the appeal to succeed. But even if this approach is not accepted, there is another basis for the same outcome.

*Interpretation approach*

[148] As noted, the loss of the right to claim performance under the contract may amount, in terms of this Court's decision in *Opperman*, to the deprivation of property under section 25 of the Constitution.[124] But that deprivation, says the main judgment, is not arbitrary. Section 10(1)(b) of the Housing Protection Act is aimed at achieving a legitimate and important statutory purpose and there is a rational, proportional connection between the statutory prohibition and its purpose.[125] I disagree.

[149] An interpretation that the building contract is valid, but that its enforcement by one of the parties, Cool Ideas, is not, deprives that party of any redress at all for the work it has done. Under the common law it may have a claim for enrichment if the building contract was declared invalid for illegality.[126] Counsel for Ms Hubbard sought to ameliorate this unjust and unequal result by suggesting that the common law could be developed to allow an enrichment claim, but fairly and properly conceded that as the law now stands there is none available to Cool Ideas.

[124] *Opperman* above n 30.

[125] See [44] of the main judgment.

[126] See above [142] and above n 118.

[150] There are good reasons why it is necessary to favour an approach that may be less intrusive on Cool Ideas' rights. The first is that we are concerned with the fairness of depriving Cool Ideas of the power to enforce an arbitration award that has not been attacked as being a result of an unfair process or any substantively unfair findings. Second, and perhaps more important, is the accepted principle that the interpretation that best protects or enhances a fundamental right should, where reasonably possible, be preferred.[127] Is that kind of interpretation of the provisions of the Housing Protection Act reasonably possible? The answer is Yes.

[151] There can be no doubt that the Housing Protection Act is intended to protect housing consumers. As pointed out in the main judgment, it employs various measures to do so. But what, in the end, is the performance it seeks to enable housing consumers to obtain? The best answer to that is to be found in the warranties that the Act seeks to be enforceable by the housing consumer against the home builder in terms of section 13(2):

> "The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that—
>
> (a) the home, depending on whether it has been constructed or is to be constructed—
>
> (i) is or shall be constructed in a workmanlike manner;

[127] *SATAWU and Others v Moloto and Another NNO* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) at para 44; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-3; and *S v Zuma* above n 18 at paras 15-6.

(ii) is or shall be fit for habitation; and

(iii) is or shall be constructed in accordance with—

(aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and

(bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1);

(b) the home builder shall—

(i) subject to the limitations and exclusions that may be prescribed by the Minister, at the cost of the home builder and upon demand by the housing consumer, rectify major structural defects in the home caused by the non-compliance with the NHBRC Technical Requirements and occurring within a period which shall be set out in the agreement and which shall not be less than five years as from the occupation date, and notified to the home builder by the housing consumer within that period;

(ii) rectify non-compliance with or deviation from the terms, plans and specifications of the agreement or any deficiency related to design, workmanship or material notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than three months as from the occupation date; and

(iii) repair roof leaks attributable to workmanship, design or materials occurring and notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than 12 months as from the occupation date."

[152] The registration of home builders – either those having the capacity to build or those who need to enter into agreements with other home builders to do so[128] – and the various other requirements laid down in the Act are all geared to ensure the

[128] Section 10(6) and (7) of the Housing Protection Act.

enforcement of proper performance in the building of their houses by housing consumers against home builders. That is the substantive, overall purpose of the Act.

[153] There are many ways of achieving this purpose, and of striking the correct balance between the interests of housing consumers and those who have performed construction work for them. The Housing Protection Act can be read to protect consumers without barring Cool Ideas' claim for its performance.

[154] The starting point is that section 10(1)(a) and 10(2), read with section 21, indubitably make it a criminal offence for a home builder to have constructed a home while unregistered. This provides home builders with a very strong incentive, backed by the criminal law, to register *before* undertaking any building work.

[155] The central conundrum in this case arises from the finding that the contract (including the arbitration agreement) is valid. How can it be that Cool Ideas' contract with Ms Hubbard is valid, but its claim is unenforceable?[129] Could it be that section 10(1)(b) has a specific and narrow purpose only? That it was the Legislature's targeted intervention to render unenforceable certain of the contract's terms?

[156] Here, the presence of the other two very broadly defined prohibitions in section 10(1)(a) and 10(2) is significant. They do not make the contract invalid. Hence this third prohibition in section 10(1)(b) was necessary. The provisions read:

[129] Where it is not a gambling contract or other agreement offensive to public policy.

> "(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."

[157] So seen, the prohibition in section 10(1)(b) should be understood in its own, narrowly expressed terms, rather than broadened by analogy with the two prohibitions flanking it. We should not, in other words, conclude that section 10(1)(b) embodies a similar, sweeping prohibition to section 10(1)(a) and 10(2). It is doing something separate, and narrower.

[158] Arising from this, an approach to the provision becomes possible in which it is clear that, while the first and the third prohibitions are absolute in relation to the activities proscribed (carrying on the business of a home builder and construction of homes), the prohibition on receiving consideration applies only *at the time of receipt*. In other words, you have to be registered to receive consideration, but you can register late.

[159] Weighing in favour of permitting late registration is, first, the simple fact that section 10(1)(b) uses the word "receive". And it does not interpose any qualification to the registration requirement. For example, it does not say "unless the person is a registered home builder *at the time of undertaking the construction*". Here it differs

from the provisions of the Attorneys Act[130] and the Estate Agency Affairs Act,[131] which require possession of a fidelity fund certificate at the time of practising, for attorneys, and at the time of performance, for estate agents, to claim payment.

[160] Also in favour of this approach is the entire registration system the Housing Protection Act constructs. The Act gives the Minister the usual general power to make regulations.[132] But, in addition, section 7(2)(b) specifically obliges the Minister to prescribe by regulation "the terms and conditions for the registration and renewal of registration of home builders". Indeed, section 10(4) states that registration of a home builder "shall be subject to the terms and conditions prescribed by the Minister under section 7(2)".

[161] These provisions give particular point to the detail of the General Regulations.[133] Together with other provisions of the Act, they create a powerful supervisory body that is not only nominally present, but actively supervises the activities of home builders,[134] and actively protects housing consumers through implied warranties[135] and enrolment of housing projects.[136]

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[130] 53 of 1979. See section 41.

[131] 112 of 1976. See section 34A.

[132] Section 27 of the Housing Protection Act.

[133] See Item 11 of the General Regulations regarding Housing Consumer Protection Measures, GN R1406 *Government Gazette* 20658, promulgated on 1 December 1999 (General Regulations).

[134] Section 5 of the Housing Protection Act.

[135] Section 13(2).

[136] Sections 14 and 14A.

[162] The Act itself says that the Council must register only home builders with the "appropriate financial, technical, construction and management capacity . . . to prevent housing consumers . . . from being exposed to unacceptable risks."[137] Closely allied to this, the Council can also impose conditions on registration and require a suretyship, guarantee, indemnity or other security in order to satisfy itself that consumers are adequately protected.[138] And the General Regulations set out more detailed conditions that the Council may impose before registering a home builder.[139]

[163] This expressly authorised system is fully consonant with the idea that late registration for the purposes of affording statutory sanction to receipt of consideration from a home-construction contract is feasible.

[164] On this approach, the Council, powerfully vested with authority under the legislation, will vet fly-by-night builders, denying them registration – but will permit good-faith builders like Cool Ideas, which omitted to register itself, but acted largely, if not exclusively, through a subcontractor that was registered.

[165] The upshot is that only carefully vetted builders with the necessary expertise and capacity to meet their financial obligations will ever be able to receive payment. Housing consumers are thus adequately protected.

[137] Section 10(3)(c).

[138] Section 10(4) and (5).

[139] See Item 11of the General Regulations above n 133.

[166] Can it be that a home builder, despite its skill and good faith, is deprived of any claim for payment, no matter how enormous its outlay, in perpetuity – without any way to remedy the mistake, even if it is carefully vetted and registered, subject to a range of conditions and suretyships imposed by the Council to ensure that its customers are adequately protected? Surely not.

[167] It is thus reasonable to interpret the provisions of the Housing Protection Act in a manner that is fair, does not deprive Cool Ideas of its property and does not necessitate the enhancement of the power of courts to interfere in private arbitration awards. Will this construction be detrimental to Ms Hubbard? That question has already been answered.[140] It will not, because she has enjoyed all the substantive protections under the Act.

[168] This interpretation is in accordance with existing authority. The broad formulation in *Schierhout*[141] that a thing done contrary to a statutory prohibition is always a nullity, has been qualified and flexibly applied in many later cases.[142] An illustration of the flexibility is to be found in *Pottie*.[143] There, as here, the conclusion of a contract in contravention of statutory requirements was criminalised without an express provision that the contract itself was invalid. In holding that this did not render the contract invalid Fagan JA stated:

[140] See above [132] and [145]-[146].

[141] *Schierhout* above n 48 at 109-10.

[142] See *Metro Western Cape* above n 79 at 188F-H; *Dhlamini en 'n Ander v Protea Assurance Co Ltd* 1974 (4) SA 906 (A) at 913H-914C; *Swart v Smuts* 1971 (1) SA 819 (A) at 829C-830C; and *Estate Van Rhyn* above n 78 at 274.

[143] *Pottie* above n 70.

> "The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent." [144]

And in relation to rendering contracts invalid as a further penalty:

> "A further compulsory penalty of invalidity would . . . have capricious effects the severity of which might be out of all proportion to that of the prescribed penalties, it would bring about inequitable results as between the parties concerned and it would upset transactions which, if . . . enforced . . . the Legislature could have had no reason to view with disfavour. To say that we are compelled to imply such consequences . . . seems to me to make us the slaves of maxims of interpretation which should serve as guides and not be allowed to tyrannise over us as masters." [145]

If this is good law in relation to the possibility of holding agreements valid in the face of statutory prohibition and criminal sanction, so much more it is for holding valid the enforcement of a valid arbitration agreement.[146]

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[144] Id at 726H-727A.

[145] Id at 727E-G.

[146] This reasoning also finds support in jurisprudence from other countries that have dealt with similar issues. In *Loving & Evans v Black* 204 P.2d 23 (Cal 1949), a case involving almost identical facts, the California Supreme Court refused to enforce an arbitration award that was based on a contract between a homeowner and an unlicensed building contractor. The dissenting judge's criticism of the majority holding (at 30) was as persuasive then as it is now:

> "The majority opinion has attempted to resolve the problem as though it might involve an unlawful contract or a contract contrary to public morals and therefore void. It may be assumed that a law declaring such contracts illegal may not be circumvented by submitting controversies thereunder to arbitration and obtaining court confirmation. But the contract here is not of that nature. There is nothing basically unlawful or contrary to public morals in a contract to construct or repair a building. . . . The statute does not declare such a contract to be unlawful. The declaration of unlawfulness is confined to engaging in the business or acting in the capacity of a building contractor without having secured a license. A person pursuing the activities of a building contractor without the required license is guilty of a misdemeanour. And such person may not maintain an action in any court of the state for the collection of compensation for building contractor services. These are the [only] consequences attached to violation." (References omitted.)

*Conclusion*

[169] For these reasons I would have granted leave and allowed the appeal, with costs.

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| For the Applicant: | Advocate P Louw SC and Advocate H Cowley instructed by Chetty de Villiers & Mafokoane Inc. |
| For the First Respondent: | Advocate W van der Linde SC and Advocate X Stylianou instructed by D.J. Greyling Inc. |