IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: 07/19105

In the matter between:

LUSHAKA INVESTMENT (PTY) LTD	First Applicant
LUSHAKA CONSTRUCTION (PTY) LTD	Second Applicant
LASON TRADING 12 (PTY) LTD	Third Applicant

and

NATIONAL HOME BUILDERS REGISTRATION COUNCIL	First Respondent
CHAIRPERSON OF THE NATIONAL HOME BUILDERS REGISTRATION COUNCIL	Second Respondent
MEC FOR HOUSING, GAUTENG PROVINCE	Third Respondent
MINISTER OF HOUSING, REPUBLIC OF SOUTH AFRICA	Fourth Respondent

J U D G M E N T

MBHA, J:

[1] The first to third applicants seek an order reviewing and setting aside the decision and/or administrative action of the first and/or second respondent taken in bringing into effect Rule 14(7) in the NHBRC Rules, published under Government Notice R1408 in Government Gazette 20658 on 1 December 1999 ("*the Rules*"), pursuant to the Housing Consumers Protection Measures Act 95 of 1998 ("*the Act*") on the basis that such rule is *ultra vires*, violates the Rule of Law and is unlawful and/or unconstitutional ("*the constitutional challenge*").

[2] In the alternative to the constitutional argument, the first and second applicants seeks an order that the decision by the second respondent requiring the second applicant to provide a financial guarantee, be set aside on review pursuant to the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*").

The parties

[3] The first and third applicants are property developers, whilst the second applicant is a construction company.

[4] The first respondent is the National Home Builders Registration Council ("*the Council*"), which:

4.1 was established in terms of the provisions of section 2 of the Act, and is, in terms thereof, a juristic person;

4.2 has, as its objects, the matters delineated in section 3 thereof; and

4.3 is vested with the powers expressed in sections 5 and 7 of the Act which:

4.3.1 compel the Council to establish, maintain and administer a fund as contemplated in section 15(4) thereof;

4.3.2 permit it, by way of publication in the Gazette, to make rules *inter alia* prescribing enrolment fees in respect of homes or category of homes and prescribing procedures for enrolment and the cancellation of enrolment; and

4.3.3 in addition, entitle it by publication in the Gazette, to prescribe any matter which is necessary or desirable to be prescribed by the Council in order to achieve the objectives of the Act.

[5] The second respondent is the Chairperson of the Council, duly appointed by the Minister of Housing in terms of section 4 of the Act.

[6] The third applicant was joined to these proceedings after it made an application to court in terms of Uniform Rule 12. There was no opposition to the intervention application from either the applicants or the respondents.

[7] The third applicant has an interest only in the "*constitutional challenge*" contained in prayer 1 of the Notice of Motion.

Background facts

[8] The first and second applicants concluded an agreement in terms of which the second applicant undertook to build a sectional title residential scheme. The scheme is to be known as "*Sunset Towers*" and is to be established in accordance to the Sectional Title Act 95 of 1986 (as amended). The building is eleven stories in height and comprises some 104 residential apartments. Each of the 104 residential units in Sunset Towers is a "*home*" as defined by the Act.

[9] The construction of Sunset Towers commenced in February/March 2006. The physical building structure is now effectively completed.

[10] When construction commenced in February/March 2006, Mr Sergio Aquino, representing the second applicant, attended at the Council to arrange for the enrolment of the scheme as prescribed by the Act. The Council advised him that an enrolment fee of some R2,5 million would be payable.

[11] The second applicant was aware that it was obliged to enrol the 104 homes before construction thereof commenced. This is expressly required by the provisions of section 14 of the Act which provides as follows:

> "*14. Enrolment*
>
> *(1) A home builder shall not commence the construction of a home following 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.*"

[12] Taking its cash flows into account, the first and second applicants elected not to enrol the scheme at that point but rather to pay the late enrolment fees some time after construction commenced. Notwithstanding this, the second applicant commenced and proceeded with the construction of the homes. Clearly this was a deliberate decision.

[13] In terms of section 21 of the Act, the second applicant's conduct in doing so was unlawful and constituted a criminal offence.

[14] As construction has commenced without the necessary enrolment, the Council could not send inspectors to monitor the commencement of the construction or the progress thereof.

[15] In or about June 2007, the second applicant applied for the "*late enrolment*" of Sunset Towers. By that time, the construction had proceeded to an advanced stage. This appears from the photographs annexed to the founding affidavits which were taken in August 2007, which show a building consisting of eleven stories, which the applicants anticipated would reach practical completion in or about December 2007.

[16] On 25 June 2007 the Council's inspectors went to the building to inspect the construction and filled in reports which are annexed to the founding papers. These indicate that material aspects of the building, including the substructure, being the foundations, and parts of the substructure were "*not visible*" and thus could not be inspected.

[17] On 17 July 2007 the Council called on the second applicant to:

17.1 furnish a bank guarantee for R18 750 155,00 which would be kept for five years;

17.2 stop construction of the homes until the Council was "*satisfied*" in terms of section 14 of the Act;

17.3 furnish a geotechnical report, structural report and a civil report.

In the same letter, the Council stated that the guarantee may be reviewed on submission of these reports.

[18] In response to the Council's demands, the second applicant:

18.1 supplied the Council with a geotechnical report, a structural report and a civil report;

18.2 refused to furnish the bank guarantee;

18.3 continued with the construction of Sunset Towers; and

18.4 launched this application on 22 August 2007.

[19] Because of the second applicant's refusal to provide the guarantee required, the Council did not approve the late enrolment applications submitted by the second applicant.

[20] In February 2008, the third applicant sought to intervene in this application as a co-applicant and sought only the main form of relief, namely an order declaring that Rule 14(7) was *ultra vires* the powers bestowed on the first respondent, alternatively violated the rule of law and was unlawful and/or unconstitutional.

[21] The latter application was not opposed and the third applicant thus joined as a co-applicant. The third applicant supplied a bank guarantee for the amount of R23 844 028,00 pursuant to its application for the late enrolment of its units in a development called Sabuti.

[22] The third applicant discloses that of the 213 units under construction some 114 were timeously enrolled, with 99 requiring an application for late enrolment but avers that the circumstances as to why this arose do not require disclosure as, so the third applicant avers, such are not in issue at this time.

[23] On 8 February 2008 an interim order was made in terms of which, *inter alia*:

23.1 the Council was directed;

23.1.1 to enrol the units in Sunset Towers; and

23.1.2 to return the guarantee which had been furnished by the third applicant;

23.2 the applicants were directed to furnish unconditional letters of undertaking by their banks that they will issue bank guarantees in favour of the Council should the court dismiss the application, failing which the enrolment certificate would be withdrawn.

[24] The units have thus been enrolled on the basis of the interim order and the letters of undertaking have been furnished.

[25] The current position that accordingly prevails is that:

25.1 all of the units under construction by the second and third applicants respectively have been enrolled with the Council. The enrolment of the former having occurred pursuant to the interim order;

The issues

25.2 What therefore remains to be determined is whether or not:

25.2.1 the publication of Rule 14(7) of the Rules was *ultra vires*, violates the rule of law and is unlawful and/or unconstitutional;

25.2.2 in regard to the second applicant, whether or not the determination made by the Council requiring it to provide the guarantee in the circumstances mentioned herein before, ought to be set aside for any of the reasons proffered by the applicants.

[26] Because of the importance of the provisions of Rule 14 of the Rules, it is necessary that they are quoted hereunder in full:

"*14. Late Enrolments*

(1) Where a home builder in contravention of section 14 of the Act submits an application for the enrolment of a home to the Council after construction has started, the Council must require the home builder to satisfy the Council that the construction undertaken at the time is in accordance with the NHBRC technical requirements so as to take prudent measures, contemplated in section 16(1) of the Act, to manage the risks pertaining to the Fund.

(2) In the case of late enrolment, the home builder must supply the Council with the following duly completed documents –

(a) an enrolment form in the form of Annexure '5' or '6' as the case may be;

(b) proof of the estimated selling price;

(c) payment of the enrolment fee by direct and full payment in terms of Rule 6;

(d) certification by a competent person of:

(i) the soil classification in terms of Rule 9;

(ii) the design of the foundations in terms of Rule 9(3) and, where applicable, Rule 9(4);

(iii) rational design in terms of Rule 10(1)(a); and

(iv) satisfactory completion of structural work by submitting a duly completed and signed completion certificate by a competent person; satisfactory completion of structural work in the form of Annexure '14' from a competent person.

(3) The homebuilder must, at the request of the Council, pay an additional prescribed late enrolment fee in an amount determined by the Council for a special inspection to be undertaken by the Council to enable the inspectorate to determine compliance with the NHBRC technical requirements, prior to the acceptance of enrolment.

(4) Should any defects be detected during the course of inspection that may influence the structural integrity of the home or if it is established that there is substantial non-compliance with the NHBRC technical requirements, the Council must, prior to acceptance of the enrolment, request rectification of such defects or such non-compliance to be undertaken as may be necessary at the home builder's cost and under the supervision of the competent person appointed by the home builder.

(5) Where an inspector is unable to determine compliance with the NHBRC technical requirements, for whatever reason, the Council may require the home builder to appoint a competent person –

(a) to inspect the home; and

(b) to complete the competent person late enrolment report in the form of Annexure '15' to confirm compliance with the NHBRC technical requirements.

(6) At any work that needs to be exposed to enable the competent person to respond to the questions raised in terms of sub-rule (5)(b), must be undertaken by and at the cost of the home builder.

(7) The Council may request any surety, guarantee, indemnity or other security considered reasonable by the Council to satisfy its obligations under section 16(1) of the Act."

The constitutional challenge: whether or not Rule 14(7) is *ultra vires*

[27] The applicants contend that the first respondent exceeded the powers given to it by the Act when it drafted Rule 14(7) of the Rules.

[28] The applicants submit that the intention of the legislature was to permit the Council, as appears from section 16 of the Act, to deal with the management of the risk pertaining to the business of the Council including the indemnity fund. It is submitted that the section makes it clear that the Council must be prudent in the manner in which it manages the fund and that this includes its obligation to secure fees from home builders and to make sure that there is at all times enough money in the fund to cover potential claims that may be lodged by members of the public. Furthermore the section also provides that if at any time it appeared to the Council that there will not be enough money available, then it may increase the enrolment fees payable by home builders.

[29] It is submitted further that the primary assessment of risk by the Council, is recognised as requiring to be assessed and regulated at the time of registration of the home builder by the Council. Applicants contend that the risk which the Council is required to manage is confined to circumstances where the home builder is no longer in existence or is unable to fulfil its obligations.

[30] The applicants recognise that in terms of section 7 of the Act, the Council is charged with the task of making rules and that this must give effect to the provisions of section 16(1) of the Act by "prescribing enrolment fees" and "procedures for enrolment".

[31] Turning to the rule specifically allowing the Council to ask home builders to furnish security in the form of a bank guarantee at the time of the late enrolment, applicants contend that when the Council drafted this rule, it went beyond the powers given to it by the legislature. The legislature did not, so it is contended, contemplate that, in addition to increasing the enrolment fees, it would also be empowered to ask the home builder to furnish a bank guarantee.

[32] The applicants do not accept that the Council can go further than merely increasing the tariffs when there are insufficient funds available. In particular, the applicants do not accept that the Council is entitled to call for bank guarantees which is what it does under the apparent "*authority*" of Rule 14(7).

[33] To summarise, the applicants contend that:

33.1 the first respondent exceeded the powers given to it in making Rule 14(7);

33.2 the rule itself offends the rule of law in that it purports to confer an extremely wide power on the Council to call for a guarantee in whatever amount the first respondent deems appropriate, and in such circumstances as it deems appropriate, all of this in circumstances where there is no way for the builders to know how much they are going to be required to provide by way of guarantee.

The intention of the legislature

[34] In order to examine the applicants' contention that the publication of Rule 14(7) was an act beyond the powers which the legislature conferred on the Council, it is necessary to have regard to the express powers so conferred upon the Council in the context of the express provisions of the Act and its clear objectives.

[35] In order to contextualise the nature of the functions of the Council and its powers, it is necessary to point out the following:

35.1 the clear objective of the Act is to protect housing consumers from defective or faulty construction work and the consequences thereof;

35.1 in order to provide such protection, the Council was established and given the power and duty, *inter alia*:

35.2.1 to inspect residential homes from the time that construction commenced until construction was completed in order to ensure that the technical requirements laid down by the Council are adhered to;

35.2.2 to establish, maintain and administer the fund to provide assistance to housing consumers by compensating them when they suffer loss resulting from defective building work;

35.3 in order to fulfil its duty to inspect homes, the Council must be notified prior to construction being commenced that the home is to be built;

35.4 if the home is not enrolled prior to the commencement of construction, as a matter of logic, the Council cannot send its inspectors to evaluate the construction process from its commencement until completion;

35.5 when a "*late enrolment*" occurs, the Council can only send inspectors to the site from the time when the construction on the site comes to the knowledge of the Council;

35.6 the provisions of Rule 14 recognise that a "*late enrolment*" may occur – this does not mean that "*late enrolments*" are either sanctioned or authorised – is merely recognition of the fact that some home builders will not comply with their lawful obligations;

35.7 the provisions of Rule 14 recognise that where a "*late enrolment*" occurs, it may or may not be possible for inspectors representing the Council to establish whether or not there has been compliance with the technical requirements from the time of the commencement of the construction work until the date on which the Council is notified that it is in progress or completed;

35.8 an examination of Rule 14 demonstrates that where the Council is asked to register a late enrolment, the Council must call for certificate to be given by the home builder, who must obtain certificates from "*a competent person*" certifying that the technical requirements have been adhered to;

35.9 such certificates cannot and do not serve as a substitute for the inspection where the Council's inspectors are obliged to undertake;

35.10 where the Council's inspectors are unable to conduct inspections the Council is entitled (but not obliged) to call for

certification by independent competent persons, other than the Council's own inspectors;

35.11 quite clearly, in such circumstances, the risk to the fund created in terms of the Act is far greater than the risk would be if the Council's inspectors had been afforded the opportunity to inspect the construction work from its commencement and at all times during its progress.

[36] Clearly, the Council was not expressly authorised in the Act to require home builders to provide guarantees in relation to any late enrolment. It is also clear that the legislature did not deal at all with the issue of late enrolment of homes. Indeed, the point of departure reflected in the Act is that in terms of section 14(1), home builders are expressly required to register prospective homes prior to construction. Section 21(1) of the Act imposes a criminal sanction for failing to abide by such imperative.

[37] In my view, the fact that the Act does not expressly deal with late enrolments, demonstrates that the legislature deemed it appropriate to leave such matters to the discretion of the Council. This obviously ties in with the wide nature of the Council's powers as expressed in the Act.

[38] Significantly, the applicants accept that the Council was vested with the authority to publish the remaining provisions of Rule 14 (i.e. other than Rule 14(7)) dealing with matters connected to late enrolments.

[39] What also self-evidently emerges from a perusal of the empowering sections of the Act, insofar as they relate to the Council, is that the mandate of the Council, and the powers conferred upon it, were widely stated. In this regard the Council is empowered:

39.1 to generally do all things necessary or expedient to achieve both its objectives, and the objectives of the Act;

39.2 to make rules prescribing procedures for enrolment and cancellation of enrolment;

39.3 to make rules prescribing any matter which is necessary or desirable to be prescribed by the Council in order to achieve the objectives of the Act; and

39.4 to take prudent measures to manage the risk pertaining to the business of the Council including any funds established by it.

[40] Far from negating the power conferred upon the Council to *inter alia* publish Rule 14(7) of the Rules, the powers expressed as aforestated, imply, in the first instance, the ability to create such a rule, and in the second instance, the obligation to do so.

[41] Indeed a perusal of the Act demonstrate that, in terms of section 10(5) thereof the Council may, in relation to the registration of the home builder, require *inter alia* the provision of any guarantee or indemnity which the Council in its discretion deems necessary to satisfy itself in respect of, *inter alia*, the home builder's financial capacity to carry on the business in question.

[42] The express purpose of permitting the exercise of the discretion under section 10(5) on the part of the Council is proclaimed to be "*in order to prevent housing consumers and the Council from being exposed to unacceptable risk*". Recognition is thus given to the financial and technical risk of a builder who may be unable to satisfy a claim against him and thereby render the fund liable to compensate the consumer.

[43] The applicants argue that the very fact that the legislature saw fit to confer the discretion under section 10(5) on the Council lends credence to the contention that the Council was not empowered to publish Rule 14(7). However, the fallacy intrinsic to such argument emerges when due consideration is given to the following:

43.1 section 10(5) applies in circumstances where the legislature has not expressly contemplated late registration of homes, and indeed to the contrary has contemplated obedience to the law;

43.2 the guarantee contemplated in section 10(5) of the Act can therefore be required even in circumstances in which it is contemplated that a home builder will timeously enrol homes and inspections can and will take place by the Council's representatives to ensure compliance with its technical requirements;

43.3 the furnishing of a guarantee would protect the fund by ensuring that if a claim is made, the compensation will not deplete the fund at all;

43.4 per force the unacceptable risks contemplated by the legislature to either housing consumers, or the Council, which the legislature had in mind, as expressed in section 10(3)(c) of the Act could accordingly only arise in a case where the inability on the part of the home builder to satisfy the claim of a home owner results from any structural (or other) defect emerging despite proper enrolment of a home, and technical inspections conducted by the Council's representatives.

[44] It does not assist the applicants in this regard, to direct attention to the parameters of Rule 14, and to suggest that in consequence of the matter therein contained (i.e. the procedures to be adopted upon late registration) that the Council was not empowered to prescribe for the matters dealt with in Rule 14(7).

[45] One can readily conceive of situations where, in the event of late enrolment the Council's representatives (and indeed any other independent competent person), despite their best efforts, would be unable to ensure compliance with the Council's technical requirements *ex post facto*, for example where the foundations have already been laid and could not *ex post facto* be fully exposed to determine the extent of compliance.

[46] In such an event consumers and the Council would be exposed to a risk which arises solely in consequence of the unlawful conduct of the home builder.

[47] The risk which would clearly arise therefrom is a risk additional to those risks that are intended to be covered by either the enrolment fee or late enrolment fee.

[48] It does not assist in this context to suggest, as the applicants are doing, that the fund is not at additional risk because:

48.1 a competent person engaged by the home builder is satisfied that "*no defects exist*" – something which does not appear to have happened in the case of the second applicant; and

48.2 that such competent person holds mandatory insurance.

[49] This is so in that one can conceive of many instances where dishonest home builders will refrain from proper enrolment, so as to obviate the inspection process with, for instance, the dubious purpose of abrogating their responsibilities insofar as technical compliance is concerned, so as to increase the profit margin. In such a situation it would not be difficult to conceive of a competent person being a participant in such a scheme. The certificate by the home builder's "*competent person*" does not obviate the risk to the fund, but merely constitutes one of the methods of attempting to limit the risk.

[50] The fact that an independent competent person who provides a certificate may or may not have insurance does not obviate the risk to the fund. If, notwithstanding the certifications, the foundations, for example, collapse and the multi-storey building becomes threatened, the insurance may not be sufficient to cover claims of all the home owners. Indeed properly contextualised, should one postulate a fundamental shortcoming in the foundations of the multi-rise building being constructed by the second applicant, giving rise to collapse, the Council would be faced by claims in respect of all 104 units to the tune of R500 000,00 each. The full parameter of the claim therefore would amount to some R52 million.

[51] The Act not only sanctions the Council in taking prudent steps to protect against such a risk, but enjoins the Council to do so.

[52] The contention advanced by the applicants to the effect that the intention of the legislature was only to permit the Council to take prudent measures where it became apparent that in aggregate the fund did not have enough money to meet expected demands placed upon it, and that such is expressed in section 16(1) and (6) is ill-conceived.

[53] This is so in that the word "*and*", employed between the words "*including any fund*" and "*secure that the fees or charges payable*" in section 16(1) of the Act is used conjunctively. Otherwise stated the section compels the Council to do two things namely:

53.1 to take prudent measures to manage the risks pertaining to the business of the Council, including any fund; and

53.2 in addition to secure that the fees or charges payable by *inter alia* home builders to the Council are prescribed at levels sufficient in aggregate to meet the demands on any funds established by the Council.

[54] The applicants suggest that should the fund be at risk of not being able to meet claims the Council is permitted to act in terms of section 16(6) of the Act and increase the fees and charges payable by home builders. If the Council was to follow this suggestion, its actions would simply amount to an attempt to ameliorate the consequences of not protecting the fund properly in the first instance. It would also be grossly unfair to suggest to innocent home

owners or home builders that they should bear the brunt of the consequences of the applicants not complying with the law, and the Council not taking appropriate measures to protect the fund resultant therefrom.

[55] To interpret the powers conferred upon the Council in the manner contended for by the applicants would in addition give rise to a manifest absurdity. This emerges from the following:

55.1 as has been observed hereinbefore the Council is entitled in terms of section 10(3) and (5) of the Act, with a view to preventing the exposure of either housing consumers or the Council to unacceptable risks, *inter alia*, to require a home builder, upon registration to provide a guarantee;

55.2 in terms of the regulations promulgated by the Minister, a home builder is required annually, prior to the renewal date, to apply for the renewal of its registration;

55.3 It does emerge that the Council may in the exercise of its discretion, in considering an annual renewal of the home builder's registration, *inter alia* request an indemnity should it deem such necessary, in considering the prevention of exposure to unacceptable risk on the part of housing consumers or the Council;

55.4 The effect of the interpretation contended for by the applicants in the circumstances would mean that, despite the emergence of an unacceptable risk during intervening periods between renewal of registration, the Council would have to wait until the renewal of an application before it would become entitled to act so as to protect *inter alia* the fund.

[56] Most importantly, it must be borne in mind that the Council does not seek to raise funds to increase the extent of the fund by calling for guarantees. It is merely a mechanism for protecting the fund by ensuring that extraordinary risks do not deplete the fund. This, in my view, is an important factor that applicants seem to have failed to grasp. In addition, the late enrolment fee is based on the additional administrative costs which result from the envisaged inspections and bears no reference to the extent of the risks which arise when a late enrolment occurs.

[57] I thus come to the conclusion that the contention that the Council acted *ultra vires* its power when it published Rule 14(7) cannot be sustained.

The contention that Rule 14(7) offends the Rule of Law

[58] This argument is premised on the assumption that Rule 14(7) is not, itself, *ultra vires*. In other words, on the assumption that Rule 14(7) is in effect authorised by Act 95 of 1995, the applicants submit as follows:

58.1 that Rule 14(7) purports to confer an extremely wide power on the Council to ask for a bank guarantee, in whatever amount and in whatever circumstances it deem appropriate;

58.2 the contentions advanced by the respondents – that the calculation of the required guarantee is applied with consistency and transparency – does not emerge from a reading of the reports purportedly relied upon by the respondents in that regard (the reports of Quindiem Consultants);

58.3 there is in fact no formula nor is there transparency as to the way in which the amount of a guarantee is calculated, the process being left to the whim of the Council;

58.4 the exercise of public power will be arbitrary, and thus in violation of the Rule of Law, where there is no certainty in the rule that is being enforced so that, as a consequence, ordinary members of the public are unable to regulate their conduct or else predict how it is that public officials will act.

[59] The applicants then submit that all of those qualities which apparently make up the Rule of Law, are missing from the manner in which the Council has created and then applied Rule 14(7). They argue that in contradistinction, the application of the rules on fees (as a tariff) does everything that the Rule of Law would expect namely, that the tariff is clear, certain, and leaves no

doubt in the minds of home builders as to how much they would have to pay in the event that they should "*late enrol a home*".

[60] The applicants conclude that Rule 14(7) even, if it is not *ultra vires* the Act, is nevertheless a rule created and applied in a manner that is inconsistent with the Rule of Law thus rendering it unconstitutional.

[61] In my view the applicants' reading of the application of Rule 14, and in particular the context in which Rule 14(7) is applicable, is misplaced.

[62] Whilst it is true that the Rule so published recognises that the Council can entertain late enrolments of homes, and whilst it is also true that the Council is enjoined thereunder to satisfy itself, to the extent that it can, that such a home has been constructed in accordance with its technical requirements, what is not true is that it must necessarily do so prior to the acceptance of a late enrolment.

[63] It is significant in this regard that Rule 14(5) of the Rules confers a discretion upon the Council, in circumstances where it is unable to determine compliance with its technical standards, for whatever reasons, to require a home builder to appoint a competent person to:

63.1 inspect the home;

63.2 complete a late enrolment report;

63.3 to the extent necessary cause any works that need to be exposed to be become exposed.

[64] The Council is however not compelled to cause these steps to be taken. The logic implicit therein is self-evident, and is the following:

64.1 the provisions of Rule 14(1) and (2) are predicated upon the steps which must be taken by home builder (as opposed to the Council itself) with a view to satisfying the Council in regard to compliance;

64.2 the Council however is enjoined to independently attempt to determine the veracity of any such matter communicated by the home builder to it and to that end is enjoined by Rule 14(3) to cause a special inspection to be undertaken prior to acceptance of any enrolment;

64.3 In terms of Rule 14(4) if the Council, as a result of such inspection, establishes that there is substantial non-compliance with its technical requirements it is compelled, prior to acceptance of the enrolment, to ensure that rectification occurs;

64.4 It is therefore significant that Rule 14(5) which postulates, as its point of departure, an inspection which is unable to determine whether or not there has been compliance, provides not that the

Council must cause the home builder to appoint a further competent person, but rather that it may require the home builder to do so;

64.5 It is clear in this context that the Council may, in preference to utilising the discretion conferred upon it in terms of Rule 14(5) of the Rules, elect to proceed in terms of Rule 14(7), i.e. instead request a guarantee, where it cannot itself, determine compliance with its technical standards.

[65] Clearly, it would be expected of the Council in the proper discharge of its statutory duties, where it cannot itself determine compliance, to take steps to protect the fund against the potential risk arising from a failure to comply, and this will be particularly the case where it is either difficult or impossible for the Council to determine whether or not there has been compliance with its technical standards.

[66] Seen in this context there is nothing either arbitrary or irrational in the discretion imposed upon the Council in accordance with Rule 14(7).

[67] It also emerges from the contents of the respondents' answering affidavit that:

67.1 the manner in which the Council applies the rule is in keeping with the aforegoing in that it requires such a guarantee only where it is unable to conduct tests, because of the late enrolment, to determine for itself compliance, the guarantee being intended to cover such risk;

67.2 in determining the quantum of the guarantee which is required the Council utilises a computer model and which model was developed by the Council's Executive Director in the Technical and IT Department, Dr Jeffrey Mahachi;

67.3 the model is in fact not constituted by the actuarial report compiled by Quindiem Consultants at all, such report rather having been utilised in compiling the computer programme;

67.4 the computer model is available to the home builders on request.

[68] It is trite that in motion proceedings the court is obliged to accept the respondent's version where it conflicts with that of the applicant. Moreover, the only facts placed before the court on this issue are the facts put up by the respondents. The applicants' contention that the Council adopts an inflexible approach is disputed by the respondents and the court is bound to accept this, particularly because the denial, and the facts averred pursuant thereto, is not challenged at all in the applicants' replying affidavit.

[69] Significantly, the applicants have at no time called for the production of the computer model.

[70] In these circumstances I am bound to find that members of the public are not only capable of determining, from a reading of the Rule itself, the circumstances in which it will be applied, but are also capable of determining the effect on them, of the application thereof. In other words, there is both transparency and flexibility in the application of the Rule.

[71] It would in any event be wholly inappropriate to require the Council, to express in the Rules, the full basis for the computation of guarantees required there under as such would require the passing of detailed rules to deal with every contingency. In my view, to require the Council to do so, would be unreasonable.

[72] In the circumstances I fail to find that Rule 14(7) in any way offends the Rule of Law.

The PAJA Review

[73] It will be recalled that the PAJA review is only pursued by the first and second applicants.

[74] The argument advanced is that, should it be found that the Council did not act *ultra vires* when it made Rule 14(7) of the Rules, then the Council, in calling for the bank guarantees:

74.1 failed to properly apply its discretion;

74.2 that the Council has not exercised the discretion given to them in Rule 14(7) in a manner that meets the minimum standards required by administrative law.

[75] On the proven facts there is no evidence at all to support the contention advanced by the first and second applicants.

[76] What becomes strikingly relevant is the fact that the first and second applicants commenced or instituted this current application in circumstances where:

76.1 they deliberately and conscientiously breached the enrolment procedure prescribed by the Act, specifically section 14, in the first instance;

76.2 they deliberately and conscientiously elected not to comply with Rule 14(7) in that they refused to provide the guarantee validly sought by the first respondent;

76.3 they at no stage of the proceedings sought to purge their apparent default in any form or manner;

76.4 they deliberately commenced to construct the development and continued therewith despite being expressly told to stop by the first respondent.

[77] As the first and second applicants are in wilful and deliberate breach of the provisions of the Act and regulations, the "*dirty hands*" principle, which holds that the court will not grant relief to a litigant in such circumstances, in the absence of either good cause being shown or until the contempt has been purged, properly applies to the first and second applicants.

[78] The "*dirty hands*" principle, was aptly captured in the following *dicta* of Chidyausiku CJ in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for Information and Publicity* 2004 (2) SA 602 at 609A-C:

> "*In my view, there is no difference in principle between a litigant who is in defiance of a court order and a litigant who is in defiance of the law. The court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged.*"

[79] No good cause has been shown in this case and neither has the contempt displayed by first and second applicants to the provisions of the relevant section and Rules been purged. On this basis alone the relief sought by the first and second applicants ought to be refused.

[80] Having regard to all the facts and circumstances of this case:

80.1 the court is satisfied that the Council did not act arbitrarily and there is no basis to suggest that it did so in this case;

80.2 there is no basis for contending that applicants for late enrolment are entitled to make additional representations before the Council can impose conditions for the issue of an enrolment certificate;

80.3 the applicants, in any event, had an opportunity to make representations when they applied for late enrolment. It is notable that they do not disclose to the court the terms of their applications;

80.4 it was, in any event, conveyed to the second applicant that the conditions would be reviewed after the requisite reports had been submitted. It is trite that the second applicant did not make any representations at this stage, but launched this application in August 2007. Clearly its protestations to the effect that no opportunity was given to make representations are not true;

80.5 there is no basis for the contention that the sole determining factor which the Council should have taken into account was the financial position of the applicants;

80.6 it would be unreasonable to expect the Council to engage in an actuarial exercise of projecting what the financial position of the applicants would be in five years' time;

80.7 the wilful disregard of the law by late applicants such as the second and third applicants inherently pose a high risk;

80.8 on the first and second applicants' own version, they were in a position to establish the Council's requirements for late enrolment when Mr Aquino made enquiries about the extent of the enrolment fee in February/March 2006;

80.9 the first and second applicants' assertion that they have complied with Rule 14, or that a competent person has certified that no defects exist is not correct having regard to the contents of the three reports. None of these reports contain any statement that no defects exist.

[81] In the circumstances the PAJA review argument advanced by the first and second applicants, must also fail.

[82] I accordingly make the following order:

1. The application is dismissed.

2. The first, second and third applicants are ordered to pay the respondents' costs, jointly and severally, which shall include the employment of two counsel.

B H MBHA
JUDGE OF THE HIGH COURT