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XANTHA PROPERTIES 18 (PTY) LTD v NATIONAL HOME BUILDERS REGISTRATION COUNCIL AND OTHERS 2018 (6) SA 320 (WCC)

Citation	2018 (6) SA 320 (WCC) A
Case No	10759/2017
Court	Western Cape Division, Cape Town
Judge	Nuku J
Heard	May 16, 2018
Judgment	May 16, 2018 B
Counsel	*JG Dickerson SC* (with *PS van Zyl*) for the applicant. *N Arendse SC* (with *N Mayosi*) for the first respondent. *T Madima SC* for the second and third respondents.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Housing — Consumer protection — Enrolment of home — Whether home builder required, in terms of s 14 of Housing Consumers Protection Measures Act, C to enrol construction of 'home', where home builder constructing home solely for purposes of leasing or renting out — Purpose of Act being protection of 'housing consumer' — Tenant in terms of lease with home builder was not 'housing consumer' — 'Home' was accordingly limited to homes acquired by housing consumers by means of sale — Enrolment therefore not required — Housing Consumers Protection Measures Act 95 D of 1998, s 1 sv 'home' and 'housing consumer', and s 14(1).

Headnote : Kopnota

Section 14(1) of the Housing Consumers Protection Measures Act 95 of 1998 requires that a home builder shall not commence the construction of a 'home' unless it has first enrolled such construction, which entails, inter alia, E the submission of certain documents and information, and the payment of a fee, to the National Home Builders Registration Council (the Council). 'Home' is defined in s 1 of the Act to mean 'any dwelling unit constructed or to be constructed by a home builder . . . for residential purposes or partially for residential purposes, including any structure prescribed by the Minister for the purposes of this definition or for the F purposes of any specific provision of this Act, but does not include any category of dwelling unit prescribed by the Minister'. The General Regulations Regarding Housing Protection Measures expand on the definition of 'home' for the purposes of s 14(1), by inter alia providing various exclusions.

Xantha Properties 18 (Pty) Ltd, a home builder registered as such in terms of the G Act, was in the process of developing a number of apartments in a building it owned; not for the purpose of selling, but for renting out. Xantha was informed by the Council that it would need to enrol the apartments, even though it did not intend to sell them to third parties. Xantha consequently approached the High Court (Cape Town) seeking, inter alia, a declaratory order to the effect that s 14(1), read with relevant provisions of s 1 (including H the definitions of 'home' and 'housing consumer') and various other provisions of the Act and the Regulations, did not require the enrolment of the proposed construction of a home where the home builder was constructing such home *solely for the purposes of leasing or renting out*. For its part, the Council insisted that enrolment was required in such circumstances.

The court, in interpreting s 14(1), and in particular the meaning of 'home', had I regard to the purpose of the Act — namely, the protection of the 'housing consumer' (see [42] – [45]). Such a person, the court held, having regard to the definition of the term 'a person who is in the process of acquiring or has acquired a home', *did not include* a tenant in terms of a lease with a home builder (see [40] and [46]). The court also had regard to the fact that the entire scheme of the Act was predicated upon the conclusion of a building J contract between a registered home builder and a housing consumer (see

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[40]). The court consequently found that for the purposes of enrolment in A terms of s 14(1), a 'home' was limited to homes acquired by housing consumers by means of a sale (see [40] and [49]).

In conclusion, the court held that the provisions of s 14, read with the definition of 'home' and 'housing consumer' in s 1 of the Act and regs 1(2) and 1(4) of the Regulations, did not require the enrolment of the proposed construction of a home in circumstances where the home builder was constructing B such home solely for the purposes of leasing or renting out (see [50]).

Cases cited

Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) (2014 (8) BCLR 869; [2014] ZACC 16): dicta in paras [28] – [30] applied

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd C 2005 (6) SA 205 (SCA) ([2006] 1 All SA 103): dictum at 213E – G applied

In re BOE Trust Ltd and Others NNO 2013 (3) SA 236 (SCA): dictum at 241H – I applied

Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA) (2012 (11) BCLR 1239; [2012] ZASCA 115): dictum in para [12] applied D

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13): dictum in para [18] applied.

Legislation cited

The Housing Consumers Protection Measures Act 95 of 1998, s 1 sv E 'home' and 'housing consumer', and s 14(1): see *Juta's Statutes of South Africa 2017/18* vol 6 at 4-114 and 4-120.

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Case Information

JG Dickerson SC (with *PS van Zyl*) for the applicant.

N Arendse SC (with *N Mayosi*) for the first respondent.

T Madima SC for the second and third respondents.

An application for declaratory relief in relation to certain provisions of the Housing Consumers Protection Measures Act 95 of 1998, read with certain provisions of the General Regulations Regarding Housing Protection Measures.

Order

1. It is declared that the provisions of s 14, read with the definition of 'home' and 'housing consumer' in s 1 of the Act, and regs 1(2) and 1(4) of the Regulations, do not, on a proper interpretation of the Act and the Regulations, require the enrolment of the proposed construction of a home in circumstances where the home builder is constructing such home solely for the purposes of leasing or renting out.
2. First and second respondents are ordered to pay costs, such costs to include costs of two counsel.

Judgment

Nuku J:

Introduction

[1] This is an application for declaratory relief in relation to certain provisions of the Housing Consumers Protection Measures Act 95 of 1998 (the Act), read with the regulations promulgated under GN

R1406 (*Government Gazette* 20658 of 1 December 1999) (the Regulations). In particular, the applicant seeks the following relief in its notice of motion:

[1.1] An order declaring that the provisions of s 14, read with the relevant provisions of s 1 (in particular, the definitions of 'business of a home builder', 'home', 'home builder', and 'housing consumer'), and ss 10 and 10A of the Act, and regs 1(2) and 1(4) of the Regulations, do not, on a proper interpretation of the Act and the Regulations, require the enrolment of the proposed construction of a home in circumstances where the home builder is constructing such home solely for the purposes of leasing or renting out.

[1.2] In the alternative, and in the event that the court does not uphold the declaratory relief sought, the applicant raises a constitutional challenge in terms of which it seeks an order declaring that the provisions of s 14, read with the relevant provisions of s 1 (in particular, the definitions of 'business of a home builder', 'home', 'home builder', and 'housing consumer'), and ss 10 and 10A of the Act, and regs 1(2) and 1(4) of the Regulations, are unconstitutional, unlawful and invalid to the extent that they compel enrolment of a proposed construction of a home in circumstances where the home builder is constructing such home solely for the purposes of leasing or renting out.

[2] The applicant is Xantha Properties 18 (Pty) Ltd, a private company with limited liability, duly incorporated in accordance with the company laws of the Republic of South Africa, with its registered office situated at 3rd Floor, 155 Main Road, Wynberg, Cape Town. The applicant is a home builder, as defined in the Act, and is registered as such with the National Home Builders' Registration Council, the first respondent, in terms of s 10 of the Act.

[3] The first respondent is the National Home Builders' Registration Council, a juristic person established in terms of s 2 of the Act, with its principal place of business within the jurisdiction of this court, at Ground Floor, Barinor's Vineyard South, The Vineyards Office Estate, 99 Jip de Jager Drive, Bellville. The objects of the first respondent, as listed in s 3 of the Act, include the protection of housing consumers and the regulation of the home building industry. The first respondent opposes the application.

[4] The second respondent is the Minister of Human Settlements, under whose ministry the administration of the Act falls, and to whom the first respondent reports. The second respondent is joined because of her interests in the declaratory relief sought by the applicant. The second respondent opposes the application.

[5] The third respondent is the Deputy Minister of Justice and Constitutional Development, who is joined in these proceedings because of his possible interest in the relief sought in the alternative relating to the constitutional challenge. As regards the constitutional challenge raised in

the application, the applicant has delivered the notice in terms of rule 16A of the Uniform Rules of Court and there has been no response to the said notice. The third respondent does not oppose the application and has not participated in these proceedings.

Factual background

[6] The applicant owns an immovable property in Wynberg, known as Erf 172878, Cape Town (the property). At the commencement of these proceedings, the applicant was in the process of developing 223 residential apartments, as well as two ground-floor retail shops, on the property. The applicant claims that it will not be selling any of these residential apartments to third parties but will retain ownership of the entire building, including the residential apartments. The applicant also claims that it intends to earn rental income from these residential apartments by renting them out upon completion.

[7] During February 2017 Mr Michael Jonathan Smith (Mr Smith), a director of the applicant, made enquiries from the first respondent about the requirement for the enrolment of the residential apartments. Mr Michael Vaughn (Mr Vaughn) and Ms Hazel Madolo (Ms Madolo), both employees of the first respondent, advised him that the first respondent required every construction project undertaken by a registered home builder to be enrolled, irrespective of whether or not there was a third-party housing consumer involved. In addition to this, the first respondent's legal advisor telephonically advised the applicant's legal representatives that the applicant would not be able to apply for exemption under s 29 of the Act.

[8] Mr Smith submitted the application for enrolment of the residential apartments, on behalf of the applicant, to the first respondent on 22 February 2017. Ms Buyiswa Somhlaba (Ms Somhlaba), also an employee of the first respondent, advised him on 14 March 2017 that the application was incomplete. She requested him to submit a schedule of prices in respect of all the residential apartments, as well as a completed ST003 form. In response Mr Smith advised Ms Somhlaba that there were no individual schedules of prices in respect of the residential apartments as the applicant did not intend selling them. Mr Smith also pointed to the fact that the first respondent did not have forms designed for the enrolment of the type of residential apartments under construction by the applicant. The applicant did not respond to the issues raised by Mr Smith, but on 6 April 2017 Ms Madole forwarded a 'pro forma' invoice to him requiring payment from the applicant of the enrolment fee in the sum of R1 583 143,90. The applicant paid the enrolment fee on 11 April 2017 and proof thereof was transmitted to the first respondent.

[9] In enrolling the residential apartments, the applicant did so without prejudice to its right to challenge the lawfulness of the requirement for the enrolment of the apartments. In this application the applicant thus challenges the lawfulness of the requirement to register the residential apartments on the basis that, properly interpreted, the relevant provisions of the Act, read with the relevant provisions of the Regulations, do

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not require the enrolment of the residential apartments under construction by the applicant. The first and the second respondents on the other hand contend that the relevant provisions of the Act and Regulations require the enrolment of the residential apartments under construction by the applicant. I set out below the provisions of the Act and the Regulations implicated in this application.

The relevant provisions of the Act and Regulations

[10] Section 14 of the Act deals with the requirement for the enrolment of homes and ss (1) provides:

> 'A home builder shall not commence the construction of a home falling within any category of home that may be prescribed by the Minister for the purposes of this section unless —
>
> *(a)* the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner;
>
> *(b)* the Council has accepted the submission contemplated in paragraph *(a)* and has entered it in the records of the council; and
>
> *(c)* the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder.'

[11] Regulation 1(4) sets out homes falling within the category of homes prescribed by the Minister for the purposes of s 14 and provides:

> 'For the purposes of the category of homes for enrolment in terms of section 14(1) of the Act, home includes all homes as defined in the Act or these Regulations, but does not include a home forming part of a project, contemplated in section 5(4)*(c)* of the Act.'

[12] Section 1 defines a home and provides —

> '"home" means any dwelling unit constructed or to be constructed by a home builder, after the commencement of this Act, for residential purposes or partially for residential purposes, including any structure prescribed by the Minister for the purposes of this definition or for the purposes of any specific provision of this Act, but does not include any category of dwelling unit prescribed by the Minister'.

[13] Regulation 1(2), which excludes certain homes from the definition of 'home' in s 1 of the Act, provides:

> For the purposes of the definition of home in section 1 of the Act, ''home'' does not include —
>
> *(a)* boarding houses, hostels, institutional facilities such as hospitals, prisons, orphanages and other welfare accommodation, time share accommodation, hotels or any residential structure which is constructed with less than 75 per cent of the floor area designed for residential purposes;
>
> *(b)* any temporary residential structure, including a shack or caravan;
>
> *(c)* any home constructed as contemplated in the exclusion paragraphs (i) and (ii) of the definition of business of a home builder in section 1 of the Act; and
>
> *(d)* until the commencement of section 14(2) of the Act, a home forming part of a project, contemplated in section 5(4)*(c)* of the Act.'

[14] The residential apartments under construction by the applicant do not form part of a project contemplated in s 5(4)*(c)* of the Act and as such this section is of no relevance to the present application.

[15] The other provisions of the Act which are relevant for the purposes of this application are s 1 (the definitions of 'business of a home builder', 'home builder' and 'housing consumer') and ss 10 and 10A of the Act. Section 1 of the Act contains the following definitions:

[15.1] The 'business of a home builder' means —

> '*(a)* to construct or to undertake to construct a home or to cause a home to be constructed for any person;
>
> *(b)* to construct a home for the purposes of sale, leasing, renting out or otherwise disposing of such a home;
>
> *(c)* to sell or to otherwise dispose of a home contemplated in paragraph *(a)* or *(b)* as a principal; or
>
> *(d)* to conduct any other activity that may be prescribed by the Minister for the purposes of this definition'.

[15.2] A 'home builder' means —

> '*(a)* a person who carries on the business of a home builder; or
>
> *(b)* an owner builder who has not applied for exemption in terms of section 10A'.

[15.3] An 'owner builder' means —

> '*(a)* a person who builds a home for occupation by himself or herself; or
>
> *(b)* a person who is not a registered home builder and who assists a person contemplated in paragraph *(a)* in the building of his or her home'.

[15.4] A 'housing consumer' means 'a person who is in the process of acquiring or has acquired a home and includes such person's successor in title'.

[16] Regulation 1(5) supplements the definition of 'business of a home builder' and provides:

> 'For the purposes of the definition of business of a home builder in section 1 of the Act, the business of a home builder includes the activity conducted by a legal entity of buying land and developing such land and constructing homes on such land and the subsequent sale of the legal entity rather than the land itself.'

[17] Section 10 of the Act deals with the requirement for the registration of home builder and subsections (1) and (2) provide:

> '(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.'

[18] Section 10A enables owner builders to apply for an exemption from having to comply with the provisions of ss 10 and 14 and provides:

> 'An owner builder may, in terms of section 29, apply to the Council for exemption from sections 10 and 14.'

[19] As the applicant seeks a declaratory order regarding the proper interpretation of the provisions of the Act and Regulations referred to

above, I set out briefly the legal principles applicable to the grant of declaratory orders, as well as the statutory interpretation. I deal first with the principles applicable to the grant of declaratory orders.

The legal principles applicable to the grant of declaratory orders

[20] Section 21(1)*(c)* of the Superior Courts Act 10 of 2013 deals with the power of the court to grant declaratory orders and provides:

> 'A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power . . . in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[21] An application for a declaratory order involves a two-stage enquiry: First, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and second, if the court is satisfied that such an interest exists, it must consider whether or not the order should be granted. (See *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) ([2006] 1 All SA 103) at 213E – G.)

[22] The applicant submitted that it has a sufficiently real interest in the matter so as to entitle it to apply for the relief. The first and second respondents did not take issue with the applicant's submission but submitted that the court should not grant the declaratory order on the basis

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that the application has no merit. I am also satisfied that it is competent for this court to grant the declaratory relief depending on the merits of the application. I now turn to deal briefly with the principles applicable to statutory interpretation.

The legal principles applicable to statutory interpretation

[23] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) (*Endumeni*) and *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) (2014 (8) BCLR 869; [2014] ZACC 16) (*Cool Ideas*) are the leading authorities on interpretation. The former deals with interpretation of documents in general whilst the latter in particular with statutory interpretation. In *Endumeni* the Supreme Court of Appeal stated the following in para 18:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all the factors. The process is objective,

Nuku J

> not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[24] In *Cool Ideas* the Constitutional Court stated the following in para 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. There are three important interrelated riders to this general principle, namely:
>
> *(a)* the statutory provisions should always be interpreted purposively;
>
> *(b)* the relevant statutory provision must be properly contextualised; 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 principles is closely related to the purposive approach referred to in *(a)*.'

[25] Before considering the merits of the application, it is necessary to deal with a point in limine raised by the first respondent relating to material non-joinder by the applicant of a party which the first respondent considers a necessary party to these proceedings.

Point in limine: material non-joinder

[26] The first respondent raised a point in limine that the applicant has failed to join Investec Bank Ltd (the Bank) as a party to these proceedings, and that such failure amounts to a material non-joinder, in that the Bank has a direct and substantial interest in the subject-matter of the proceedings, as any order this court makes in relation to the relief sought by the applicant will affect the interests of the Bank, namely the structural integrity of its security.

[27] The common-law rule regarding the obligatory joinder of parties is that anyone with a direct and substantial interest in a matter must be joined. (See *In re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) at 241H – I.) The joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. (See *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) (2012 (11) BCLR 1239; [2012] ZASCA 115) para 12.) A mere financial interest is an indirect interest and may not require joinder of a person having such interest. (See DE van Loggerenberg & E Bertelsmann *Erasmus: Superior Court Practice* vol II 2 ed at D1 – 124 – 125.)

[28] For its point in limine the first respondent relies on s 18(1) which provides:

Nuku J

> 'No financial institution shall lend money to a housing consumer against the security of a mortgage bond registered in respect of a home, with a view to enabling the housing consumer to purchase the home from a home builder, unless that institution is satisfied that the home builder is registered in terms of this Act and that the home is or shall be enrolled with the Council and that the prescribed fees have been or shall be paid.'

[29] The first respondent's reliance on s 18 is based on the fact that the Bank granted the applicant a loan in the amount of R116 000 000 pursuant to which the bank registered a bond over the property as security for the said loan. The submission then is that, as is apparent from the provisions of s 18(1), prior to the granting of such loan and the registration of security over the property, the Bank will have satisfied itself not only that the applicant is a registered home builder, but also that the development project is or will be enrolled as required by s 14(1) of the Act.

[30] The reading of s 18 makes it clear that its concern is the lending of money by a financial institution to a housing consumer with a view to enabling the housing consumer to purchase a home from a home builder. The first respondent does not allege that the Bank has lent money to a housing consumer nor does it allege that the applicant is a housing consumer. The first respondent also does not allege that the Bank lent the money to the applicant with a view to enabling the applicant to acquire a home from a home builder. In fact, that applicant is the home builder and is not in the process of acquiring a home from a home builder. In my view the reliance by the first respondent on s 18 is misplaced.

[31] The first respondent submitted further that the Bank's interest in the property as its security is also apparent from the provisions of clause 5 of the bond agreement, which deals with improvements to the property, and stipulates that, inter alia, no structural alteration shall be done on the property without the consent of the Bank; no material improvements shall be effected on the property without the consent of the Bank; and the applicant shall keep all improvements on the property in good order and repair. The submission goes further, that the 223 residential apartments that the applicant is currently constructing on the property form an integral part of the Bank's security for the loan granted to the applicant; that they constitute improvements, the state and quality of which the Bank has an interest in; that they presently fall within the regulatory ambit of the applicant under the provisions of the Act and that the order that the applicant seeks would take them outside of the regulatory ambit of the applicant and the Act.

[32] The provisions of the mortgage bond are a matter between the applicant and the Bank and nowhere does it appear that the Bank lent the money to the applicant subject to the residential apartments being enrolled in terms of the Act. In my view, reliance on the provisions of the mortgage bond cannot assist the first respondent.

Nuku J

[33] The first respondent further relies on s 17(1) which provides:

> 'Subject to subsection (2), the Council shall pay out of the fund established for that purpose in terms of section 15(4), an amount for rectification where —
>
> *(a)* within —
>
> (i) five years of the date of occupation, a major structural defect has manifested itself in respect of a home as a result of non-compliance with the NHBRC Technical Requirements and the home builder has been notified accordingly within that period;
>
> (ii) 12 months of the date of occupation, a roof leak attributable to workmanship, design or materials has manifested itself in respect of a home and the home builder has been notified accordingly within that period;
>
> *(b)* the home builder is in breach of the home builder's obligations in terms of section 13(2)*(b)*(i) regarding the rectification of such defect;
>
> *(c)* the relevant home was constructed by a registered home builder, had been enrolled with the Council and, at the occupation date, the home was enrolled with the Council subject to section 14(4), (5) and (6);
>
> *(d)* the home builder no longer exists or is unable to meet his or her obligations; and

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(e) in the case of a home that has been enrolled with the Council on a project basis in terms of section 14(2), the application has been made by the MEC pursuant to an agreement in terms of section 5(4)*(c)*.'

[34] The submission in this regard is that, in the event that the relief sought by the applicant is granted, this will mean that, if for any reason (such as, for instance, the applicant ceases to exist) during the 5-year period referred to in s 17(1)*(a)*(i) (or even the 12-month period from date of occupation referred to in s 17(1)*(a)*(ii)) the Bank has cause to foreclose on its loan, or for whatever reason there is a forced sale of the property, then in that case the Bank or any other prospective buyer of the apartment would not have enjoyed any housing-consumer protection provided by the Act, through the applicant's regulatory function, because the residential unit will not have been enrolled.

[35] Firstly, it is clear from this submission that the Bank only has a financial interest which, as stated at [27] above, is an indirect interest and may not require joinder of a person having such interest. So too would be the interest of the Bank's successor in title. The first respondent's submission, in my view, is without merit.

[36] In any event, after the first respondent raised this point in limine, the Bank was provided with the set of papers relating to this application and the Bank has confirmed in writing that it expressly waives its right to be joined to these proceedings and will abide by the decision of this court.

[37] For the reasons set out above the first respondent's point in limine cannot succeed. I now turn to the merits of the application.

Nuku J

On a proper interpretation of the relevant provisions of the Act and the Regulations, is the applicant required to enrol its project?

[38] The central issue in this application is whether s 14(1) of the Act requires the enrolment of the residential apartments that the applicant is constructing. At first blush the reading of s 14(1) together with the definition of 'home' in the Act, as well as the categories prescribed in regs 1(2) and (4), indicates that the category of homes to be enrolled with the first respondent is very wide and includes 'any dwelling unit constructed or to be constructed by a home builder, . . . , for residential purposes or partially for residential purposes'.

[39] The applicant, however, contends that the definition of 'home' for the purposes of enrolment is necessarily limited by the context provided by the Act. In this regard the applicant made a number of submissions.

[40] Firstly, the applicant submitted that the definition of 'housing consumer', on its plain meaning, includes only persons purchasing homes, or having their own homes constructed for them by a home builder. These housing consumers are the ones who conclude agreements with registered home builders as contemplated in s 13, and who have recourse under s 17, a section which effectively provides a form of insurance to housing consumers against defects in the construction of their homes, caused by home builders and falling within the parameters set by the said section. In response, the first and second respondents submitted that the definition of 'housing consumer' should be aligned with the definition of 'business of home builder' so as to include not only the persons who acquire homes by means of sale, but also those who acquire homes by means by lease.

[41] The Constitutional Court in *Cool Ideas* para 29 observed that '(t)he entire legislative scheme is predicated upon a building contract between a registered home builder and a housing consumer being concluded'. To extend the definition of a 'housing consumer' to include those persons who acquire homes by means of lease would be at odds with the legislative scheme. A person who acquires a home by means of sale does not stand in the same position as the one who acquires a home by means of lease. This is so because in the event of a sale the parties part ways upon delivery of the home which is the subject-matter of the building contract, whereas a landlord has certain obligations towards a tenant, including an obligation to deliver a home which is not defective and, where such defects occur, it is the responsibility of the landlord to remedy them. This militates against the extension of the definition of 'housing consumer' as contended for by the first and second respondents.

[42] The second respondent submitted in the alternative that the definition of 'housing consumer' ought to have been amended to align it with the definition of 'business of a home builder', as the amendment to the definition of 'business of a home builder' signalled a change of intention by the legislature. In my view, this would amount to the court usurping the functions of the legislature. In its wisdom the legislature

Nuku J

deemed it not necessary to amend the definition of 'housing consumer' when it amended the definition of 'business of a home builder'.

[43] Secondly, the applicant submitted that the purpose of the Act is essentially the protection of the housing consumers and that the first respondent's legislative mandate is the furtherance of such protection by way of various measures provided for in the Act. The first and second respondents on the other hand place more emphasis on the fact that the ultimate objective of the Act is the regulation of the home building industry. In this regard they relied on what was stated by the Constitutional Court in *Cool Ideas* in para 30 when it said that 'the ultimate objective is the regulation of the home building industry through, amongst other things, the protection of the housing consumer and maintaining minimum standards for home builders'.

[44] There can be little doubt that the purpose of the Act is to provide protection to housing consumers. This appears from the name of the Act as well as the preamble which 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 for matters connected therewith.'

[45] The argument is that the ultimate objective of the Act is plausible. This is even more so when one reads s 3 which provides:

'The objects of the Council shall be —

(a) to represent the interests of housing consumers by providing warranty protection against defects in new homes;

(b) to regulate the home building industry;

(c) to provide protection to housing consumers in respect of the failure of home builders to comply with their obligations in terms of the Act;

(d) to establish and to promote ethical and technical standards in the home building industry;

(e) to improve structural quality in the interests of housing consumers and the home building industry;

(f) to promote housing consumer rights and to provide housing consumer information;

(g) to communicate with and assist home builders to register in terms of this Act;

(h) to assist home builders, through training and inspection, to achieve and to maintain satisfactory standards of home building;

(i) to regulate insurers contemplated in section 23(9)*(a)*; and

(j) in particular, to achieve the stated objects of this section in the subsidy housing sector.'

[46] Regulation of the home building industry is a legitimate government business. This, however, has to be understood in context: the context in this regard being the protection of housing consumers through various measures. The regulation of the home building industry must, thus, be aimed at achieving the protection of housing consumers. Where there are no housing consumers, as in the case of the residential apartments that the applicant is constructing, there could no longer be any legitimate business that the regulation of the home building industry would serve.

Nuku J

[47] Thirdly, all the parties are in agreement that s 14 is expressly grouped together with s 13 in ch 3 of the Act under the heading 'Protection of Housing Consumers' and that s 14 contains various provisions specifically aimed at the protection of the interests of housing

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consumers. The parties differed regarding the interpretation to be B accorded to the definition of a 'housing consumer', which I have already dealt with above. Flowing from the interpretation of the definition of a 'housing consumer' that excludes tenants, it follows that to require the registration of homes in circumstances where there are [no] housing consumers to protect would result in absurdity as it would not serve any legitimate purpose. I agree with the submission by the applicant that it is C neither sensible nor reasonable to impose the onerous obligation upon a home builder to enrol a home where there is no housing consumer to protect.

[48] To interpret the definition of 'home' by limiting it to homes acquired or to be D acquired by housing consumers achieves the purposes of the Act, namely to protect housing consumers. This interpretation also aligns with the entire scheme of the Act in that the Act is predicated on a building contract. Lastly, to interpret the definition of 'home' to include homes where there are no housing consumers concerned may render the provisions of the Act unconstitutional, and, as stated in *Cool Ideas* E in para 28, 'legislative provisions ought to be interpreted to preserve their constitutional validity'. To require the enrolment of homes in circumstances where there are no housing consumers to protect would be irrational and unconstitutional. I am thus persuaded that the court should exercise its discretion to grant the declaratory order.

[49] F The declaratory order sought by the applicant is couched in wide terms and includes provisions which have no bearing on the requirement for enrolment under s 14 of the Act. The only provisions that are concerned with the requirement for enrolment of homes are s 14, the definition of 'home', regs 1(2) and 1(4). It is thus only these provisions G that should be declared that, on a proper interpretation of the Act and Regulations, they do not require the enrolment of the proposed construction of a home in circumstances where the home builder is constructing such home solely for the purposes of leasing or renting out.

Costs H

[50] The applicant has been successful, and in my view the costs should follow the results. The matter is complex and justified the employment of two counsel. In fact, all the parties were represented by two counsel. For this reason I am satisfied that the employment of two counsel was warranted.

[51] I In the circumstances I make the following order:

[51.1] It is declared that the provisions of s 14, read with the definition of 'home' and 'housing consumer' in s 1 of the Act, and regs 1(2) and 1(4) of the Regulations, do not, on a proper interpretation of the Act and the Regulations, require the enrolment of J the proposed construction of a home in circumstances where

the home builder is constructing such home solely for the A purposes of leasing or renting out.

[51.2] First and second respondents are ordered to pay costs, such costs to include costs of two counsel.

Applicant's Attorneys: *Smith, Tabata, Buchanan Boyes*. B

First Respondent's Attorneys: *Werksmans*.

Second and Third Respondents' Attorneys: *State Attorneys*.

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