THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 580/12

In the matter between:

HUBBARD, ANNE CHRISTINE **Appellant**

and

COOL IDEAS 1186 CC **Respondent**

Neutral citation: *Hubbard v Cool Ideas 1186 CC* (580/12) [2013] ZASCA 71 (28 May 2013)

Coram: **NAVSA, PONNAN and THERON JJA and WILLIS and MBHA AJA**

Heard: **10 MAY 2013**

Delivered: **28 MAY 2013**

Summary: **Section 10 of Housing Consumers Protection Measures Act 95 of 1998 prohibiting unregistered home builder from receiving any consideration for construction of home – arbitration award to that effect cannot be made an order of court.**

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Victor J sitting as court of first instance):

(1) The appeal is upheld with costs.

(2) The order of the court below is set aside and in its stead is substituted the following order:

'The application is dismissed with costs.'

JUDGMENT

PONNAN JA (NAVSA and THERON JJA and MBHA AJA concurring):

[1] The purpose of the Housing Consumers Protection Measures Act 95 of 1998 (the Act), as its preamble proclaims, is to afford protection to housing consumers. It does so in various ways, including the establishment of a National Home Builders Registration Council (the Council) and the requirement that home builders be registered as such with it. Thus subsections (1) and (2) of s 10 of the Act provide:

'**10 Registration of home builders**

(1) No person shall –

(a) carry on the business of a home builder; or

(b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,

unless that person is a registered home builder.

(2) No home builder shall construct a home unless that home builder is a registered home builder.'

[2] That registration, according to subsection (3), is dependent upon the Council being satisfied that the home builder: (a) meets the criteria prescribed by the Minister of Housing; (b) will meet its obligations in terms of the Act; and (c) has appropriate financial, technical, construction and management capacity in order to prevent housing consumers and the Council from being exposed to unnecessary risk. What consequence follows upon a home builder failing to register as such but who nonetheless undertakes a building project, is the question that confronts us in this appeal. It arises for determination against the following factual backdrop.

[3] During February 2006 and pursuant to a written building contract the appellant, Ms Anne Christine Hubbard, appointed the respondent, Cool Ideas 1186 CC (Cool Ideas), to undertake certain building works for her, namely the construction of a residential dwelling unit, being unit number two of the Chesterfields in Bryanston for the contract sum of R2 695 600.00. Clause 14 of the building 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.'

[4] Disputes did indeed arise between the parties, which in terms of clause 14 of the building agreement were referred to arbitration by Ms Hubbard. Mr Charles D Cook an architect and valuer was appointed the arbitrator. Ms Hubbard, who complained about various aspects of the building works, claimed an amount of R1 231 300.50, which she asserted was the cost of the remedial works that had to be performed to her residential dwelling. Cool Ideas opposed that claim. In addition, it claimed payment of that portion of the contract sum that remained outstanding. The arbitration agreement concluded between the parties recorded, inter alia, that:

'A dispute has arisen between the parties in respect of

The work executed, and
Payment for such work.

. . . .

4. The Arbitration will be held in terms of the Arbitration Act, No. 42 of 1965.

5. The Arbitrator's award shall be final and binding. There shall be no appeal against the Arbitrator's award.'

[5] On 15 October 2010 the arbitrator made the following award:

'32.1 The Claimant [Ms Hubbard] is to pay the Respondent [Cool Ideas] the sum of the R550,211.00 inclusive of VAT (five hundred and fifty thousand two hundred and eleven rand).

32.2 Interest to be paid by the Claimant on the sum of R1,101,333.36 (one million one hundred and one thousand three hundred and thirty three rand and thirty six cents) from 7th 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 clients, compounded monthly, the start date being 7th November 2007.

32.3 Costs are awarded in favour of the Respondent.

The Claimant shall be responsible for all of the Arbitrator's fees.

Any portion of the Arbitrator's fees paid by the Respondent must be reimbursed by the Claimant to the Respondent together with the amounts due in respect of paragraphs 32.1 and 32.2 above.

The costs incurred in respect of the preparation of the Statements of Issues and responses thereto were not claimed by the parties and are excluded herefrom.

32.4 All amounts due in terms of this award shall be payable by the Claimant to the Respondent within seven days from the date of handing down this award.

32.5 Any amounts due and remaining unpaid by the due date as set out in paragraph 32.4 herein shall accrue interest as for a judgement debt at the rate of 15.5% per annum compounded monthly from the date due for payment.'

[6] As Ms Hubbard failed to satisfy the arbitration award, Cool Ideas applied to the South Gauteng High Court in terms of s 31 of the Arbitration Act 42 of 1965 for the award of the arbitrator to be made an order of court. That application was opposed by Ms Hubbard, who in support of her opposition stated:

'24. . . . [I]t was discovered . . . that the Applicant [Cool Ideas], whom I contracted to construct my home, was not registered as a home builder in terms of the Housing Consumer Protection Measures Act No. 95 of 1998.

25. The effect of the above, so I am advised, is that that Applicant 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 Consumer Protection Measures Act No. 95 of 1998, in respect of the sale or construction of a home.

. . . .

27. The result of the above is, so I am advised, that the Applicant 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 064 746.00 (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.

. . . .

91. 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 Consumer Protection Measures Act NO. 95 of 1998, in relation to an agreement in respect of the construction/sale of a home, while such an entity is not registered in terms of the Housing Consumer Protection Measures Act No. 95 of 1998 as required by such an Act.

92. I am advised, advice which I accept, that by applying to the above Honourable Court to have the said arbitration award made an order of court, the Applicant is requiring of the Honourable Court to make an order contrary to an express prohibition imposed by the Legislator and that a Court cannot be asked to order the performance of a prohibited or criminal act.

93. I am furthermore advised that the arbitrator acted *ultra vires* in making the above order, which resulted in the award being void *ab initio* and/or being a nullity and therefore the award is incapable of being made an order of this Honourable Court.'

[7] The application came before Victor J who concluded:

'1. In terms of Section 31 of the Arbitration Act 42 of 1965 the award of the Arbitrator Mr C D Cook dated 15 October 2010 is hereby made an order of court.

2. The costs of the application should be paid by the respondent.

3. The late filing of the replying affidavit and the costs of the condonation application should be paid by the applicant.'

The appeal is with the leave of this court.

[8] In arriving at that conclusion the high court reasoned:

'[15] The respondent simply relies on the direct prohibition where it is pre-emptory that not only the project, but also that the builder be registered in terms of the said Housing Act. The respondent relies on Bekker v Schmidt Bou-Ontwikkelings CC And Others 2007 (1) SA 600 (C) 607 to 608) which holds that the registration in terms of S10 of the Act is absolute. It is on this basis that the respondent contends that the arbitration award is void.

[16] One of the distinguishing features in this case is that by the time the applicant wished to make the arbitral award an order of this court it had registered as a home builder in terms so Act.

"14A Late enrolment and non-declared late enrolment

(1) 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;"

[17] The Act clearly envisions the situation where late registration is permissible after the building has commenced and therefore peremptory provisions of section 10 are to be read with section 14A of the act. "2) No home builder shall construct a home unless that home builder is a registered home builder".

[18] This amendment was introduced in 2007. The further distinguishing feature in this case is that the work was done by Velvori Construction CC a registered home builder as required in terms of the Act.

[19] To preclude the applicant from its clam at this stage is really to give effect to form over substance. The substance of the applicant's claim at this stage is that it is a registered builder and that at the time it executed the building work it did so in cooperation with the subcontractor Velvori Construction CC a properly registered entity as it was entitled to do.'

[9] In this court neither counsel sought to support the reasoning of the high court. Nor, I daresay, could they. For, it seems to me that both pillars underpinning its conclusion are flawed. *In respect of the first:* Section 14 appertains to the enrolment of the home (the subject of the construction) with the Council. It prohibits a home builder from commencing the construction of that home unless the Council has issued a certificate of enrolment in respect of it. It is so that s 14A permits late enrolment, but that

is only after certain fairly stringent requirements as prescribed by that section have been met. That in any event has to occur prior to the completion of the construction. By its very nature the protection afforded to a housing consumer by s 14 is in addition to that afforded by s 10. Any relaxation afforded by s 14A for the failure of the home builder to comply with s 14 plainly does not find application to s 10. Significantly, in respect of s 10 one finds no counterpart to s 14A. That is perhaps the clearest indicator that the legislature did not intend a relaxation of those prohibitions. The broad thrust of the Act is obviously to protect home consumers, the vast majority of whom will undoubtedly be poor and unsophisticated, against shoddy and unsafe houses at the hands of unskilled, unregistered and perhaps even unscrupulous home builders. *In respect of the second:* It matters not that the work may have been done by Velvori Construction CC (which in any event has not been admitted by Ms Hubbard), for in those circumstances, s 10(7) required both it and Cool Ideas to be registered as home builders. It thus hardly availed Cool Ideas that Velvori Construction CC may have been registered as a home builder.

[10] One of the earliest cases that had to consider the consequence for the validity of an act that has taken place in conflict with a statutory prohibition was *Schierhout v Minister of Justice*1926 AD 99 at 109 in which Innes CJ said:

'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.'

But as Nugent JA pointed out in *Lupacchini NO v Minister of Safety and Security* 2010 (6) SA 457 (SCA) para 8:

'. . . [T]hat will not always be the case. Later cases have made it clear that whether that is so will depend upon the proper construction of the particular legislation. What has emerged from those cases was articulated by Corbett AJA in *Swart v Smuts* [1971 (1) SA 819 (A) at 829C-G].

"Die regsbeginsels wat van toepassing is by beoordeling van die geldigheid of nietigheid van 'n transaksie wat aangegaan is, of 'n handeling wat verrig is, in stryd met 'n statutêre bepaling of met verontagsaming van 'n statutêre vereiste, is welbekend en is alreeds dikwels deur hierdie Hof gekonstateer (sien *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Sutter v Scheepers* 1932 AD 165; *Leibbrandt v South African Railways* 1941 AD 9; *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (AD); *Pottie v Kotze* 1954 (3) SA 719 (AD), *Jefferies v Komgha Divisional Council* 1958 (1) SA 233 (AD); *Maharaj and Others v Rampersad* 1964 (4)

SA 638 (AD)). Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang. In die algemeen word ‘n handeling wat in stryd met ‘n statutêre bepaling verrig is, as ‘n nietigheid beskou, maar hierdie is nie ‘n vaste of onbuigsame reël nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die Wetgewer geen nietigheidsbedoeling gehad het nie.'"

[11] 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 (s 21) and will be prevented from enforcing his or her claim.

[12] Counsel for Cool Ideas was constrained to accept that had it issued a summons against Ms Hubbard for payment of the consideration she could successfully have excepted to it (*IS & GM Construction CC v Tunmer* 2003 (5) SA 218 (W)). Here though, so it was contended, an arbitration intervened. That, so the contention proceeded, materially altered the situation. I cannot see how it does. For present purposes I shall assume, without deciding, that the arbitration award is a valid award. The purpose of the arbitration, as the arbitration agreement makes plain, was to determine the work that had been executed by Cool Ideas and the consideration to be paid by Ms Hubbard for such work. The arbitrator determined the consideration to be paid by Ms Hubbard to Cool Ideas and issued an award to that effect. It is that award that Cool Ideas seeks to have made an order of court. But that a court cannot do. For, as Innes CJ pointed out in *Hoisain v Town Clerk, Wynberg* 1916 AD 236 at 240

'It is sought to compel the Town Clerk to place the applicant's name upon the statutory list; he can only do that upon the grant of a certificate by the Council, which that body has definitely refused to give. Such a certificate is not in truth in existence. So that the Court is asked to compel the Town Clerk to do something which the Statute does not allow him to do; in other words we are asked to force him to commit an illegality. There can be no question of estoppel as far as he is concerned. His negligence cannot be a substitute for the Council's approval, nor can he by virtue of his mistake be compelled to bring about a position which he has no power in law to create by his own free will.'

[13] The section makes it clear that a home builder may not act in that capacity at all without the requisite registration. If we were to find that notwithstanding a home builder having acted in conflict with the section he or she would nonetheless be entitled to payment of the consideration it seems to me that we would be giving legal sanction to the very situation that the legislature wished to prevent (*Pottie v Kotze* 1954 (3) SA 719 (A) at 726H). One of the objects of the Act is to protect members of the public who have to do business with home builders. The prohibitions in ss 10(1) and (2) and the penalties in s 21 are intended to make that protection effective. It accordingly matters not that an arbitration intervened. For, it seems to me, that even were Ms Hubbard not to have disputed Cool Ideas' claim, the legislation operated to preclude a court from entering judgment in its favour.

[14] Although not absolutely neccessary in the light of my approach to the matter, I nonetheless deem it prudent to briefly touch on some of the arguments advanced on behalf of Cool Ideas. First, much was sought to be made of the equities in this case. On a proper approach to the matter the equities hardly come into the reckoning because, simply put, the equities cannot be invoked with a view to in some way trumping an illegality. In *S v Zuma & others* 1995 (2) SA 642 (CC), Kentridge AJ stated (para 17):

'While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

He added (para18): '. . . [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.'

Likewise, whilst it is always helpful to trawl through the old authorities and analogous cases for the general principles that they establish, those cannot be called in aid to do violence to the language of a statute by placing upon it a meaning of which it is not reasonably capable. It remains for the court considering the legislation to give effect to the object or purpose of the legislation (per Innes CJ, *Dadoo v Krugersdorp Municipal Council* 1920 AD 530 at 543). In all such instances where ss 10(1) or (2) finds application some building work would have been undertaken by the home builder. And although on the face of it, it may appear to work an injustice that a consumer should garner the benefit of those labours without having to compensate the home builder, that is the outcome that has been decreed by the legislature. It is one that is applicable to all home builders who have failed to register as such, not just those who may prove to be unscrupulous. It is thus wholly irrelevant that the work may have been undertaken with the necessary skill or that, as is the case here, the housing consumer happens to be a fairly sophisticated individual from one of the more affluent suburbs of Johannesburg rather than a historically disadvantaged resident from one of our poorer townships. I may add that whilst it is so that at first blush the equities appear to favour the home builder in this case, on more careful reflection that is not case. Cool Ideas undertook the construction of Ms Hubbard's home without having been registered as a home builder. That it had not registered as such was information that was peculiarly within its knowledge. After disputes arose it proceeded to arbitration, with full knowledge that it suffered a legal impediment. It was only after the entire arbitration process had run its course and an award had issued that Ms Hubbard came to discover that Cool Ideas was not a registered home builder. Even then there was no pause for reflection on its part. Instead, it persisted, that revelation notwithstanding, in its endeavour to have the arbitration award made an order of court. It may thus be fairly said that Cool Ideas was very much the author of its own misfortune. In those circumstances I baulk at manifesting any sympathy for Cool Ideas, for to do so may well attract the epithet 'maudlin'.

[15] Second, it was argued that courts are obliged to show due deference to arbitration awards. But that is to mischaracterise the enquiry. It is important to recognise that we are not here dealing with whether an arbitrator's award can and should be set aside. Rather the enquiry with which we are engaged is whether such an award can and therefore should be made an order of court, where to do so would admittedly fly in the face of a clear statutory prohibition. The legion of cases that distinguish between a court's review as opposed to appeal power and emphasise the fairly limited grounds on which an arbitartion award can indeed be set aside, serve to obfuscate the present enquiry. That aside though, it seems to me, that it can hardly be expected of a court to show deference to an arbitration award in circumstances where for it to do so would result in it lending its imprimatur to an illegality. In those circumstances any such deference must necessarily yield to the deference that a court is obliged to show to the will of the legislature. It may well be that the arbitration is void ab initio. But I have specifically refrained from going that far. It suffices for present purposes to observe that had the point been taken before the arbitrator, I can hardly imagine that he could, simply in disregard of it, have proceeded to finalise the matter on the terms that he did. For, had he done so, it hardly seems likely that a court would have sat idly by were it to be called upon to review the award. I venture to suggest that it is the very antithesis of the rule of law for a court to simply disregard a clear legislative prohibition that neither party has sought to constitutionally impugn. Here the legislature has chosen, in its wisdom, not to vest the courts with a discretion as to whether or not to allow claims by home builders for consideration in circumstances where they have failed to register as such. All such claims, without exception, are hit by the prohibition. The language employed by the legislature could not have been clearer. And where the legislature, as here, has expressed itself in clear and unambiguous terms, a court cannot appropriate for itself a power that it does not have under the guise of ameliorating any perceived harshness that may result from the enforcement of that legislation. A court, no matter how well intentioned, is therefore not free simply on a whim to act in flagrant disregard of a statutory prohibition thereby rendering the will of the legislature nugatory. That, in my view, our Constitution does not countenance.

[16] It follows that the appeal must succeed and it is accordingly upheld with costs. The order of the court below is set aside and in its stead is substituted the following:
'The application is dismissed with costs.'

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V PONNAN
JUDGE OF APPEAL

WILLIS AJA (dissenting):

[17] I have had the benefit of reading the judgment of my brother Ponnan. I regret that we do not agree. After the appellant had filed her answering affidavit on 14 February 2011 in which she raised, for the first time, the issue of the respondent's non-registration as a home builder, the respondent registered as such with effect from 11 March 2011. Mr Thihangwani Mudau, the provincial manager of the National Home Builders Registration Council, addressed co-operative letter to Mr Etienne Hayward of the appellant on 1 April 2011 in which he records that the appellant's property had been re-enrolled with the council under the respondent's name and that this had been necessary 'in order to align the business model' adopted by the respondent and Velvori Contruction CC with the requirements of section 10 of the Act. Mr Mudau added that:
'This re-enrolment of the above stand has no impact on the protection afforded on home owners by the Act and though the membership of Velvori Construction expired on 14/11/2008 this has no bearing on the protection afforded to housing consumers'.
There is nothing before us to indicate that the respondent had the requisite *mens rea* to conduct business unlawfully.

[18] Lest it seem that my disagreement with my colleagues is unduly fractious or febrile, I should point out that the issue of what should be done when an act is prohibited by law has troubled even the ancients. An example of this is to found in Johannes Voet's *Commentarius Ad Pandectas*[1] where he says:

[1] J Voet *Commentarius Ad Pandectas* (1723).

'(i) *Quorum omnium hanc rationem puto, quod in hisce aliisque similibus ipsam gestorum rescissionem majora sequerentur incommoda, majorque indecentia, quam ipsum actum contra leges gestum comitantur.*' [2]

A little later, in the same section, Voet continues:

'(ii) *Hoc communis praxios fundamento niti putem, quod apud Groitium legitur, ita demum contra leges gesta ipso jure infirma esse, si id lex nominatim expresserit; vel ei, qui quid gessit aut fecit, gerendi facultatem & habiltatem denegaverit; vel denique id, quod gestum est, manifesta ac permanente turpitudine laboret*.'[3]

Sir Percival Gane[4] translated these passages as follows respectively:

'(i) The reason for all these things is, I think, that in these and the like cases greater inconveniences and greater impropriety would follow on the actual rescission of the things done, than attend the actual thing done contrary to the laws.

. . .

(i) I should think that on this foundation of general practice rests what is found in Grotius, namely that things done against the law are only *ipso jure* invalid if the law has so expressed it in clear words; or has denied the capacity and ability of performance to him who has done or performed the thing; or finally if the act performed suffers from some obvious and ingrained disgrace.'

[19] In *Standard Bank v Estate Van Rhyn*,[5] Solomon JA delivering the judgment of the court, referred to these passages to hold that care should be taken to ensure that 'greater inconveniences and impropriety' do not result than 'would follow the act itself done contrary to the law'.[6] When Solomon JA alluded to 'inconveniences and impropriety' he could just as well have said 'injustices'. This case has been followed in innumerable cases since then, most recently, by this court, in *Oilwell (Pty) Ltd v Protec International Ltd*.[7]

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[2] At 1.3.16.
[3] *Ibid*.
[4] P Gane *The Selective Voet being the Commentary on the Pandects* vol 1 (1955) at 46-47.
[5] *Standard Bank v Estate Van Rhyn* 1925 AD 266.
[6] At 274.
[7] *Oilwell (Pty) Ltd v Protec International Ltd and others* 2011 (4) SA 394 (SCA) para 19.

[20] In *The Effect of Illegality in South African Law, a Doctrinal and Comparative Study*,[8] Leon Trakman says:

'Few areas of law reflect the problems inherent in the system of South African private law as readily as do the effects of illegality in contract. The law is essentially institutional, finding its basis in the ancient Roman law as interpreted by the glossators and commentators, as adopted into the Roman-Dutch law, and as finally reflected in the South African law. The system reflects the inevitable conflict between an attempt to remain as close as possible to the institutional writings upon which the substantive law is founded and the need to acknowledge the advent of changing circumstances. The court has to face situations not anticipated by the Roman and Roman-Dutch authorities, and advance the system accordingly in the interests of effectiveness, necessity, justice and expediency.'

The Roman and Roman-Dutch authorities could not have anticipated 'modernity'. It is a term that eludes easy definition. Generally, it refers to the period (and the social conditions and processes) consequent upon the Enlightenment.[9] It has been characterized by a belief that the world is capable of transformation through human intervention.[10] The period is marked by the rise of capitalism, increasing complexity of economic institutions, industrial production, the market economy, large-scale social integration, the nation state and mass production.[11]

[21] If the old authorities could not have anticipated modernity, how much less so would they have had 'postmodernism' in mind? Postmodernism has ventured critiques of the rationalistic inheritance of the Enlightenment and the subsequent rise of modernism. It has been influenced by thinkers such as Thomas Altizer, Jean Baudrillard, Jacques Derrida, Michael Foucault, Jürgen Habermas, Søren Kierkegaard, Jean-François Lyotard, Robert Scharleman and Mark Taylor. Arising in response to the tragic history not only of the western world but also the failures of socialism in so much

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[8] L E Trakman 'The effect of illegality in South African law – a doctrinal and comparative study' (1977) 94 *SALJ* 327-341 and 468-482 at 327.

[9] See for example, A Giddens *Conversations with Anthony Giddens: Making Sense of Modernity* (1998) at 94; R Leppert 'The Social Discipline of Listening' in J Drobnick (ed) *Aural Cultures* (2004) at 19-35; C Norris 'Modernity' in T Honderick (ed) *The Oxford Companion to Philosophy* (1995) at 583.

[10] *Ibid*.

[11] *Ibid*.

of the world over the past century, postmodernism is characterised by cynicism, scepticism and an attack on the 'complacencies' of modernism.

[22] All over the world, among the consequences of modernity, followed upon by 'postmodern' terms of reference, has been the regulation of our lives to an extent that would have been unimaginable a generation ago. Among the consequences of postmodernism is that formalism in law has come under scrutiny. The inaugural lecture of Christopher Forsyth, erstwhile professor of public law at the University of Cape Town and now of the University of Cambridge, provides a helpful understanding of the issue.[12]

[23] As Trakman points out in his article on the effect of illegality in contract, the root of the reluctance to give effect to contracts 'tainted by illegality' is to be found in the concept of certain contracts arising *ex turpi causa* (out of a wicked/evil purpose) and which are *contra res publica* (contrary to public policy) or *contra bonos mores* (contrary to good morals).[13] For thousands of years, people have been building homes for others for 'consideration' without the benefit of section 10(1) of the Housing Consumers Protection Measures Act 95 of 1998 (the Act). Not only is there abundant evidence across the globe that, in general, builders have, in doing so, advanced the progress of the human race but also that most human beings have scant sense of 'turpitude' when houses are built by someone who is not registered as a 'home builder' in terms of the Act.

[24] The long title of the Act provides that its purpose is, *inter alia*, 'to make provision for the protection of housing consumers'. In plain English, the purpose of the Act is to protect from charlatans, carpetbaggers and confidence tricksters those who pay for homes to be built, either for themselves or for others. This is a purpose deserving of respect and support from the courts. To make this particular arbitration award an order of the court will not give impetus to the nefarious activities of any bogus builders.

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[12] C Forsyth 'Showing the fly the way out of the flybottle: the value of formalism and conceptual reasoning in administrative law' (2007) 66 *Cambridge Law Journal* 325.
[13] Trakman *supra* at 328-329. See also *Colonial Banking & Trust Co Ltd v Hill's Trustee* 1927 AD 488.

[25] In *Jajbhay v Cassim*[14] Watermeyer JA, who delivered the leading judgment of the court, gave a careful review of the old authorities as well as English law and concluded that, even in Roman law there were exceptions to the general rule that a court will not enforce an unlawful contract and that the need to prevent injustice was one of these exceptions.[15] In that case Centlivres JA referred approvingly to a Scottish case in which the sale of potatoes had been illegal because it took place in contravention of a statute,[16] *Cuthbertson v Lowes*[17] and noted that the 'pact [was] not so illicit that the Court could not look at it'.

[26] In *Sutter v Scheepers*,[18] Wessels JA, who delivered the judgment of the court, held that a court should consider the objects and scope of a statutory provision and if its terms were strictly carried out, this would lead to injustice, then that provision should be interpreted as being directory rather than peremptory.[19] This case has been refered to with approval in innumerable cases and, in this court, most recently in *Geue v Van der Lith*.[20]

[27] Section 21 of the Act provides a criminal sanction for non-compliance with the section in contention. The principle of *nulla poena sine lege* (the principle of legality), to which the Constitutional Court referred with approval in *S v Dodo*,[21] must apply. The word *poena* in Latin is difficult to translate into English. It means 'punishment' or 'penalty' but denotes, in general, a criminal sanction.[22] In *Scagell v Attorney-General, Western Cape*,[23] The Constitutional Court affirmed that it has long been recognised by our courts that, unless there are clear and convincing indications to the contrary in a statute, the prosecution will be required to prove the necessary *mens rea* on behalf of

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[14] *Jajbhay v Cassim* 1939 AD 537.
[15] At 550-551.
[16] At 558.
[17] *Cuthbertson v Lowes* (1870) 7 Sc.L.R.706.
[18] *Sutter v Scheepers* 1932 AD 165.
[19] At 174.
[20] *Geue v Van der Lith* 2004 (3) SA 333 (SCA) para 18.
[21] *S v Dodo* 2001 (3) SA 382 (CC) para 13.
[22] See, for example, the *Oxford Latin Dictionary*.
[23] *Scagell v Attorney-General, Western Cape 1997 (2) SA 368 (CC)*.

the accused. [24]The principle of legality suggests that, in the absence of *mens rea* court should be reluctant to visit a nullity upon a contravention of the provision. Jonathan Burchell, in both his *South African Criminal Law and Procedure, General Principles of Criminal Law*[25] and his *Principles of Criminal Law*,[26] renders the maxim as *nullum crimen sine lege*. Burchell refers to Pomorski's *American Common Law and the Principle Nullum Crimen Sine Lege*.[27] There is nothing in the record before us that shows that the respondent or its key actor, Etienne Hayward, had the requisite *mens rea*. This is a further factor that should be taken into account.

[28] There are a number of cases taken from the law reports furnishing examples which suggest that, in the particular case before us, the appeal should be dismissed. In *Pottie v Kotze*[28] Fagan JA, dealing with a Transvaal Ordinance which forbade the sale of a motor vehicle without a valid roadworthy certificate, referred to 'serious inequities [that] might be caused, by the invalidation of the contract'[29] and declined to vitiate the agreement in question.

[29] In *Swart v Smuts*,[30] Corbett JA, delivering the unanimous judgment of the court, referred to numerous cases before concluding:

'Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang.'[31]

This may be translated as follows:

It appears from these and other relevant authorities that the statutory provision in question does not even expressly provide that the intention of the legislature is that the validity of such a transaction is of null and void and of no force and effect. (My translation).

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[24] Para 33.
[25] J Burchell *South African Criminal Law and Procedure – General Principles of Criminal Law* 4 ed (2011) at 34.
[26] J Burchell *Principles of Criminal Law* 3 ed (2005) at 94.
[27] S Pomorski *The American Common Law and the Principle of* Nullem Crimen Sine Lege 2 ed (1975).
[28] *Pottie v Kotze* 1954 (3) SA 719 (A).
[29] At 727B-C.
[30] *Swart v Smuts* 1971 (1) SA 819 (A).
[31] At 829E-F.

The court confirmed that a deed of sale in conflict with the provisions of section 23(1)(*b*) of the Agricultural Credit Act 28 of 1966 was not invalid because it did not have a certificate that there was a reasonable prospect that the Land Bank would grant him credit.

[30] In *Noragent (Edms) Bpk v De Wet*[32] a full bench of the Transvaal Provincial Division consisting of Nestadt, O'Donovan and Van Niekerk JJ referred to *Swart v Smuts* to hold that an agreement between an estate agent and an owner of land was not invalid merely by reason of the fact that the estate agent had failed to comply with the provisions of section 26 of the Estate Agents Act 112 of 1976.

[31] This decision was approved in *Taljaard v TL Botha Properties*[33] where the court dealt with a similar matter. Nugent JA delivered the unanimous decision of the court in holding that '[i]t is well established that legislation is to be construed so as to interfere as little as possible with established rights'.[34]

[32] In the *Oilwell v Protec* case[35] this court held that the failure to obtain prior consent from the treasury for an agreement falling under reg 10(1)(*c*) of the Exchange Control regulations[36] promulgated under the Currency and Exchanges Act 9 of 1933 was, by reason of the principles set out in *Standard Bank v Estate van Rhyn*,[37] not a nullity. Ponnan JA was a member of that court.

[33] In *Bekker v Schmidt Bou-Ontwikkelings CC*,[38] Yekiso J held of section 10 of the Housing Consumers Protection Measures Act that:

'The Legislature could never have contemplated that failure or omission by the home builder, either deliberately or through ignorance, to comply with the provisions of the Act should result in

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[32] *Noragent (Edms) Bpk v De Wet* 1985 (1) SA 267 (T).
[33] *Taljaard v TL Botha Properties* 2008 (6) SA 207 (SCA).
[34] Para 8.
[35] *Supra*.
[36] Exchange Control Regulations, GN R1111, *GG Extraordinary* 123, 1 December 1961.
[37] *Supra*.
[38] *Bekker v Schmidt Bou-Ontwikkelings CC and others* 2007 (1) SA 600 (C).

the invalidity of the agreement contemplated in s 13 of the Act and the prejudice of the housing consumer'.[39]

[34] One is mindful of the fact that Goldblatt J held in *IS & GM Construction CC v Tunmer* 2003 (5) SA 218 (W) that:

'*I am satisfied that the particulars of claim do not disclose a cause of action in that the plaintiff, in view of the facts pleaded, is obliged to allege that it is a registered home builder as defined in the Act, before it can receive any consideration.*'[40]

If, by way of hypothetical example, the plaintiff had pleaded that it was not at the relevant time a registered home builder but had putatively been one, bona fide believing that it had been so registered, when it was not, owing to fraud and/or negligence in the registering office, would an exception still be upheld? In other words, non-registration as a home builder would not necessarily and in every instance result in a plaintiff not having a claim against its employer. The particular facts of any given case are always of the utmost importance.

[35] There is a further consideration that militates against interfering with the order of the court a quo: the principle of judicial deference to arbitration awards. In *Telcordia Technologies Inc v Telkom SA Ltd*[41] Harms JA delivering the judgment of this court affirmed the principle of party autonomy in arbitration proceedings and the need to minimise judicial intervention in arbitration proceedings.[42]

[36] In *Boksburg Town Council v Joubert*,[43] which is particularly relevant , the court, in the context of an arbitration award, referred to both *Doyle v Shenker & Co Ltd*[44] and *Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk*[45] to hold that a bona fide misinterpretation or an unintentional overlooking of a provision of a statute does not constitute a gross irregularity and affords no grounds for review.

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[39] Para 27.
[40] At 220H-I.
[41] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).
[42] Para 4.
[43] *Boksburg Town Council v Joubert and others* 1964 (4) SA 73 (T).
[44] *Doyle v Shenker & Co Ltd* 1915 AD 233.
[45] *Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk* 1955 (1) SA 557 (A) at 569.

[37] In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*,[46] the Constitutional Court affirmed the *Telcordia* judgment but emphasised the need for the courts to ensure that certain standards, including procedural fairness, had to be met to prevent injustice. Therein lies the control measure of application in undeserving cases where a builder was unregistered. The court had to consider a case where an application to have an order made an order of court in the High Court was granted. A counter application to review that decision was dismissed. This court dismissed the appeal. The majority supported the judgment of O'Regan J. Both she and Kroon AJ, supported the reasoning in the *Telcordia* case and affirmed the need for deference to arbitration awards.

[38] Ever since *Dickenson & Brown v Fisher's Executors*[47] it has been our law that a mistake of law by an arbitrator does not permit interference by a court. This case has been affirmed in numerous cases: See, recently in this court: *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*[48] and *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd*.[49]

[39] In *Total Support Management*, Smalberger ADP, delivering the unanimous judgment of this court affirmed that 'even a gross mistake, unless it establishes *mala fides* or partiality, would be insufficient to warrant interference'.[50] Smalberger ADP affirmed[51] the correctness of decision of Mpati J in *Patcor Quarries CC v Issroff*[52] to the effect that there was nothing to show the arbitrator's mistake was gross and, accordingly, there could be no interference.[53]

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[46] *Lufuno Mphaphuli & Associates (Pty) Limited v Andrews and another* 2009 (4) SA 529 (CC).
[47] *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174-176.
[48] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (SCA) at 10E.
[49] *Total Support Management (Pty) Ltd and another v Diversified Health Systems (SA) (Pty) Ltd and another* 2002 (4) SA 661 (SCA).
[50] Para 17.
[51] Para 25.
[52] *Patcor Quarries CC v Issroff and others* 1998 (4) SA 1069 (SE).
[53] Mpati J's judgment at 1079F-1082G.

[40] In this case the mistake was unusual inasmuch as the same mistake was made not only by at least one of the parties but also by the arbitrator rather than concerning a rule of common law or a statutory provision that he was specifically called upon to decide. Elementary set theory in mathematics makes it plain that if three persons make the same mistake it remains as much a mistake as if it had been made by only one person or two. A mistake by an arbitrator does not become a non-mistake because the parties themselves made the same mistake. The mistake in question could conceivably have been made by any number of judges discharged from active service or senior counsel who act as arbitrators.

[41] In *Interciti Property Referrals CC v Sage Computing (Pty) Ltd*,[54] in a case concerning the making of an arbitrator's award an order of Court, Zulman J referred to *RPM Konstruksie (Edms) Bpk v Robinson*[55] and *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd*[56] to hold that even if an arbitrator's reasoning is flawed this is no reason not to make his award and order of court.[57]

[42] In *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd*[58] Goldstone JA said that the parties 'abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator.'[59]

[43] If one has regard to *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[60] recently decided in this court, it cannot be that the 'purpose to which [the section] is directed' is that in every instance the builder would be left empty handed. That could have unfortunate and unjust results. Not making the award an order of the court would be an unjust result in this particular case. The overall thrust of both the

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[54] *Interciti Property Referrals CC v Sage Computing (Pty) Ltd and another* 1995 (3) SA 723 (W).
[55] *RPM Konstruksie (Edms) Bpk v Robinson* 1979 (3) SA 632 (C) at 636A-B.
[56] *Hyperchemicals International (Pty) Ltd and another v Maybaker Agrichem (Pty) Ltd and another* 1992 (1) SA 89 (W).
[57] At 727G-H.
[58] *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A).
[59] At 169F-G.
[60] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) Para 18.

majority and the minority judgments in *National Credit Operator v Opperman and Others*[61] in favour of avoiding legislative sledgehammers provides me with final encouragement.

[44] I should have dismissed the appeal with costs.

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N WILLIS
ACTING JUDGE OF APPEAL

[61] *National Credit Operator and Others v Opperman* 2013 (2) SA 1 (CC).

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