THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 780/2018 and 784/2018

In the matter between:

NATIONAL HOME BUILDERS'
REGISTRATION COUNCIL **FIRST APPELLANT**

MINISTER OF HUMAN SETTLEMENTS **SECOND APPELLANT**

and

XANTHA PROPERTIES 18 (PTY) LTD **RESPONDENT**

Neutral citation: *National Home Builders' Registration Council & another v Xantha Properties 18 (Pty) Ltd* (780/2018 and 784/2018) [2019] ZASCA 96 (21 June 2019)

Coram: Leach, Saldulker and Van der Merwe JJA and Gorven and Weiner AJJA

Heard: 27 May 2019

Delivered: 21 June 2019

Summary: Housing – Housing Consumers Protection Measures Act 95 of 1998 – whether s 14(1) of that Act applies to homes being built with the intention that they be let and not sold.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Nuku J sitting as court of first instance):

1 The appeal is upheld, with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following:

'The application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Leach JA (Saldulker and Van der Merwe JJA and Gorven and Weiner AJJA concurring)

[1] The issue in this case is whether the respondent, who is registered as a 'home builder' as defined in s 1 of the Housing Consumers Protection Measures Act 95 of 1998 (the Act), is obliged to comply with the provisions of s 14(1) of the Act in respect of homes being built solely for the purpose of being let. The Western Cape Division of the High Court, Cape Town decided that the section was of no application in those circumstances and issued an order declaring that to be the case. The appeal against that order is with the leave of the court a quo.

[2] The first appellant (the Council) is the National Home Builders' Registration Council established in terms of s 2 of the Act. It is composed of at

least seven members appointed by the second appellant, the Minister of Human Settlements, who is obliged to ensure that it consists of persons who are 'representative of the interests' of various parties in the home building industry.[1] Section 3 of the Act provides the objectives of the Council. Those include the regulation of the home building industry;[2] the establishment and promotion of ethical and technical standards;[3] and the improvement of structural quality in the interest of the industry.[4]

[3] The respondent, Xantha Properties 18 (Pty) Ltd, carries on business in the building construction industry. It embarked upon the construction of a property development in Wynberg, Cape Town consisting of shops and 223 residential apartments. It averred that it had no intention of selling these apartments or developing them in terms of a sectional title scheme but intended to rent them to tenants. In these circumstances, the respondent disputed being obliged to enrol the project with the first appellant or to pay the prescribed enrolment fee as prescribed by s 14(1) of the Act, to which provisions I shall return in due course.

[4] The respondent took the matter up with the Council, arguing that the Act was intended to provide a form of housing insurance in favour of housing consumers against errant home builders. It contended that where, as in the present case, there was no third party but the home builder was, itself, the effective end user of the apartments which it intended to rent out, it was absurd to expect it to insure against itself. The Council did not agree and advised the respondent to enrol the apartments. This it ultimately did, and paid the assessed enrolment fee (a sum in excess of R1.5 million) but did so under protest. It then

[1] Section 4 of the Housing Consumers Protection Measures Act 95 of 1998 (the Act).
[2] Section 3*(b)* of the Act.
[3] Section 3*(d)* of the Act.
[4] Section 3*(e)* of the Act.

applied to the high court for an order declaring that s 14(1) did not require a home builder to enrol houses being constructed solely for the purpose of being let. As mentioned at the outset, that court decided in its favour.

[5] In considering the interpretation of the Act, it is necessary to remind oneself, as this court recently pointed out in *Adendorf*,[5] that the Act is consumer-protection legislation designed to offer protection against incompetent builders and the construction of homes having structural defects, and that to achieve those aims it requires registration of home builders and the enrolment of the homes they build. Bearing that in mind, I turn to the relevant provisions of the Act.

[6] As a starting point, a 'home' is defined in s 1 of the Act as meaning

'. . . 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.'

(I must immediately mention that the respondent accepts that apartments being constructed by the respondent fall within this definition as read with the regulations as they currently stand, so that such issue need not be debated further for purposes of this judgment.)

[7] Crucial to the decision in this case are the further definitions in s 1 of 'home builder' and 'business of a home builder'. The two are inter-related. A home builder is defined, inter alia, as meaning 'a person who carries on the business of a home builder' whilst such business is defined as meaning:

'*(a)* to construct or to undertake to construct a home or to cause a home to be constructed for any person;

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[5] *National Home Builders Registration Council v Adendorf & others* [2019] ZASCA 20 para 6.

(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.'

The words 'leasing, renting out' contained in sub-para *(b)* of this definition were not included in the Act as originally passed but were inserted with effect from 9 April 2008 by way of the Housing Consumers Protection Measures Amendment Act 17 of 2007 (the Amendment Act). I mention this as it forms part of the respondent's argument, as shall become apparent in due course.

[8] Section 10 of the Act goes on to require 'home builders' to be registered as such, and prescribes that no person may carry on the business of a home builder unless so registered. Section 10(3) further provides that the council may only register a home builder if satisfied that the person seeking registration meets various criteria, will comply with a home builder's obligations in terms of the Act, and has the appropriate financial, technical, construction and management capacity to do so.[6]

[9] Importantly, s 14(1) of the Act, which lies at the heart of this appeal, 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.'

[6] Section 10(3).

[10] At first blush these provisions, as they currently stand, therefore provide for a person who wishes to construct a home for the purposes of 'leasing, renting out' and thereby carry on the 'business of a home builder' as defined, to first register as a home builder under s 10 – after satisfying the council that it meets the necessary requirements – and then, before commencing construction, to enrol the home with the Council, pay the prescribed fee and otherwise fulfil the requirements laid down in s 14(1) – which will entail showing that the proposed building specification will not be sub-standard and will meet the necessary specifications.

[11] The respondent, however, contends that this is not so, and that despite the definition of 'business of a home builder' containing specific reference to homes constructed for the purpose of being let, s 14(1) has no application in such a case. Its argument as to why the Act should not be afforded what appears to be its clear meaning, is somewhat convoluted. It commences with the definition in s 1 of the Act of 'housing consumer' as meaning 'a person who is in the process of acquiring or has acquired a home and includes such person's successor in title'. In the light of this, it was argued that the word 'acquire' used in this definition is generally understood as buying or obtaining ownership of something which, in the context of the Act, would mean obtaining ownership of a home. Therefore, a person who rents a property without becoming its owner cannot be said to have 'acquired' the property and, by definition, can thus not be a 'housing consumer'. Accordingly, so the argument went, as s 14(1) is in chapter 3 of the Act which is headed 'PROTECTION OF HOUSING CONSUMERS', and as housing consumers are limited to persons who either purchase homes or have homes built for them, the Act and its regulatory scheme were not intended to apply to properties being constructed for the purpose of rental; and s 14(1) thus did not apply in such a case.

[12] Although this reasoning appears to have been accepted by the court a quo, it seems to me to stumble at the first hurdle. The Concise Oxford English Dictionary[7] does not restrict the word 'acquire' to the concept of becoming an owner. Instead it provides its primary meaning to be to 'come to possess (something)'. The suggestion that persons who have rented their places of permanent residence have not 'acquired a home' as that phrase is understood in common parlance, is untenable. It is also significant that even prior to the amendment brought about by the Amendment Act in April 2008, the business of a home builder was by definition not restricted solely to the construction of a home for the purposes of sale but also for 'otherwise disposing of such a home'.

[13] Be that as it may, it is in my view unnecessary to decide whether the definition of housing consumer embraces a tenant. For present purposes, but without deciding the issue, I intend to accept in favour of the respondent that it does not. But for the reasons that follow, and even if a tenant is not to be regarded as a housing consumer, the respondent cannot succeed.

[14] Prior to the amendment, the construction of homes for the purposes of leasing or renting out did not fall within the definition of 'the business of a home builder'. A person building such a home was accordingly neither a home builder nor carrying on the business of a home builder, and was therefore not obliged to be registered under s 10 and did not have to comply with s 14(1) before commencing construction. However, as the definition of business of a home builder was amended by the Amendment Act to specifically include homes constructed for the purposes of leasing or renting out, thereafter a builder constructing a house for those purposes also became obliged to register as a home builder under s 10. This the respondent conceded, but argued that the relevant definitions and regulations as they were at the time of their original

[7] The Concise Oxford English Dictionary 12 ed (2011) at 11.

enactment continued to apply in respect of s 14(1). This would mean that a home builder constructing a home for purposes of rental would be obliged to register as a home builder but not to enrol the home under s 14(1), despite the obvious intention of the legislature having been to broaden the scope of operation of the Act to embrace homes built for the purposes of sale or rental. As s 1 provides for the amended definition to apply throughout the Act 'save where the context indicates otherwise', this would require a clear indication from the legislature that such a deviation was necessary in respect of s 14(1). As appears from what follows the contrary is the case.

[15] In attempting to support that this somewhat incongruous situation was indeed what the lawgiver had intended, the respondent relied on the argument which it had put forward to the council at the outset of their dispute; namely that the Act was intended to provide a form of insurance in favour of housing consumers and that it was absurd to expect it to insure against itself. It also argued that, in cases of lease, tenants would have the normal rights of a tenant faced with defective premises; that the protection to be afforded by s 14(1) was consequently unnecessary in respect of property to be leased; that this distinguishes such property from property to be sold; and that this was a clear indication that the legislature would not have intended the Act to be applied to properties being built for purposes of being let.

[16] This latter argument may be swiftly disposed of. A purchaser also has contractual remedies in respect of latent defects or misrepresentations in respect of property it purchases, and the fact that they may be different to those of a lessee is neither here nor there. But the purpose of the Act is designed to attempt to avoid contractual disputes, either in sale or lease, having to be resorted to by ensuring that homes are built which comply with the Council's standards and specifications. The fact that a lessee may have contractual remedies is no reason

to think that the legislature must have intended not to afford the Act's protection to homes which were constructed for rental purposes.

[17] In any event, legislation falls to be interpreted by having regard to the words used by the legislature, and not by taking account of what a party feels the legislature should have said. It simply does not lie in the mouth of the respondent to argue that the legislature did not intend the Act as amended to apply to homes being built for 'purposes . . . of leasing, renting out' when that is exactly what the definition provides shall be the business of a home builder. Moreover the fact that s 14 is situated in a chapter which bears a heading relating to 'housing consumers' acquired before the Act was amended, is no reason for its provisions not to apply to the amended definition.

[18] In any event, the underlying purpose of the Act clearly trumps the respondent's argument. The Act was designed to afford adequate housing for residents by ensuring that their homes were constructed by competent builders to approved standards. These objectives were sought to be achieved, first, by s 10 (to ensure that homes are constructed by persons having the necessary competence) and, secondly, by s 14 (to enrol such homes and ensure that they are built to a prescribed level of structural and technical quality). These provisions are supplemented by s 19 of the Act which, inter alia, provides:

'Inspectors

(1) The Council shall for the purposes of this Act-

(a) appoint inspectors in terms of section 6; and

(b) enter into agreements or liaise with local government bodies or other bodies or persons for the inspection of homes.

(2) An inspector may, for the purpose of inspecting a home during its construction, enter and inspect the premises constituting the site of the construction at any reasonable time.

(3) For the purposes of an investigation, an inspector may-

(a) require the production of the drawings and specifications of a home or any part of a home, including plans approved by the local authority and plans and specifications prescribed in the Rules or the Home Building Manual, for inspection from the home builder and may require information from any person concerning any matter related to a home or any part of a home;

(b) be accompanied by any person employed or appointed by the Council who has special or expert knowledge of any matter in relation to a home or part of a home; and

(c) alone or in conjunction with any other person possessing special or expert knowledge, make any examination, test or enquiry that may be necessary to ensure compliance with the Home Building Manual.'

Without homes being enrolled under s 14, inspectors would be unable to identify them or to fulfil their duties or obligations under this section. In itself this is a clear indication that it was intended that all homes were to be enrolled.

[19] In the light of this, and when one remembers that the fundamental underlying premise of the Act is to guard against builders constructing sub-standard homes and that the definition of a home builder's business was amended to specifically include building homes for purposes of being let or rented out, I can think of no reason why the legislature would have intended to treat homes built for leasing purposes any differently from those constructed for sale. There is certainly nothing in the structure of the Act which indicates that to be the case.

[20] On the contrary, there is every reason to think that the legislature would have wished homes built for sale to be treated the same way as homes built for lease. Circumstances often change, and it takes little imagination to envisage how a home being constructed for rental purposes might end up being sold rather than let. And requiring both categories of home to be enrolled would not only avoid a sub-standard home being sold in those circumstances, but would also serve to mitigate against the abuse of unscrupulous developers building

inferior homes allegedly for leasing purposes, then professing to change their minds and selling them.

[21] Taking all of the above into account, it is clear to me that s 14(1) does apply to homes being built for lease and rental purposes. In these circumstances the court a quo incorrectly reached the contrary conclusion and ought not to have issued the order it did.

[22] In the alternative to the declaratory order that was granted, the respondent sought an order in the court a quo that should it be held that s 14 did require the enrolment of a proposed construction of a home being built solely for the purposes of leasing or renting out, various sections of the Act and the regulations promulgated thereunder should be declared 'unconstitutional, unlawful and invalid to the extent that they compel such enrolment'. Counsel for the respondent, in their heads of argument filed in this court, persisted in this argument. They contended that those provisions were irrational, and in that respect again relied on the contention that it is irrational to expect a home builder in the respondent's position to insure itself against itself.

[23] This argument was not advanced with any enthusiasm in this court, understandably as in my view it is devoid of merit. Whilst it is so that enrolment carries with it the necessity to pay amounts that are levied, those sums are used to fund the activities of the Council and to ensure that all homes, whether constructed for resale or for rental, are up to scratch. This will include the costs which will be incurred by inspectors doing their duty to ensure this is the case. I see nothing arbitrary, irrational or discriminatory in the legislation. The respondent's argument in that regard must also be rejected.

[24] For these reasons the respondent's application ought to have been dismissed in the court a quo and the appeal must succeed.

[25] In civil litigation, the general rule is that costs should follow the result. Counsel for the respondent however invoked the so-called principle in *Biowatch*[8] in arguing that should the appeal be upheld, the respondent had sought a declaratory order to interpret statutory provisions relevant to its constitutional right to freely conduct its trade and occupation enshrined in s 22 of the Constitution, and should therefore not have to pay the appellants' costs in both courts.

[26] The general rule laid down in *Biowatch* applies in constitutional matters involving organs of state, and operates to shield unsuccessful litigants from paying costs to the State in order 'to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights'.[9] But as has previously been stressed, the mere labelling of litigation as 'constitutional' is insufficient. For the rule to apply the issues should be genuine and substantive and raise constitutional considerations relevant to their adjudication. The rule thus does not mean 'risk-free constitutional litigation'[10] and a court in the exercise of its discretion must consider the scope and character of the litigation.

[27] In the present case, the respondent sought a declaratory order freeing it from the obligation to pay a substantial sum of money. The litigation has, in truth, been nothing more than a commercial dispute in which the respondent sought to evade the clear provisions of the Act. Constitutional considerations

[8] *Biowatch Trust v Registrar, Genetic Resources, & others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).
[9] *Harrielall v University of KwaZulu*-Natal [2017] ZACC 38; 2018 (1) BCLR 12 (CC) para 11.
[10] *Lawyers for Human Rights v Minister in the Presidency* & *others* [2016] ZACC 45; 2017 (1) SA 645 (CC) para 18.

played no part and I see no reason for the respondent not to bear the costs of the proceedings.

[28] It is ordered as follows:

1 The appeal is upheld, with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following:

‘The application is dismissed with costs, including the costs of two counsel.’

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L E Leach

Judge of Appeal

Appearances

For the First Appellant:	A G Sawma SC (with him N T Mayosi)
Instructed by:	Werksmans Attorneys, Cape Town
	Phatshoane Henney Attorneys, Bloemfontein
For the Second Appellant:	T Madima SC (with him R Matsala)
Instructed by:	The State Attorney, Cape Town
	The State Attorney, Bloemfontein
For the Respondent:	J G Dickerson SC (with him P S van Zyl)
Instructed by:	Smith Tabata Buchanan Boyes, Cape Town
	E G Cooper Majiedt Inc, Bloemfontein