

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No. **13669/14**

In the matter between:

**FRANCOIS JOHAN RUITERS**

Applicant

And

**THE MINISTER OF HUMAN SETTLEMENTS**

First Respondent

**NATIONAL HOMEBUILDERS' REGISTRATION  
COUNCIL**

Second Respondent

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**JUDGMENT DELIVERED ON 12 AUGUST 2015**

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**INTRODUCTION**

[1] The applicant is the owner of Erf 21811 Kuils River (“the property”). The first respondent is the Minister of Human Settlements (“the Minister”). The second respondent is the National Home Builders Registration Council (“the Council”). This matter concerns the validity

of a decision taken by the Minister on 22 May 2014, when she confirmed an earlier decision by the Council refusing applicant an exemption from registering as a home builder and from enrolling the construction of a home on the property. It is common cause that the Minister's decision constitutes administrative action reviewable under section 6 of the Promotion of Administrative Justice Act 3 of 2000.

- [2] The applicant presently seeks to review and set aside the Minister's decision, as well as her confirmation of the Council's refusal of his exemption application, and a direction that he should make application for late enrolment in terms of s.14A of the Housing Consumers Protection Measures Act No. 95 of 1998 ("the Act"). The applicant also claims a declaratory order to the effect that, in the event of the review succeeding, applicant should be recognised as an "owner builder" in terms of the provisions of the Act, with exemption from the provisions of sections 10 and 14 thereof.

### **BACKGROUND FACTS AND CIRCUMSTANCES**

- [3] During February 2012 the City of Cape Town approved certain building plans for a new house that had been submitted to it by the applicant, in terms of s.4 of the National Building Regulations and

Building Standards Act No. 103 of 1977 (“the Building Regulations Act”). The applicant then commenced with the construction of his home.

[4] On 1 August 2012 the Council served a notice of non-compliance with the provisions of s.14(1) of the Act on the applicant. The non-compliance report stated that, as a home builder, applicant had commenced the construction of a home prior to enrolment by the Council. The applicant was required to achieve compliance by 8 August 2012.

[5] Applicant contends that he is in fact an owner builder as defined in s.1 of the Act; that is, “a *person who builds a home for occupation by himself.*” The Minister counters this by alleging that applicant was a home builder, until such time as he brought an application for an exemption “*based on the fact that he is an owner builder*”.

[6] In any event, the applicant submitted an exemption application to the Council on 12 September 2012 in terms of s.10A<sup>1</sup> and s.29<sup>2</sup> of the

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<sup>1</sup> S10A provides as follows:

“**10.A Owner builder exemption.** - An owner builder may, in terms of section 29, apply to the Council for exemption from sections 10 and 14.

<sup>2</sup> Section 29 provides as follows:

Act. He alleges that this was in order to qualify as an owner builder. This qualification would exempt him from complying with the provisions s.10 and s.14 of the Act.

[7] The application was constituted by a covering letter and the Council's pro-forma questionnaire that had to be completed and signed by an applicant. In his covering letter applicant stated that he was an owner builder, building his own house in stages as funds became available. The building project would occur over a period of time. His plans had been approved by the municipality and he had appointed an engineer to assist him with the structural designs of the building project. The engineer would perform regular site visits as and when required.

[8] The questionnaire commenced with a statement (typed in bold) to the effect that the applicant, being the owner of the property, was applying to be classified as an owner builder as defined in s.1 of the

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**“29. Exemption.** – (1) *the Council may, on application made to it in the format prescribed by the Council by notice in the Gazette, in exceptional circumstances and on the conditions that the Minister may prescribe in general or in any particular case, exempt a person or a home from any provision of this Act, if the Council is satisfied that:*

(a) *the granting of the exemption would be in the public interest;*

(b) *the granting of the exemption would not undermine the objectives of this Act, or the effectiveness of the Council; or*

Act; and also to be granted exemption from the requirements of the Act as provided for in s.29. In support of his application the applicant warranted that he understood the implications of the exemption and his home not being enrolled under the requirements of the Act. He would occupy the property and not sell it within five years. He was aware that he would have no warranty protection as laid down in the Act; and that he might not be able to sell the home in the future, as an enrolment certificate would normally be called for upon resale. He was aware that the house he intended building would have to comply with the requirements of the Building Regulations Act. He would be fully responsible for administering the whole building project and purchasing all building material, employing and monitoring artisans and labourers and the quality of materials and workmanship.

- [9] In this questionnaire applicant also denied that he would be receiving progress payments directly from a banking institution that was providing mortgage finance. He indemnified the Council and held it free from blame against any claim that might arise out of the granting of the exemption.

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(c) *should the exemption not be granted, the effect would be extremely prejudicial to the interest of the applicant and housing consumers.*”

[10] In essence it would appear that if applicant was granted the status of an owner builder he would have had to occupy the property and not sell the house for five years. He would have had no warranty under the Act, and the Council would have been indemnified for any claim against it that could arise out of the granting of an exemption from the provisions of the Act.

[11] On 18 September 2012 the Council advised the applicant by letter that his application had been rejected. The requirements for satisfying the Council contained in subsections 29(a), (b) and (c) were not dealt with in the letter. Instead the Council quoted s.10A of the Act and then stated the following:

*“3. Sections 10 and 14 of the Act prohibit the commencement of construction of a home prior to registration of home builder and enrolment of a home. Accordingly, exemption of sections 10 and 14 of the Act can only be made prior to construction.”*

As a result thereof the Council contended that the applicant's application for exemption did not fall within the ambit of the Act.

[12] The Council's letter went on to say that it had come to the Council's attention that the applicant had already commenced construction; that such conduct was a criminal offence in terms of s.21 of the Act; and that the Council reserved its rights to institute criminal proceedings against him. Applicant was also requested to bring an application for late enrolment of his property, in terms of s.14A of the Act<sup>3</sup>, before the close of business on 19 September 2012. Failing this the Council

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<sup>3</sup> Section 14A provides as follows:

***“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; or*

*(b) does not declare the fact that construction has commenced at the time of enrolment and the Council becomes aware of that fact,*

*the Council shall require the home builder to satisfy the Council that the construction undertaken at the time is in accordance with the NHBRC Technical Requirements and shall take prudent measures, contemplated in section 16 (1), to manage the risks pertaining to the fund.*

*(2) In the case of late enrolment and non-declared late enrolment, the home builder shall-*

*(a) submit to the Council such documentation and information as may be prescribed in the Council Rules;*

*(b) at the request of the Council, pay a prescribed late enrolment fee in an amount determined by the Council for a special inspection to be undertaken by the Council to enable an inspector to determine compliance with NHBRC Technical Requirements, prior to the acceptance of enrolment;*

*(c) at the request of the Council, and prior to the acceptance of the enrolment, rectify any defects detected during the inspection contemplated in paragraph (b)-*

*(i) that may influence the structural integrity of the home; or*

*(ii) that constitute non-compliance with the NHBRC Technical Requirements,*

*at the home builder's cost and under the supervision of a competent person appointed by the home builder;*

*(d) at the request of the Council, in circumstances where an inspector is unable to determine compliance with the NHBRC Technical Requirements, for whatever reason, appoint a competent person-*

*(i) to inspect the home; and*

*(ii) to complete a late enrolment report in the form prescribed in the Council Rules to confirm compliance with the NHBRC Technical Requirements;*

*(e) undertake any work, and pay for any costs resulting from such work, to expose work already done in order to enable the competent person to address all questions raised in the late enrolment report contemplated in paragraph (d) (ii); and*

*(f) at the request of the Council provide any surety, guarantee, indemnity or other security considered reasonable by the Council to satisfy its obligations under section 16 (1).*

*(3) Notwithstanding the provisions of this section, the Council may prescribe disciplinary measures for late enrolment and non-declared late enrolment which are not inconsistent with this Act.”*

would instruct its attorneys to proceed with an interdict application in terms of s.20 of the Act.

[13] In the answering affidavit filed on behalf of the Minister it is alleged that the Council could not exempt applicant from something that he had already done. His duty was to register as a home builder and to enrol the home before commencement of construction.

[14] On 5 November 2012 applicant's attorney lodged an appeal with the Minister against the decision of the Council. It was contended therein that the Council erred in finding; firstly, that an application for exemption in terms of s.10A and s.29 can only be made prior to the construction of a home; secondly, that applicant's application fell outside the ambit of the Act because it was submitted after construction had commenced; and thirdly, that applicant was bound to apply for late enrolment in terms of s.14A.

[15] On 17 January 2013, before this appeal was heard, the Council's Registrations Committee approved an updated owner builder training manual for the period up to 9 November 2012. The Council refers to this as "*a policy*". It was not a Home Building Manual, published by the Council in terms of s.12 of the Act and which contains the NHBRC

Technical requirements and guidelines with which home builders must comply.

[16] On 8 March 2013 the Council submitted a report on the appeal to the Minister in which it gave reasons for rejecting the application. The report concluded that the 2004 training manual only authorised exemption from s.10 and s.14 of the Act, on condition that an applicant had not commenced with the construction of a home. The Council pointed out that in his application the applicant had indicated that he had already commenced construction. As a result the Council rejected the application in line with the 2004 “*policy*”.

[17] However, the Council also stated that the amended 2012 policy did provide for the possibility of owner builder exemption, even where construction of a home had commenced. The Council pointed out nevertheless that applicant’s application had been submitted – and a decision to reject it had occurred – before the resolution of 17 January 2013 which had put the content of the 2012 manual into effect. The Council added that prior to this amendment of the policy the Council had rejected several applications in similar instances where construction of a home had already commenced. The

Department was therefore asked to take into consideration the implications of retrospective application of the 2012 policy.

[18] The Council recommended that the appeal should be dismissed; firstly, in line with the policy that was applicable at the relevant time; and secondly, due to the fact that similar applications had been rejected in line with this policy. The Council expressed concern that there might be a flood of cases, such as the applicant's, on appeal.

[19] On 13 March 2013 this report and the 2012 manual were provided to the applicant. On 4 April 2013 the applicant supplemented his appeal.

[20] On 17 July 2013, some ten months after applicant had lodged his application for exemption, the Council was granted an interim interdict against the applicant arising from his failure to adhere to the non-compliance notice.

[21] On 12 August 2013 the Minister's representative apologised to the applicant for the delay on the part of the Minister in deciding the appeal and alleged that this was due to a change of ministers. An indulgence, until 21 August 2013, was requested.

[22] On 30 October 2013 the applicant launched a *mandamus* application in which he sought to compel the Minister to make a decision. Notice of opposition was served on 18 November 2013, but no answering papers were filed. On 20 November 2013 the State Attorney requested a further indulgence because the Minister was out of the country. On 27 January 2014 there was a further request for an indulgence to 3 March 2014 because the Minister was in Zambia.

[23] On 11 February 2014 applicant launched a Chamber Book application which was also opposed by the Minister. A second Chamber Book application, on 27 March 2014, resulted in an order that the Minister produce her ruling in the appeal within 10 days failing which applicant could set the matter down on the unopposed roll.

[24] On 16 May 2014 the Director-General of Human Settlements directed a memorandum to the Minister in order to appraise the latter of the pending appeal. It was pointed out that the 2012 policy did provide for the possibility of an owner builder making an application to qualify for an exemption, even where the construction of a home had already commenced. The aforementioned approach of the Council in

applying the new policy was reiterated. The Director-General recommended that the Minister should dismiss the appeal and confirm the Council's advice that the applicant should make an application for late enrolment in terms of the Act.

[25] On 22 May 2014 the Minister eventually made a ruling. She noted that the statutory function of the Council, *inter alia*, is to provide protection to housing consumers in respect of the failure of home builders to comply with the Act. She also noted that the applicant had undertaken not to sell his house for five years, thereby indemnifying the Council against any financial claim by a housing consumer. She noted further what applicant had stated in support of his appeal; namely, that after receiving approval of his plans from the City no one had made him aware that he had to comply with the Act.

[26] In the Minister's evaluation she noted that the Council had amended its policy to permit an applicant to qualify for exemption, even where construction of a home has commenced. She accepted that applicant is an owner builder. Her ruling expressly disavowed making any determination as to whether or not the application for exemption fell within the ambit of the Act at the time the decision was taken by the

Council. The Minister made her ruling with reference to s.29(1)(b) of the Act. No facts motivating this conclusion were referred to.

[27] The Minister ruled that the appeal was dismissed; that the decision by the Council to refuse applicant an exemption was confirmed; and that the applicant was directed to make an application for late enrolment as prescribed. The Minister therefore stood by the decision of the Council; but she did not address the legal principle relied upon by the Council to reject applicant's application, and set out by the Council in its rejection letter to the applicant.

## **THE HOUSING CONSUMERS PROTECTION MEASURES ACT NO. 95** **OF 1995**

[28] The Act commenced on 4 June 1999. It was intended to make provision for the protection of housing consumers and to provide for the establishment and functions of the Council. Accordingly, the Council was established as a juristic person. Section 10 of the Act<sup>4</sup>

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<sup>4</sup> Sections 10(1) and (2), which commenced on 1 December 1999, provide as follows:

**“10 Registration of home builders.** – (1) no person shall –  
(a) carry on the business of a home builder; or

required registration of home builders. According to s.10(3) registration is dependent on the Council being satisfied that the home builder (a) meets the requirements by the Minister; (b) will meet its obligations in terms of the Act; (c) has appropriate financial, technical, construction and management capacity in order to prevent housing consumers and the Council from being exposed to unacceptable risks. A housing consumer is defined as a person who is in the process of acquiring or has acquired a home and includes such person's successor in title.

[29] It is evident from the provisions of Chapter III of the Act, which deals with the protection of housing consumers, that such persons are intended to receive protection from home builders. This object is given effect to by requiring a home builder to ensure that a written agreement signed by the parties is concluded between the home builder and housing consumer for the construction or sale of the home by the home builder. This must set out all material terms and have attached to it the specifications pertaining to the materials to be used and the plans reflecting the dimensions and measurements approved by the local government body. Such an agreement is

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- (b) *receive any consideration in terms of any agreement with the housing consumer in respect of the sale or construction of the 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.”*

deemed to include warranties, enforceable by the housing consumer against the home builder in any court, that the home is constructed in a workmanlike manner, is fit for habitation, is constructed in accordance with the NHBRC technical requirements and the terms, plans and specifications of the agreement.<sup>5</sup>

[30] The last-mentioned requirements are prescribed in terms of s.7(2)(d) by the Minister. They apply to a home builder for the design and construction of prescribed homes.

[31] A home builder is required, upon demand by the consumer, to rectify at his own cost any major structural defects caused by non-compliance with the NHBRC technical requirements and occurring within an agreed period not less than five years from occupation. The home builder must also rectify non-compliance with or deviation from the terms, plans and specification of the agreement related to design, workmanship or material of which he is notified within an agreed period of not less than three months from occupation date; and he must repair roof leaks attributable to workmanship, design or materials that he is notified of within an agreed period of not less than

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<sup>5</sup> See Sections 13(1) and (2) of the Act.

twelve months from occupation date.<sup>6</sup> These rights are transmissible by sale or disposal.<sup>7</sup> The correlative obligations would continue to rest upon the home builder.

[32] Furthermore, a home builder may not demand or receive a deposit, or any other consideration unless an agreement has been concluded and the provisions of section 14(1) or 14(2) have been complied with.<sup>8</sup> Section 14 provides that a home builder may not commence construction unless prescribed documents, information and the fee have been submitted and accepted by the Council, and the Council has issued a certificate of proof of enrolment.<sup>9</sup>

[33] A home builder may not commence construction of a home to be financed by state housing subsidy unless similar requirements have been met.<sup>10</sup> Furthermore, no home builder can complete the construction of a home begun by another home builder without assuming the obligations of the first home builder.<sup>11</sup>

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<sup>6</sup> Section 13(2)(b) of the Act.

<sup>7</sup> Section 13(4)

<sup>8</sup> Section 13(7)

<sup>9</sup> Section 14(1)

<sup>10</sup> Section 14(2)

<sup>11</sup> Section 14(7)

[34] The Council is required to establish a fund for the purpose of providing assistance to housing consumers when a home builder fails to meet obligations to rectify major structural defects in the consumer's home caused by non-compliance with NHBRC Technical requirements and occurring not less than five years from occupation date by the housing consumer and notified to the home builder. The Council is bound to pay an amount out of this fund for rectification in the various circumstances set out in s.17 of the Act.<sup>12</sup>

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<sup>12</sup>Section 17 provides as follows:

**17. Claims and Recourse.** – (1) Subject to subsection (2), the Council shall pay out 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;

[Para.(a) substituted by s.8 (a) of Act No.17 of 2007.]

- (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
  - (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).
- (2) Subject to subsections (3), (4) and (5)—
- (a) subject to section 7(2)(e), reduce any amount that may be expended in terms of subsection (1);
  - (b) in exceptional circumstances prescribed by the Council, instead of having a defect rectified, make payment to the housing consumer in full and final settlement of any claim; or
  - (c) refuse any claim.

[Sub-s. (2) substituted by s.8(b) of act No.17 of 2007]

(3) Prior to exercising its powers in terms of subsection (2), the Council shall consult with and make recommendations to the Minister in respect of its obligations under section 16(1) and (6).

(4) The Minister shall make a decision on any recommendation contemplated in sub-section (3) within a period of three months.

(5) The Council may not

- (a) exercise its powers in terms of subsection (2); or
- (b) prescribe increased enrolment fees or late enrolment fees under section 16(6),

[Para (b) substituted by s.8(c) of Act No.17 of 2007]

[35] Section 14A, was not part of the original Act. It was inserted by Act No.17 of 2007. It provides for late enrolment and non-declared late enrolment by a home builder. It authorises the Council to require a home builder to satisfy the Council that a construction that is started before the home builder submits an application for enrolment of the home is in accordance with the NHBRC technical requirements; and to take prudent measures to manage the risks pertaining to the fund. The Council may nevertheless prescribe disciplinary measures for late enrolment and non-declared late enrolment.

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unless the Minister has approved such action or the period referred to in subsection (4) has expired.

(6) Subject to section 17(1), no housing consumer shall have a claim against the Council pursuant to the failure of a home builder to meet his or her obligations in terms of this Act.

(7) If the Council has incurred costs or expenditure contemplated in sub-section (1), a home builder who fails to meet his or her obligations in terms of section 13(2)(b)(i) shall, on demand by the Council, reimburse the Council with all reasonable costs or expenditure incurred by the Council as a result of the failure of the home builder.

(8) If a home builder registered in terms of section 10(6)(b) fails to meet his or her obligations in terms of section 13(2)(b)(i), the home builder having constructed a home enrolled with the Council in terms of an agreement concluded pursuant to the provisions of section 10(7) shall be liable to perform the obligations of the defaulting home builder in terms of section 13(2)(b)(i) or to reimburse the Council in respect of the costs or expenditure of the Council, after having obtained judgment against the defaulting home builder, or after insolvency proceedings having been instituted against the default home builder by any person, has been unable to obtain settlement of the Council's claim against such defaulting home builder.

[Sub-s.(8) amended by s.4(b)(i) and (ii) of Act No.27 of 1999.]

(9) If the Council has incurred costs or expenditure where a home builder has failed to meet his or her obligations in terms of section 13(2)(b)(i), the Council shall be entitled to institute any action which the housing consumer or home builder may have or would have had in contract or in delict against any person for having caused or contributed to the failure of the home builder in respect of his or her obligations in terms of section 13(2)(b)(i).

(10) The provisions of this section shall apply, with the necessary changes to any other fund established in terms of section 15(5).

[36] Section 10(2), which does not form part of Chapter III, prohibits a home builder from constructing a home unless that home builder is registered with the Council.

### **AMENDMENTS TO THE ACT**

[37] From all of the above it is apparent that the protective measures in the Act are directed at protecting housing consumers from home builders. There is no reference in the above protective provisions to owner builders. Nor are any duties placed upon them.

[38] Previously owner builders were not regulated by the Act. Amendment Act No.17 of 2007, which commenced on 9 April 2008, introduced such regulation. "Owner builder" is defined as:

*"(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."*

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[39] In essence an owner builder is characterised by the fact that he or she builds a home. This differs from a housing consumer who “*acquires*” a home built by somebody else. An owner builder is therefore not a housing consumer whom the Act needs to protect or intends to protect, or subjects to regulation for that purpose. The Act does, however, impose regulation on an owner builder which eliminates potential prejudice to housing consumers where the genuineness of a builder’s status as an owner builder has not been established.

[40] Whether a builder is an owner builder is a question of fact. If the builder complies with the definition of an owner builder, he or she cannot adversely affect the interests of housing consumers in the various situations which the Act seeks to regulate by means of the protective measures described above. However, uncertainty as to whether a builder is a home builder or owner builder may lead to abuse and compromise housing consumers. Therefore the Amendment Act redefined a home builder to include an owner builder conditionally.

[41] The following definition of “home builder” was substituted by Amendment Act:

*“Home builder’ means –*

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

[42] As a result of these amendments, save for one exception<sup>13</sup> all persons who construct or sell new homes become subject to regulation in terms of the Act. This includes an owner builder. He or she is treated as a home builder until application is made for exemption in terms of s.10A. Until that time an owner builder remains subject to the same duties, and consequences for breach of such duties, as a home builder.

[43] Examples of such consequences may be criminal liability, under s.21(1)(b) of the Act, for contravening s.10(2) thereof (by constructing a home before registration as a home builder) and contravention of

s.14(1) (commencing construction of a home before obtaining a certificate of proof of enrolment.) These consequences are an inducement to an owner builder who has not applied for exemption to do so before commencing building.

[44] Two main consequences arise from part (b) of the above definition of home builder. Firstly, if an owner builder has not applied for exemption in terms of s.10A he or she remains subject to the duties resting upon a home builder and the consequence of breach of such duties. Secondly, if such application for exemption has been made no such duties or consequences arise.

[45] Counsel for the Minister contends that a literal interpretation and application of part (b) of the definition of an “*home builder*” would undermine the purpose of the amendments introduced by the Amendment Act because;

[a] it would allow any builder to define him or herself as owner builder and thus avoid complying with the Act by a mere submission of an application for an exemption;

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<sup>13</sup> See section 1A of the Act which provides that the Act does not apply to a person who uses his or her

[b] even if later found not to qualify for an exemption from s.10 and s.14 of the Act, such a builder could then not be visited with the sanctions provided for in the Act because by submitting the application, the Act ceased to apply;

[c] the exemption process would be rendered meaningless if the owner builder is already in effect exempted from the moment that he or she makes application.

[46] These submissions ignore the jurisdictional requirement for exemption; namely, that the applicant must be an owner builder. That is the avenue for escape from the consequences of literal interpretation contended for by counsel. An applicant for exemption must establish, as a matter of fact, that he or she is an owner builder. Upon a conspectus of part (b) of the definition of home builder, read with s.10A (which must in turn be read with s.29 of the Act), it appears to be incumbent upon the Council, when it is faced with an application for exemption, to investigate and establish the jurisdictional fact for an application for exemption, namely that an applicant is in fact an owner builder. If the Council is not satisfied that an applicant is a *bona fide* owner builder, the duties of a home builder

and consequences of breach of those duties by a home builder continue to apply to the applicant. However, if an applicant satisfies the Council that he or she is a *bona fide* owner builder, the duties that rest upon a home builder and consequences of breach of those duties cease to exist from the time that the owner builder applies for exemption.

[47] Furthermore, if a builder does comply with the definition of an owner builder he or she cannot conceivably harm the interests of housing consumers or the Council in any way which requires regulation under the Act.

### **THE SITUATION OF THE APPLICANT**

[48] It is common cause that the applicant is the owner of the immovable property on which he has commenced to build. As the owner of Erf 21811 the applicant has certain common law rights. One of these is to use and enjoy his property by erecting a building on the land.

[49] Section 25(1) of the Constitution protects this property right. It provides as follows: -

*“25.(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”*

[50] The property that is protected by this section includes not only applicant’s ownership of the erf, but also the bundle of rights that make up his ownership, such as his aforementioned right to use the property. Were this right to be interfered with by the Act, applicant would be considered to have been deprived of his property to the extent of that interference.<sup>14</sup>

[51] One law of general application which justifiably limits applicant’s use right is s.4 of the Building Regulations Act. This prohibits the applicant from building without approved plans. The provisions of the Act exclude arbitrary deprivation of the property rights of use. They ensure building standards. By comparison, no provision in the Housing Consumer Protection Measures Act prohibits an owner builder from commencing to build on his or her property before an application for exemption is brought in terms of s.10A. Although an owner builder may be deemed by definition to be a home builder, that same definition requires an applicant to be dealt with as an owner

builder from the time that such an application for exemption is made. In my view it would be arbitrary to deprive a *bona fide* owner builder of his or her right continue to build on his or her property as the Council would appear to have done. Such a prohibition would be irrelevant to the purpose of the Act, namely to protect housing consumers.

[52] Should the present applicant in fact be an owner builder the Act as it stands would not deprive him of the liberties associated with this status because he built without fulfilling the duties of registration and enrolment before he applied for exemption. The only consequence of his conduct in that regard may be that he could be visited with criminal liability.

[53] In his founding affidavit applicant denies that he is a home builder as defined in the Act. He alleges that he is neither in the business of home building nor has he any intention of entering the business of home building. To the first-mentioned allegation the Minister answers that the applicant is a home builder; unless he applies for an exemption based on the fact that he is an owner builder. The Minister alleges that she has no knowledge of whether applicant is in the

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<sup>14</sup> See Geyser v Msunduzi Municipality 2003 (3) BCLR 235 AT 249I – 250B

business of home building or intends to enter it. However, in her ruling she stated: “*The Applicant is such an owner builder.*”

[54] This Court is not equipped, in motion proceedings, to investigate fully and satisfy itself that the applicant is a *bona fide* owner builder. That power is vested in the Council by s.29 of the Act. In my view it would be inappropriate for the Court to usurp that power, or to reach a conclusion in these review proceedings based on the ordinary principles used for analysing and weighing evidence in motion proceedings.

[55] If the applicant does satisfy the Council that he is an owner builder, immunity from the provisions of s.10(2) and s.14(1) would rest on him from the date of his application for exemption, and he would not have to be subjected to the requirements of s.14A.

### **THE MINISTER’S CONTENTIONS**

[56] The Minister’s primary argument is that the Act precludes the Council from granting an exemption to an owner builder who has commenced

with construction. For this submission the Minister relies on the dicta of the Constitutional Court in **Cool Ideas 1186 CC v Hubbard**<sup>15</sup>

[57] In the alternative to the above, the Minister contends that the applicant failed to satisfy the Council:

[a] that he was technically competent to undertake the construction of the home; and/or

[b] that the construction already undertaken complied with the NHBRC technical requirements; and

[c] the granting of the exemption would not undermine the objectives of the Act and/or the effectiveness of the Council as contemplated by s.29(1)(b) of the Act.

### **Premature construction**

[58] As stated above no provision of the Act expressly provides that application for exemption must be brought prior to commencement of construction, or that exemption may not be granted to an owner

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<sup>15</sup> 2014 (4) SA 474 (CC) paragraphs 29 – 37.

builder who has commenced building before applying or exemption. The only considerations raised by the Act are whether the applicant fulfils the definition of an owner builder and satisfies the Council as to the criteria mentioned in subsections 29(1)(a), (b) and (c). This stands in contrast to the peremptory provisions of sections 10(2) and 14(1), pertaining to home builders, where it is clearly stipulated that compliance must take place prior to construction.

[59] The purpose of the Act would not be undermined if an owner builder is allowed to build before making application for exemption; because consumers do not need protection from an owner builder as they do from a home builder.

### **The Cool Ideas case**

[60] The judgment in the **Cool Ideas** case in the Supreme Court of Appeal<sup>16</sup> identified the following question for resolution by the Court, namely; “*What consequences follow upon a home builder failing to register as such but who nonetheless undertakes a building project?*” Ultimately the Constitutional Court found that the Act is not capable of being construed as permitting after the fact registration of a home

builder when construction has already commenced (or may even have been completed). The provisions of the Act lead to the conclusion that the statute envisions registration of a home builder before construction commences. The purpose of these provisions is to protect housing consumers.<sup>17</sup> In the present matter the legal and factual questions posed by the decisions of the Council and the Minister, are different. They respectively relate to an alleged and admitted owner builder, and not a home builder. They do not embrace circumstances where it is necessary to protect housing consumers.

### **Technical Competence**

[61] The provisions of the Act relating to an owner builder do not expressly require proof of his or her technical competence. No law of general application limits the use of an owner builder's property on the basis that he or she is not technically competent to construct his home. The limitation in the Act based on lack of technical construction capacity relates only to a home builder.<sup>18</sup> The construction of a building by an owner builder, however, is required to comply with

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<sup>16</sup> See *Hubbard v Cool Ideas* 1186 CC 2013 (5) SA 112 (SCA) para [2] at 114I

<sup>17</sup> Paragraph [33]

<sup>18</sup> See s.10(3)(a)

plans approved by the local authority as provided for in the National Building Regulations Act. A certificate authorising occupancy will only be granted in terms of s.14 of this Act if the building has been erected in accordance with the provisions of the Act and the conditions on which approval was granted; and an electrical certificate of compliance with applicable laws has been issued; and certificates relating to design, erection and installation of the structural, fire protection and fire installation systems have been submitted.

**Compliance with NHBRC technical requirement**

[62] If an applicant for exemption satisfies the Council that he or she fulfils the definition of an owner builder, that would be sufficient to eliminate him or her from regulation as a home builder. Such regulation, under s.10(2), s.14(1), s.14A, as well as the NHBRC Technical requirements prescribed under s.7(2)(d), only apply to a home builder. The Act does not require an applicant who satisfies the Council that he or she is an owner builder also to satisfy the Council that the construction complies with NHBRC technical requirements.

**Undermining the objectives of the Act and/or the effectiveness of the Council (S29(1)(b))**

[63] The Minister made her decision with reference to the criteria in s.29(1)(b) of the Act. The Council do not appear to have considered these criteria. Because an owner builder poses no apparent risk to a housing consumer an applicant for exemption who satisfies the Council that he or she is an owner builder would not appear to undermine the objects of the Act. An undertaking such as the one made by the applicant, to occupy and not to sell the owner builder's house for five years, coupled with indemnification of the Council from claims by housing consumers, would appear to eliminate the chance of undermining the effectiveness of the Council. Furthermore, severe prejudice to a *bona fide* owner builder would result if exemption was not granted; because the burdens of protecting housing consumers would be imposed on him or her for no reason. This would not be in the public interest. *Prima facie* therefore a proven owner builder satisfies the requirements of sub-sections 29(1)(a), (b) and (c).

[64] The Minister accepted in her reasons that the applicant was an owner builder. *Prima facie* at least the conclusions above had to follow. In passing it should be noted that s.29 is framed in broad general terms.

It avails “*a person or a home*” with exemption from any provision of the Act. Passage through the criteria mentioned in s.29, for persons other than applicants in terms of s.10A, may not be as self-evident as for an owner builder.

### **THE DECISION OF THE COUNCIL**

[65] From the reasons given by the Council for its refusal to grant the applicant exemption, it would appear that the Council did not investigate and try to satisfy itself whether the s.29(1) criteria were established, or whether in fact the applicant was an owner builder. Instead it based its rejection of the application on the ground that applicant commenced building before making his application for exemption. The Act does not authorise the Council to reject an application by an owner builder on this ground. Nor does it prohibit an owner builder from commencing building before making application for exemption. Nowhere in the papers does it appear that the Council ever doubted that applicant was an owner builder. It would therefore be appropriate for the Council to reconsider the application for exemption and base its conclusion upon a proper application of the Act and all the relevant factors.

## **THE DECISION OF THE MINISTER**

[66] The Minister found against the application for exemption in terms of s.29(1)(b) of the Act. Although no facts were referred to by the Minister in that regard, the only possible inference is that the exemption was not granted because the Minister believed that to do so would undermine the objectives of the Act or the effectiveness of the Council. Having regard to the Minister's acceptance that the applicant is an owner builder her conclusion is irrational. If the applicant is to be regarded as an owner builder his activities could not threaten the interests of housing consumers, which is the main purpose of the Act. Because the applicant has undertaken to occupy the house he builds and not sell it for five years, and because he has indemnified the Council, the effectiveness of the Council cannot be undermined by the applicant. The decision of the Minister therefore bears no relationship to the purposes for which she made the decision.

## **CONCLUSION**

[67] In all the circumstances the Minister misdirected herself in concluding that the applicant did not meet the requirements of s.29(1)(b). The

Council has not yet satisfied itself on the relevant factors. Its previous decision is tainted by an error of law. This Court is in no position to substitute its own decision for that of the Council. I therefore make the following order:

- [a] The decision of the Minister, dated 22 May 2014, is set aside.
  
- [b] The matter is referred back to the Council for determination as to whether the applicant is entitled to exemption in terms of s.10A and s.29 of the Housing Consumers Protection Measures Act.
  
- [c] The first respondent shall pay the applicant's costs, including the costs of the *mandamus* application instituted by applicant on 1 November 2013 under case number 18036/13.

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**DONEN AJ**